

LEGISLATIVE COUNCIL BRIEF

Legal Practitioners Ordinance (Chapter 159)

HIGHER RIGHTS OF AUDIENCE RULES

INTRODUCTION

In January 2010, the Legal Practitioners (Amendment) Ordinance 2010 (“the Ordinance”) was enacted to implement a scheme for granting higher rights of audience to solicitors.

JUSTIFICATIONS

2. The Higher Rights Assessment Board (“the Board”) was established under section 39E of the Ordinance on 2 July 2010 to, among other things, make rules in relation to applications for higher rights of audience and determination of such applications. To grant higher rights of audience, the Board has to be satisfied, inter alia, that the applicant has acquired sufficient litigation experience within the period of three years immediately before the date of the application and is in all other respects a suitable person. Pursuant to section 73CA of the Ordinance, detailed eligibility requirements and matters relating to the assessment of applications will be governed by rules to be made by the Board, which will be subject to the scrutiny of the Legislative Council.

BACKGROUND

3. In June 2004, the Chief Justice established the Working Party on Solicitors’ Rights of Audience (“the Working Party”) to consider whether solicitors’ existing rights of audience should be extended and, if so, the mechanism for dealing with the grant of extended rights of audience to solicitors.

4. In October 2007, the Working Party published a report (“the Report”) recommending a proposed scheme for granting higher rights of audience to solicitors.

5. In January 2010, the Ordinance was enacted to implement the scheme proposed in the Report. Sections 1, 2, 3, 5, 6, 7, 8, 9, 10 and 11; and section 4 (insofar as it relates to sections 39E, 39F and 39G of the new Part IIIB on “Solicitors Advocates”) of the Ordinance came into effect on 2 July 2010 and the Board was established on the same date.

6. The Board comprises members appointed by the Chief Justice from serving and former judges, members of the legal profession and an officer of the Department of Justice, as well as a lay member to be selected by the chairperson of the Board from among a panel of lay persons appointed by the Chief Justice, and pursuant to the Ordinance, it will serve as the gatekeeper of the standard of advocacy before the courts and determine applications by solicitors for higher rights of audience.

7. Under the Ordinance, solicitors who have at least five years' post-qualification practice, of which at least two years must have been in Hong Kong during the period of seven years immediately before the date of application and who have satisfied further eligibility requirements prescribed by the rules to be made by the Board may apply to the Board for rights of audience before the High Court and the Court of Final Appeal in civil proceedings, criminal proceedings, or both. The Board must, in relation to each calendar year, also specify one or more periods during which applications may be made.

8. On the granting of an application, the applicant has the higher rights of audience sought, and those rights will then be exercisable by the applicant as a solicitor. The Council of the Law Society (“the Council”), upon notification, must issue a certificate in respect of higher rights of audience to the successful applicant. The Council is also empowered to issue a code of conduct for solicitor advocates, in consultation with Chief Justice and the Council of the Hong Kong Bar Association.

HIGHER RIGHTS OF AUDIENCE RULES

9. The main provisions of the Higher Rights of Audience Rules (“the Rules”), at Annex, are set out below-

Part 2

10. Part 2 consists of the proposed rules 3 to 5. It stipulates further requirements concerning application for higher rights of audience.

11. The proposed rule 4 requires an applicant to demonstrate by sitting and passing a full assessment that he or she possesses the necessary professional competence to exercise higher rights of audience in respect of the class of proceedings for which the application is made.

12. The proposed rule 5 provides that an applicant may elect to make the application on the basis of exemption from the requirements prescribed by rule 4.

Part 3

13. Part 3 consists of the proposed rules 6 to 10. It deals with applications for which no election for exemption is made.

14. The proposed rules 7 and 8 set out the roles of an Examining Panel in conducting full assessment of professional competence of an applicant.

15. The proposed rule 9 allows an applicant to make written representations to the Board requesting it to review its proposed decision on the application. A decision of the Board in respect of the request is final.

Part 4

16. Part 4 consists of the proposed rules 11 to 16. It deals with applications for which election for exemption is made.

17. The proposed rules 13 and 14 set out the alternative requirements that an applicant who elects to make his or her application on the basis of

exemption from the requirements prescribed by rule 4 has to satisfy which include possession of the necessary professional competence to exercise higher rights of audience and, if applicable, sitting and passing a specified portion of the full assessment of professional competence.

Part 5

18. Part 5 consists of the proposed rules 17 to 19. It sets out various administrative matters concerning application for higher rights of audience.

19. The proposed rule 17 provides for the establishment of Examining Panels for the purpose of conducting assessments of professional competence of applicants for higher rights of audience. Each Panel is to consist of 4 members appointed by the Board, of whom two must be selected from the legal profession. The rule also stipulates further provisions relating to members of the Panels including their appointment, resignation or removal, etc.

20. The proposed rule 18 requires the Board to issue standards against which the professional competence of applicants for higher rights of audience is to be assessed. The standards may provide for applicants to be assessed on their competency in advocacy, evidence, practice and procedure, ethics and court conduct. The Board may publish in any manner that it considers appropriate any standards issued and any amendment made.

21. The proposed rule 19 requires the Board to issue guidelines for the preparation, conduct and marking of assessments of professional competence by Examining Panels. The Board may publish in any manner that it considers appropriate any guidelines issued and any amendment made.

Part 6

22. Part 6 consists of the proposed rules 20 to 24. It deals with miscellaneous issues including enquiries by the Board with the Council.

Schedule

23. The Schedule sets out the proposed fees to be charged for application, sitting assessment and review of the Board's proposed decisions.

LEGISLATIVE TIMETABLE

24. The legislative timetable is as follows-

Publication in the Gazette	23 March 2012
Tabling at the Legislative Council for negative vetting	28 March 2012

CONSULTATION WITH LEGCO PANEL

25. The Legislative Council's Panel on Administration of Justice and Legal Services was consulted on the Rules at its meeting on 30 January 2012. It does not have any objection to the Rules.

26. In addition, the Privacy Commissioner and the Independent Commission Against Corruption ("the ICAC") have been consulted on the draft Rules. Both the Privacy Commissioner and the ICAC have no particular comment in respect of the Rules. Their comments concern administrative matters and will be given due consideration when the Board prepares its administrative guidelines.

27. The Law Society of Hong Kong and Hong Kong Bar Association have also been consulted on the draft Rules. Responses from the two professional bodies have been taken into account in the drafting of the Rules.

ENQUIRY

28. Any enquiry on this brief can be addressed to the secretariat of the Higher Rights Assessment Board at info@hrab.org.hk

Higher Rights Assessment Board
March 2012

Higher Rights of Audience Rules

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Higher Rights of Audience Rules

(Made by the Higher Rights Assessment Board under section 73CA of the Legal Practitioners Ordinance (Cap. 159) and section 29 of the Interpretation and General Clauses Ordinance (Cap. 1))

Part 1

Preliminary

1. Commencement

These Rules come into operation on the day on which section 4 of the Legal Practitioners (Amendment) Ordinance 2010 (2 of 2010) (insofar as it relates to sections 39H, 39I, 39J, 39K, 39L, 39M, 39N, 39O, 39P, 39Q and 39R of the new Part IIIB) comes into operation.

2. Interpretation

In these Rules—

application (申請) means an application for higher rights of audience under section 39H of the Ordinance;

assessment guidelines (評核指引) means guidelines issued under rule 19, as in effect at the material time;

competency standards (能力標準) means standards issued under rule 18, as in effect at the material time;

Examining Panel (審核小組) means an Examining Panel established under rule 17;

full assessment of professional competence (專業才能全面評核)—see rule 4(4);

higher court of Hong Kong (較高級法院) means any of the following—

- (a) the Court of First Instance;
- (b) the Court of Appeal;

- (c) the Court of Final Appeal;
 - (d) a court which before 1 July 1997 exercised jurisdiction similar to that of a court referred to in paragraph (a), (b) or (c).
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Part 2

Applications for Higher Rights of Audience

3. Form of application, fees, etc.

- (1) An application to the Assessment Board for higher rights of audience under section 39H of the Ordinance must be made in the form specified by the Board.
- (2) An application—
 - (a) must contain the information required by the specified form;
 - (b) must be completed in accordance with the instructions contained in that form;
 - (c) must be accompanied by the documents or other material required by that form; and
 - (d) subject to subrule (3), must be accompanied by the fees set out in items 1 and 2 of the Schedule.
- (3) An applicant who elects to make the application on the basis of exemption from the requirements prescribed by rule 4 is not required to pay the fee set out in item 2 of the Schedule.
- (4) An application may be made to the Assessment Board only during the period or periods specified by it under section 39J(3) of the Ordinance.

4. Professional competence to be demonstrated

- (1) This rule is made under section 73CA(1)(a)(i) of the Ordinance for the purposes of section 39I(1)(c) of the Ordinance.
- (2) An applicant under section 39H of the Ordinance must demonstrate to the satisfaction of the Assessment Board that he or she possesses the necessary professional competence to

exercise higher rights of audience in respect of the class of proceedings for which the application is made.

- (3) Such competence is to be demonstrated by the applicant sitting and passing a full assessment of professional competence at the time and place directed by the Assessment Board.
- (4) A full assessment of professional competence consists of examinations (whether written or oral or a combination of both) on the matters that are required by the competency standards to be assessed in a full assessment relating to the class of proceedings for which the application is made.
- (5) This rule is subject to rule 5.

5. Election to make application on basis of exemption

An applicant under section 39H of the Ordinance may, in accordance with section 39I(3) of the Ordinance, elect to make the application on the basis of exemption from the requirements prescribed by rule 4.

Part 3

Applications for which No Election for Exemption is Made

6. Application of Part 3

This Part applies in relation to an application for which no election has been made to make the application on the basis of exemption from the requirements prescribed by rule 4.

7. Examining Panel to conduct assessment

- (1) In relation to an applicant, the full assessment of professional competence is to be conducted by an Examining Panel assigned by the Assessment Board.
- (2) The assessment is to be prepared, conducted and marked by the Examining Panel in accordance with the assessment guidelines.
- (3) The Examining Panel may determine the nature, form and number of examinations to be held for the purposes of the assessment.
- (4) The Examining Panel must, after it conducts an assessment, determine whether the applicant—
 - (a) has passed the assessment by demonstrating the required level of professional competence; or
 - (b) has failed the assessment.
- (5) The Examining Panel may not assess an applicant as having passed a full assessment of professional competence unless at least 3 members of the Panel agree.

8. Report of Examining Panel

- (1) An Examining Panel must, after it completes a full assessment of professional competence of an applicant, give to the

Assessment Board a report setting out the results of the assessment.

- (2) The report must—
 - (a) state the determination of the Examining Panel as to whether the applicant has passed the assessment or has failed the assessment;
 - (b) if the Examining Panel determines that the applicant has failed the assessment, contain brief reasons for that determination; and
 - (c) contain a brief assessment of the competency of the applicant.
- (3) In addition, the report must be accompanied by—
 - (a) a copy of all written materials given to the applicant for the purposes of the assessment; and
 - (b) a record of the responses of the applicant (whether written or oral) in sitting the assessment.
- (4) The report must be signed by each member of the Examining Panel.

9. Notice of proposed decision by Assessment Board

- (1) This rule applies if the Assessment Board proposes to refuse an application or, in the case of an application made in respect of the class of proceedings specified in section 39H(2)(c) of the Ordinance, to grant the application only in respect of a class of proceedings specified in section 39H(2)(a) or (b) of the Ordinance.
- (2) The Assessment Board must notify the applicant in writing of its proposed decision. The notice must include brief reasons for the proposed decision and must inform the applicant of the provisions of subrule (3).
- (3) The applicant may, within the period fixed in the notice, make written representations to the Assessment Board requesting it to review its proposed decision.

- (4) A request for review made under subrule (3)—
 - (a) must include a statement of the grounds on which the review is sought; and
 - (b) must be accompanied by the fee set out in item 3 of the Schedule.
- (5) A decision of the Assessment Board in respect of a request for review made under subrule (3) is final.

10. Determination by Assessment Board under section 39K of Ordinance

- (1) As soon as practicable after the Assessment Board has made its decision under section 39K of the Ordinance, it must notify the applicant and the Council of the decision in writing.
- (2) If the Assessment Board has decided to refuse the application or, in the case of an application made in respect of the class of proceedings specified in section 39H(2)(c) of the Ordinance, to grant the application only in respect of a class of proceedings specified in section 39H(2)(a) or (b) of the Ordinance, the notice must include the reasons for the decision.

Part 4**Applications for which Election
for Exemption is Made****11. Application of Part 4**

This Part applies in relation to an application for which an election has been made to make the application on the basis of exemption from the requirements prescribed by rule 4.

12. Alternative requirements

The applicant must satisfy the requirements of rule 13 and, if applicable, any requirements imposed on the applicant under rule 14.

13. Applicant must demonstrate professional competence

- (1) The applicant must demonstrate to the satisfaction of the Assessment Board that he or she possesses the necessary professional competence to exercise higher rights of audience in respect of the class of proceedings for which the application is made.
- (2) Without limiting subrule (1), such competence may be demonstrated by the applicant establishing to the satisfaction of the Assessment Board that the applicant has—
 - (a) practised as a Senior Counsel (or before 1 July 1997, as a Queen's Counsel) at the bar in Hong Kong;
 - (b) practised as a Queen's Counsel or as a Senior Counsel in the capacity of advocate in—
 - (i) Australia;
 - (ii) Canada (except the Province of Quebec);
 - (iii) England and Wales;
 - (iv) Ireland;

- (v) New Zealand;
 - (vi) Northern Ireland;
 - (vii) Scotland;
 - (viii) Singapore; or
 - (ix) South Africa;
- (c) practised as a barrister or as a solicitor, in Hong Kong, and during that time acquired substantial experience—
- (i) in the role of an advocate before the higher courts of Hong Kong;
 - (ii) as a member of a judicial or quasi-judicial tribunal in Hong Kong; or
 - (iii) as an arbitrator in Hong Kong deciding disputes in accordance with the law of common law jurisdictions; or
- (d) practised as an advocate in any other common law jurisdiction and during that time acquired substantial experience—
- (i) before the higher courts of that jurisdiction (being courts having the same or a similar status as the higher courts of Hong Kong);
 - (ii) as a member of a judicial or quasi-judicial tribunal in that jurisdiction; or
 - (iii) as an arbitrator in that jurisdiction deciding disputes in accordance with the law of common law jurisdictions.

14. Applicant may be required to pass portion of full assessment of professional competence

- (1) If, on the basis of the application, the Assessment Board is not satisfied that the applicant possesses sufficient experience to exercise higher rights of audience in respect of the class of proceedings to which the application relates, the Assessment

Board may require the applicant to sit and pass a specified portion of the full assessment of professional competence at the time and place directed by the Assessment Board.

- (2) If the Assessment Board requires an applicant to sit and pass a specified portion of the full assessment of professional competence, it is not necessary for the applicant to submit a new application under rule 3. The applicant may proceed with his or her application as originally filed by—
- (a) paying the fee set out in item 4 of the Schedule; and
 - (b) sitting the specified portion of the full assessment of professional competence.

15. Examining Panel to conduct assessment and issue report

If the Assessment Board requires an applicant to sit and pass a specified portion of a full assessment of professional competence, that portion of the assessment is to be conducted by an Examining Panel assigned by the Assessment Board, and for that purpose rules 7 and 8 apply with any necessary modifications.

16. Notice of proposed decision and determination by Assessment Board etc.

Rules 9 and 10 apply, with any necessary modifications, in relation to an application to which this Part applies.

Part 5

Administrative Matters

17. Establishment of Examining Panels

- (1) For the purpose of conducting assessments of professional competence of applicants for higher rights of audience, the Assessment Board may establish one or more Examining Panels.
- (2) Each Examining Panel is to consist of 4 members appointed by the Assessment Board, of whom—
 - (a) one must be selected from a list of not less than 6 solicitors submitted to the Assessment Board by the Council;
 - (b) one must be selected from a list of not less than 6 barristers submitted to the Assessment Board by the Bar Council; and
 - (c) one must be—
 - (i) a former or retired judge of any higher court of Hong Kong; or
 - (ii) any other person who, in the opinion of the Assessment Board, is suitably qualified to be a member of an Examining Panel.
- (3) A member of the Assessment Board may not be appointed a member of an Examining Panel.
- (4) A member of an Examining Panel—
 - (a) holds office for a period of 2 years; and
 - (b) may resign from office by giving notice in writing to the Assessment Board.
- (5) A person may be appointed a member of more than one Examining Panel and may serve on more than one Examining Panel at the same time.

- (6) If, by reason of having an actual or potential interest in a matter before an Examining Panel or for any other reason, a member of the Panel is not able to participate in the performance of any function of the Panel, the Assessment Board may appoint a temporary member to act in that person's place.
- (7) If a member of an Examining Panel resigns from office or for any other reason ceases to hold office before the expiry of his or her term of office, the Assessment Board may appoint a new member to act in that person's place for the balance of the term of office.
- (8) A person appointed under subrule (6) or (7) must be selected in accordance with subrule (2) such that the membership of the Examining Panel continues to comply with the requirements of that subrule.
- (9) The Assessment Board may, by notice in writing, remove from office a member of an Examining Panel if the Assessment Board is satisfied that the member is unable or unfit to carry out the duties of the office due to permanent incapacity or other sufficient cause.
- (10) An Examining Panel may regulate its own procedure.

18. Standards of professional competence

- (1) The Assessment Board is to issue standards against which the professional competence of applicants for higher rights of audience under section 39H of the Ordinance is to be assessed.
- (2) The standards—
 - (a) must indicate the areas of professional competence that must be the subject of all full assessments of professional competence conducted under these Rules; and
 - (b) must indicate, in relation to each of those areas of professional competence, the weighting that is to be

given to that area of professional competence in the marking of the assessment.

- (3) Without limiting subrule (1) or (2), the standards may provide for applicants to be assessed on their competency in advocacy (whether criminal or civil), evidence, practice and procedure, ethics and court conduct.
- (4) The Assessment Board may amend any standards issued under this rule.
- (5) The Assessment Board may publish in any manner that it considers appropriate—
 - (a) any standards issued under this rule; and
 - (b) any amendment made under subrule (4).

19. Guidelines for conduct of assessments etc.

- (1) The Assessment Board is to issue guidelines for the preparation, conduct and marking of assessments of professional competence by Examining Panels.
- (2) The Assessment Board may amend any guidelines issued under this rule.
- (3) The Assessment Board may publish in any manner that it considers appropriate—
 - (a) any guidelines issued under this rule; and
 - (b) any amendment made under subrule (2).

Part 6**Miscellaneous****20. Enquiries by Assessment Board with Council**

- (1) Any enquiry by the Assessment Board with the Council under section 39M(1)(a) of the Ordinance in relation to an applicant must be made in writing, and a copy of the written enquiry must be sent to the applicant at the same time.
- (2) Any information provided by the Council to the Assessment Board in reply to such an enquiry must be provided in writing, and a copy of the written reply must be sent to the applicant at the same time.
- (3) Except as provided by subrule (4), any information provided by the Council to the Assessment Board in reply to such an enquiry must not be disclosed to any other person.
- (4) Such information—
 - (a) may be disclosed to any of the following persons, if such disclosure is made in connection with the performance by the Assessment Board of any function under the Ordinance—
 - (i) any member of the Assessment Board;
 - (ii) any member of an Examining Panel;
 - (iii) any other person assisting the Assessment Board in the performance of its functions under the Ordinance;
 - (b) may be disclosed to any person in respect of whom the applicant has given his or her consent to the disclosure; and
 - (c) may be disclosed in accordance with an order of a court, or in accordance with a law or a requirement made under a law.

- (5) The copy of the written enquiry or written reply that is required to be sent to an applicant under subrule (1) or (2) may be sent in any manner the Assessment Board or the Council, as the case may be, considers appropriate.

21. Member of Assessment Board may attend assessment as observer

A member of the Assessment Board may attend any sitting of an assessment of professional competence conducted by an Examining Panel under rule 7 or 15 as an observer.

22. Fees are not refundable

Fees paid under these Rules are not refundable.

23. Further applications

Subject to section 39I(1)(d) of the Ordinance, there is no limit on the number of times a solicitor may apply to the Assessment Board for higher rights of audience under these Rules.

24. Saving

To avoid doubt, nothing in these Rules is to be construed as limiting any power conferred on the Assessment Board under the Ordinance.

Schedule

[rr. 3, 9 & 14]

Fees

Item	Matter	Amount
1.	Application fee	\$1,950
2.	Fee for sitting full assessment of professional competence as required by rule 4	\$8,130
3.	Fee for review of Assessment Board's proposed decision under rule 9	\$2,270
4.	Fee for sitting portion of full assessment of professional competence as required by rule 14	\$5,110

Chairperson,
Higher Rights Assessment Board

2012

Explanatory Note

These Rules set out the procedures for applying for higher rights of audience under Part IIIB of the Legal Practitioners Ordinance (Cap. 159) and provide for the manner in which the professional competence of applicants is to be assessed for that purpose.

2. Part 1 (rules 1 and 2) contains preliminary provisions on commencement and interpretation.
3. Part 2 (rules 3 to 5) provides for the form of applications and fees, and makes provision for the sitting of full assessments of professional competence and for elections for exemption from the requirement to sit a full assessment.
4. Part 3 (rules 6 to 10) sets out the procedures relating to applications for which no election has been made for exemption from the requirement to sit a full assessment of professional competence.
5. Part 4 (rules 11 to 16) sets out the procedures relating to applications for which an election has been made for exemption from the requirement to sit a full assessment of professional competence.
6. Part 5 (rules 17 to 19) deals with certain administrative matters including the establishment of Examining Panels to conduct assessments of professional competence and the establishment of professional competency standards and guidelines for the preparation, conduct and marking of assessments by Examining Panels.
7. Part 6 (rules 20 to 24) deals with certain miscellaneous matters including the procedure to be followed by the Higher Rights Assessment Board in making enquiries with the Council of the Law Society.