

Standards of Professional Competence

(Issued by the Higher Rights Assessment Board pursuant to Rule 18 of the Higher Rights of Audience Rules)

Introduction

Solicitors applying for higher rights of audience must be able to demonstrate that they are competent to undertake advocacy in the higher courts of Hong Kong in all proceedings in respect of which they have sought such higher rights, that competency to be judged according to the same standards of competency expected of a barrister appearing in the higher courts.

The purpose of this set of standards is to provide guidance to solicitors who are required to sit and pass an assessment of professional competence, be it either a full assessment or a portion only of a full assessment. However, on the basis that assessments are designed to seek a practical demonstration of overall professional competence, written and oral, in the context of higher court proceedings, it is not to be taken as being exhaustive of all matters that may be the subject of an assessment.

The content of assessments

All assessments will require a demonstration that the applicant has the necessary knowledge of the ethical imperatives that guide the practice of advocacy in the higher courts.

All assessments will further require, first, a demonstration of competency in advocacy generally, including knowledge of evidence and procedure, and second, a demonstration of competency in the specific area of advocacy – civil or criminal or both – in respect of which the applicant seeks higher rights of audience.

It must be noted that, while many of the standards set out in this document are of the same nature as those required to competently advocate cases in the lower courts (for example, the ability to conduct cross examination of witnesses or to make an oral presentation of legal submissions), the purpose of assessments is to test the ability of

applicants in the context of higher court proceedings in which expectations of competency are more rigorous.

The form of assessments and their marking

After lengthy consideration and discussion with another body which has considerable experience in teaching applicants for higher rights and in conducting assessments, the Board has determined that all assessments, civil and criminal should consist of two parts, each carrying equal marks. The first part consists of a written examination. The second part consists of a practical assessment. Applicants must obtain a minimum of 50% in both the written examination and the practical assessment. Both parts of the assessment, that is, the written examination and the practical assessment, will constitute one 'advocacy assessment'. There will be one assessment mark arrived at and conveyed to applicants namely 'pass' or 'fail'.

Both the written examination and the practical assessment will seek to test applicants as to their competency in the matters that are set out in these Standards.

Guidance as to each area of assessment

I. Ethics and appropriate court conduct

Applicants should be familiar with the Code of Conduct for Solicitor-Advocates issued by the Law Society of Hong Kong, and they should be familiar with the Code of Conduct of the Hong Kong Bar.

Applicants should be able to:

1. advise the client on suitable representation at court including the possibility or desirability of instructing a barrister or a solicitor-advocate not from his/her own firm or practice,
2. resolve issues arising from unintentional or inadvertent disclosure of confidential or privileged information,

3. resolve potential and actual conflicts, including conflicts arising between the solicitor-advocate's duty owed to the client and the solicitor-advocate's duty to court,
4. advise on potential conflicts between acting as a solicitor-advocate for a client and becoming a potential witness for that client,
5. recognize when a solicitor-advocate may become professionally embarrassed and have to withdraw from a case,
6. advise the client of the solicitor-advocate's need to maintain professional independence and the associated need to draw to the attention of the court any unfavourable law or authorities of which the solicitor-advocate is aware.

II. Evidence and procedure

Applicants should have a sound knowledge of the applicable rules of evidence and procedure.

Practising solicitor-advocates should be able to apply the rules of evidence, be able to determine when evidence is relevant, and therefore potentially admissible, and be able to demonstrate their understanding of:

1. burden and standards of proof and, in criminal matters, the differing roles of judge and jury,
2. disclosure, including issues relating to confidentiality, privilege and public interest immunity,
3. hearsay evidence, including being able to identify hearsay evidence, recognize when it may be admissible, how it may be admitted and its evidential value when adduced,
4. documentary hearsay, including laying the evidence for documentary hearsay, any formal requirements and time limits,

5. similar fact and character evidence, including being able to recognize when similar fact and character evidence is appropriate as evidence,
6. opinion and expert evidence, including when and to what extent opinion and expert evidence is admissible,
7. improperly obtained evidence, including being aware of how evidence has been obtained, and the evidential constraints and effects of adducing improperly obtained evidence.

III. General advocacy

Applicants should demonstrate appropriate techniques for handling witnesses as well as sound skills in legal and factual submissions in a contested, adversarial context.

Applicants should be able to analyze and understand the case, assimilate the facts and apply relevant statute and case law in order to react to unexpected events in court, and should be able to demonstrate that they have a thorough knowledge of evidence and procedure.

In all aspects of advocacy, whether interlocutory or at trial or on appeal, applicants should demonstrate thorough knowledge of the case materials and papers, and must be able quickly to locate and identify materials amongst the court papers.

Applicants should also be able to understand and comply with judicial interventions and rulings.

Legal submissions/interim applications

Applicants should be able to:

1. prepare well structured and coherent skeleton arguments and necessary supporting documents and supply the court with copies of the relevant law,

2. present legal arguments to the court cogently and accurately, citing only relevant and material law where necessary,
3. respond to interventions by the court,
4. respond to the opponent's legal arguments and develop appropriate legal arguments in the light of them.

Trial advocacy

Preparation for trial must be thorough, and must reflect the senior jurisdiction of the courts.

1. Applicants should be able:
 - (a) to understand the importance of a clear trial strategy,
 - (b) to outline the facts and evidence, in terminology and detail as appropriate to the type of case,
 - (c) to present an effective opening speech,
 - (d) to make appropriate and effective objections,
 - (e) to conduct an examination in chief, if required, by:
 - asking relevant non-leading questions which promote the client's case,
 - identifying and placing before the court relevant documentation produced by the witness after establishing the necessary evidential foundation;
 - (f) in cross examination:
 - to know how to cross-examine on relevant matters,
 - to control the direction and pace of the evidence,

- appropriately to challenge the witness' evidence,
 - to ensure that all relevant disputed matters are put to the witness,
 - to identify and appropriately to cross-examine on any previous inconsistent statements;
- (g) in re-examination:
- to identify situations when re-examination is required,
 - to ask non-leading questions seeking to clarify or amplify matters raised in cross-examination.

2. Handling expert witnesses

Applicants should be able to:

- (a) identify and use effectively expert evidence,
- (b) challenge expert evidence,
- (c) where necessary, confirm or question the expert's qualifications and expertise.

3. Closing speeches

During the closing speech, applicants should:

- (a) identify and appropriately present:
 - the key issues in the client's case,
 - the positive and negative evidence elicited from witnesses;
- (b) anticipate and appropriately address arguments likely to be advanced by the opposing advocate,
- (c) effectively deal with interventions by the court and respond appropriately to them.

Appellate Advocacy

Preparation for appeals must be thorough and must reflect the higher jurisdiction of the appeal courts.

Applicants should be able to:

1. demonstrate knowledge of the rules and procedures to bring an appeal,
2. draft appropriate notices and grounds of appeal,
3. draft appropriate skeleton arguments or written cases in compliance with the relevant practice directions or rules,
4. outline the facts and evidence, in terminology and detail as appropriate to the point or points on appeal,
5. present an effective opening of appeal,
6. present an effective response to the appeal,
7. deal appropriately with judicial questions and interventions.

IV. Civil advocacy

Introduction

These standards identify the activities, procedures and practices specific to advocacy in civil proceedings before the Court of First Instance and above. The standards are in addition to those applicable to general advocacy.

Applicants should:

1. be aware that much civil advocacy depends on the quality of written documentation put before the court in addition to the quality of the oral advocacy at trial,
2. comply with rules of civil procedure throughout the trial process,
3. recognize the costs implications faced at all stages of preparation and during hearings including the trial,
4. apply practice directions where relevant,
5. appropriately advise the client on alternative dispute resolution procedures.

Trial preparation

In addition to general matters of trial preparation, applicants should:

1. be able to prepare for trial based on:
 - (a) the pleadings and/or statement of case,
 - (b) witness statements,
 - (c) other disclosed documents put before the court;
2. exercise sound judgment in the making of appropriate interim applications,
3. understand the effect of interim orders,

4. identify any costs implications resulting from interim orders,
5. draft coherent skeleton arguments to assist the court,
6. understand the implications and requirements of current Practice Directions as to what needs to be included in the trial bundle and should be able to ensure that the bundle complies with court requirements.

Alternative dispute resolution

Applicants should understand the importance of alternative dispute resolution and when it is appropriate, and must be able to advise their client appropriately.

V. Criminal advocacy

Introduction

These standards identify the activities, procedures and practices specific to advocacy in criminal proceedings before the Court of First Instance and above. The standards are in addition to those applicable to general advocacy.

In contrast to civil advocacy, criminal advocacy is primarily dependent upon oral advocacy, rather than written documentation. Notwithstanding this, applicants should:

1. understand and comply with rules of criminal procedure throughout the trial process,
2. ensure that documents which may be put before the judge and jury are in the appropriate format, accurate and material to the case,

3. ensure that copies of any law to be argued are prepared for the benefit of the judge and the opposing barrister or solicitor-advocate,
4. demonstrate understanding of the law and procedure relating to confessions and previous inconsistent statements.

Trial preparation

Preparation for trial must be thorough and reflect the increased seriousness and complexity of cases heard in the Court of First Instance.

To ensure this, applicants must be able to demonstrate the ability to develop a clear trial strategy based on:

1. full and proper instructions,
2. an understanding of the rules relating to indictments; for example, joinder of counts and severance,
3. an identification of the elements of the offence or offences charged and the issues arising in regard thereto,
4. an understanding of the rules relating to disclosure.

Trial procedure

Applicants should understand:

1. the procedure for empanelment of the jury and when, during the course of a trial, it may be necessary to seek the discharge of the jury,
2. when legal submissions should be made to the judge in the absence of the jury,

3. how they can assist the judge with any specific points to be addressed in the summing up,
4. actions and attributes that may adversely affect the client's case in the eyes of a jury.

Sentencing

Applicants should be able to make an effective plea in mitigation and demonstrate an understanding of the issues involved in dealing with sentencing including:

1. matters relating to advice on a plea of guilty,
2. sentencing guidelines and case law, the judge's sentencing powers and the range of sentencing tariffs,
3. the obligation of advocates, whether for the prosecution or the defence, to draw the trial judge's attention to any limitation on his/her sentencing powers.