THE LAW SOCIETY OF HONG KONG
香港律師會

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POSITION PAPER ON HIGHER RIGHTS OF AUDIENCE FOR SOLICITORS

香港律師會

律師於較高級法院出庭發言權之意見書

POSITION PAPER ON HIGHER RIGHTS OF AUDIENCE FOR SOLICITORS

Membership of the Law Society's Working Party on Higher Rights of Audience

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POSITION PAPER ON HIGHER RIGHTS OF AUDIENCE FOR SOLICITORS

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THE LAW SOCIETY OF HONG KONG'S POSITION ON THE EXTENSION OF HIGHER RIGHTS OF AUDIENCE ("HRA") TO SOLICITORS QUALIFIED IN HONG KONG

I. Introduction

1. Since the publication of the Law Society's submission on HRA - "*A Proposal for Extension of Higher Rights of Audience ("HRA") to Solicitors Qualified in Hong Kong*" (the "**2000 Paper**") - in February 2000, the Law Society has been continuing its efforts in seeking an extension of rights of audience for solicitors into the higher courts and in finding the most suitable path for achieving this goal. Through its Working Party on Higher Rights of Audience, the Law Society has also consulted with the Bar, the Judiciary, the Department of Justice, and the legal functional constituency's LegCo Member, to ascertain their views on this matter. The rationale behind seeking HRA for solicitors set out in the 2000 Paper remains sound today. The purpose of this paper is to clarify the Law Society's current position on its proposal for the extension of HRA to solicitors.

2. Solicitors' rights of audience have not been extended since the 2000 Paper. Solicitors currently have rights of audience (1) in arbitration; (2) in statutory tribunals where the parties may be represented; (3) in Magistrates Court and Coroner's Court matters; (4) in the District Court; (5) in Masters' and High Court chambers; and (6) before the Master in Court when dealing with certain matters (for example, the assessment of damages, or where (by consent of the parties) the action has been listed to be tried by a Master). Solicitors still do not have the right to conduct High Court trials or to appear in the Court of Appeal in open court - these remain the exclusive territory of barristers.

3. It is worth noting that the financial jurisdictional limits in the District Court have been increased significantly since 1 September 2000. Specifically, for general civil jurisdiction and personal injuries cases, the limit has been increased from $120,000 to $600,000. Although this means more cases can be commenced in the District Court as a result of the increases, they have no effect on criminal practice, or any of the specialist areas.

II. The Law Society's Current Position

NO FUSION OF THE PROFESSION

4. It must be emphasised at the outset that the Law Society does not seek fusion of the profession. Fusion means having a unified profession with no distinction between barristers and solicitors. An example of a jurisdiction where there is true fusion is the USA.

5. Indeed, the Law Society supports the existence of an independent private Bar. An independent private Bar is an important source of specialist advice; it is also vital to solicitors in general practice who choose not to pursue higher rights of audience when they need to engage in litigation in the higher courts.

6. What the Law Society is advocating for in Hong Kong is an extension of the rights of audience for solicitors into the higher courts through a process of accreditation. The Law Society does not seek to break down the Bar as an independent profession. What the Law Society aims to do is to break down the artificial and arbitrary monopoly which barristers enjoy in the right of audience in higher courts.

HRA MUST BE GAINED THROUGH A SYSTEM OF ACCREDITATION

7. The Law Society does not ask for unlimited general rights of audience to be granted to all solicitors. Rather, those solicitors who would like to acquire HRA would need to do so through a process of accreditation. Therefore, if HRA were extended to solicitors, it does not mean that every one of the more than 5,000 solicitors in Hong Kong will embark on a career as a litigator and start representing clients in the higher courts. In fact, it is expected that only litigators who engage in full time litigation practice will seek HRA, and of those who seek HRA, only those who satisfy the accreditation standards will be granted HRA.

HRA IS IN THE PUBLIC INTEREST

8. The Law Society firmly believes that an extension of HRA to solicitors is in the public interest. Legal fees will be lower as the duplicated costs of briefing, updating and reviewing proceedings with counsel, who is often brought in only right before trial begins, can be avoided. Clients can have the benefit of having their cases handled from start to finish by a team of solicitor-advocates who are familiar not only with their cases but also with their businesses from previous dealings. Clients can have a larger and more competitive (both in terms of skills and pricing) pool of advocates than the current 700 or so barristers, who comprise less than 15% of the legal profession, to choose from. Indeed, it is a fundamental right of every citizen in a free society to be represented by suitably qualified advocates of his or her choice. Clients can be confident that solicitors who have acquired HRA have satisfied a set of qualification rules. The increased competition caused by the increase in the number of advocates is also likely to drive the level of advocate fees to a more competitive level and ensure "survival of the fittest" at the Bar.

III. Accreditation

9. In the UK, *The Courts and Legal Services Act 1990* (the "**1990 Act**") established a process whereby solicitors can qualify for HRA in civil, criminal or all proceedings. Regulations under the Access to Justice Act 1999 further developed the approach to solicitors obtaining HRA so that HRA can be obtained by exemption, accreditation and development.

9.1. *Exemption* - solicitors with at least three years of post qualification experience (**"PQE"**) can gain exemption if they can demonstrate to the Law Society that they have advocacy or judicial experience in the higher courts and are suitably experienced and qualified to exercise rights of audience

9.2. *Accreditation* - solicitors with at least three years PQE must satisfy the Law Society that they have sound experience and understanding of procedure, evidence and ethics. An assessment of advocacy skills must be taken

9.3. *Development* - solicitors will need to undertake training and assessments in procedure, evidence and ethics

10. Whilst it is not suggested that the UK approach be closely followed in Hong Kong, it does shed some light on the possible way forward.

11. In Hong Kong, a system of accreditation could be introduced by amendments to the *Legal Practitioners Ordinance* - by introducing a mechanism in the legislation for making qualification rules for obtaining HRA and by appointing an authorising body (for example, the Law Society as in the case of the UK) to assess whether such qualification rules have been satisfied. The qualification rules should cover the following areas:

11.1. *The experience required* - the threshold can be set at five years ("PQE") - the same period required for the appointment to the Bench as a Magistrate or District Judge.

11.2. *The training to be undertaken* - the Law Society will organise accredited courses covering the following areas which are of particular importance to litigators:

11.2.1. Case analysis and drafting pleadings

11.2.2. Ethics

11.2.3. Evidence

11.2.4. Advocacy - including trial advocacy, appellate advocacy, opening and closing speeches

The courses can be provided initially by "providers" running courses for the UK. Obviously, the contents of the courses will be adapted to specifically cater for the Hong Kong system.

11.3. *The criteria for approval* - an assessment of proficiency in the above topics by qualified assessors

12. In England, the relevant qualifying rules, the *Higher Courts Qualification Regulations 2000 (the "**2000 Rules**")*, were made by the Council of the Law

Society. Under the 2000 Rules, applications for HRA are made to the Law Society, which is responsible for specifying the training and assessments to be undertaken by the applicants, and also making decisions as to whether the relevant qualifying rules have been satisfied. The 2000 Rules were made pursuant to a mechanism for the making and approval of such rules established by the 1990 Act:

12.1. The *Lord Chancellor's Advisory Committee on Legal Education and Conduct* ("**ACLEC**") was set up under section 20 of the 1990 Act to carry out the duty of "*assisting in the maintenance and development of standards in the education, training and conduct of those offering legal services*". ACLEC comprises a Chairman (a Lord of Appeal or a judge of the Supreme Court) and 16 members appointed by the Lord Chancellor (1 present or former Circuit judge, 2 practising barristers, 2 practising solicitors, 2 persons with experience in the teaching of law and 9 lay persons).

12.2. ACLEC has an important role in the making of the relevant qualification rules. Whenever the Law Society (being one of the "authorised bodies" defined in the 1990 Act) makes any alteration to the rights of audience granted by it or alters any of its qualification regulations or rules of conduct, it is required to submit a copy of the relevant regulations or rules in question (together with any amending regulations/rules or a statement of the proposed alteration to the rights in question, as the case may be) to ACLEC for its consideration. ACLEC would advise the Law Society of any alteration that it considers necessary. After making the alteration in question, in order to obtain the approval for the regulations / rules in question required by the 1990 Act, an application for approval needs to be made to the Lord Chancellor. The Lord Chancellor would seek the advice of ACLEC and the Director General of Fair Trading before it makes a decision on whether to grant the approval.

13. In Hong Kong, a similar model can be followed. The Law Society can assume the role of formulating the qualifying rules and assessing whether an applicant has satisfied the requisite qualifying rules. A supervisory committee similar to ACLEC can be established to oversee and supervise the Law Society's performance of its function in this area. Obviously, the rule-making and supervisory mechanism should be tailored to the particular circumstances of Hong Kong.

14. By granting HRA only to those solicitors who satisfy the qualifying rules, the competence and quality of the pool of solicitor-advocates who do gain HRA can be guaranteed.

IV. Addressing the Concerns of the Bar over Extending HRA to Solicitors

THE BAR WILL CEASE TO BE AN ATTRACTIVE CAREER

15. The reality is that the nature of the practice of a barrister is very much different from that of a solicitor, whether in terms of the nature of the work undertaken or in terms

of the characteristics of the practice itself. The extension of HRA does not automatically lead to the result that barristers and solicitors who have acquired HRA perform identical roles.

16. The experience in Australia is a good illustration of this. The Attorney General's 1996 study of "*The State of the Bar in Other Common Law Jurisdictions*" revealed that even though all solicitors in Australia have full rights of audience in all eight Australian jurisdictions, in all jurisdictions, whether they have a divided or fused legal profession, there is an independent pool of advocates working on a consultancy basis.

17. As in Australia, no doubt there will be practitioners in Hong Kong who would continue to prefer operating in an independent private practice rather than working in a law firm environment, where on top of the legal work, there is also the work of running a business.

18. Granting HRA to solicitors does not mean that the hiring of outside counsel by solicitors' firms will be significantly reduced. There will be very many cases where the specialist experience of outside counsel is needed – indeed as Hong Kong continues to develop as an international dispute resolution centre we anticipate that the need for such specialist experience will increase. There will also be many cases where it is either more cost effective to hire outside counsel or in the client's best interest to do so.

THE LIVELIHOOD OF YOUNG BARRISTERS

19. Some argue that young barristers have to give up the financial security of paid articles, followed by an associate's salary, for unpaid pupillage followed by the struggle to make a living as a self-employed young barrister, and the extension of HRA to solicitors will seriously threaten the livelihood of young barristers thus driving the "price to pay" in order to become a barrister even higher.

20. First, whilst it is not for the Law Society to comment upon the internal process of the Bar, the recent development in England in this area is worth mentioning. In February 2001, the Bar Council in England has voted in favour of introducing a minimum payment of at least £10,000 a year to all pupils. Failure to do so amounts to an abuse of the Bar's Code of Conduct. This measure no doubt facilitates access to the Bar.

21. Secondly, the Law Society supports the existence of an independent private Bar and it sees the importance in giving instructions to young, competent barristers where appropriate - for example, in a less complex case where it is cost effective for the client to instruct a junior barrister - in order to enable them to gain sufficient experience to become the strong and experienced Bar of the future.

22. Thirdly, it must be remembered that the Law Society is not seeking a blanket extension of HRA to all solicitors. Solicitors who choose not to acquire HRA but need to engage in litigation in the higher courts will continue to be a source of instructions for young barristers.

23. Young lawyers who are inclined to become barristers are unlikely to be easily swayed by the cessation of the barristers' monopoly in the rights of audience in higher courts. To take England as an example, despite the fact that solicitors are entitled to obtain full HRA under the 1990 Act, in the year 2000/2001, 783 pupils were registered with the Bar Council in pupillage, which represents an annual growth of nearly 8% in the size of the Bar.

LARGER SOLICITOR FIRMS WILL MONOPOLISE THE TOP BARRISTERS TO THE DETRIMENT OF SMALLER SOLICITOR FIRMS

24. The argument that large law firms will monopolise top barristers by recruiting such barristers as "in-house advocates" is simply misconceived. The obvious counter argument is that this has not happened in other jurisdictions. For example, in England, the pool of practitioners who practise independently at the Bar continues to exist and grow. Indeed, rather than recruiting top barristers as "in-house advocates", large law firms continue to send instructions to such barristers, on an ad hoc basis, in appropriate cases. Further, such an argument also overlooks the practical consideration that the service that such top barristers can offer to law firms, which is to provide specialist advice in specific cases involving areas of law in which such top barristers have extensive experience and expertise, is unlikely to justify the costs to law firms of retaining such top barristers as "in-house advocates".

25. Indeed, quite contrary to this argument, granting HRA to solicitors with considerable experience and competence in litigation is likely to increase competition higher up the food chain in the Bar. Experienced solicitor-advocates could, in some cases, be understandably better positioned to do the advocacy work for the client than outside barristers briefed right before the trial begins. This is precisely the level at which smaller law firms which do not have comparable resources in terms of advocacy expertise could take advantage of the expertise of independent barristers in the senior Bar.

MANY SOLICITORS DO NOT WANT HRA

26. There is no evidence that this is true. In order to obtain evidence on the true position, the Law Society polled its members in the autumn of 2001 and, by significant majority the Law Society has a clear mandate for its work in obtaining HRA. The results of the opinion poll showed that 72% of solicitors support the Law Society's proposals for extending HRA to appropriately experienced and qualified solicitors. (See **Appendix 1**: Results of opinion poll on Law Society's members on the Law Society's policy on extending solicitors' HRA.)

27. It must be emphasised that the results of the opinion poll do not mean that 72% of the solicitors in Hong Kong would apply for and acquire HRA. The purpose of the opinion poll was simply to ascertain the views of solicitors on the Law Society's position on HRA for solicitors - the Law Society made it clear that not every solicitor who wishes to acquire HRA will be granted HRA, and that only suitably qualified solicitors would be accredited.

28. Solicitors specialising in litigation practice are already regularly exercising their rights of audience to the extent possible; for example, it appears that almost 90% of all interlocutory applications heard before Masters are conducted by solicitors. (See **Appendix 2**: Survey results of Solicitor firms instructions to barristers on Interlocutory Applications in the High Court.) Also, the fact that not all solicitors want HRA should not prevent the ones who do from obtaining HRA.

OVERWHELMING ADVANTAGE FOR SOLICITORS RESULTING IN "1-STOP-SHOP"

Two separate points need to be made:

29. First, it is true that extending HRA to solicitors could result in greater continuity of service to clients, which is obviously in the best interests of the clients. Duplication of costs can be avoided, and the client's case will be handled from start to finish by a team of solicitor-advocates who not only know their case from the very beginning but very often also have a sound knowledge of the business of the client from previous dealings with the client. However, this is not to say that barristers can be dispensed with. Indeed, a barrister with expertise in specific areas could be invaluable to a client's case.

30. Secondly, there is no evidence to merit the argument that solicitors are susceptible to exercising subjective preference to encourage clients to engage the advocacy service of a member of his / her firm over a more suitable barrister. In any event, any such risks can be controlled by making conduct rules which preclude a solicitor from requiring his clients to employ his service as an advocate, and also positively oblige the solicitor to advise his client on the choice of a suitable advocate based on costs and competence.

31. In England, the Law Society introduced a number of Practice Rules addressing similar concerns prior to the first batch of Solicitor-Advocates being qualified in 1993. An extract of the relevant Practice Rules can be found at **Appendix 3.** Similar Practice Rules can be introduced in Hong Kong upon the introduction of HRA to solicitors.

THE NUMBER OF SOLICITORS WHO WOULD LIKE TO ACQUIRE HRA IS NOT INSIGNIFICANT COMPARED TO THE NUMBER OF BARRISTERS

32. Granting HRA to solicitors would indeed mean increased competition to members of the Bar. However, surely, this should not be viewed as a negative outcome. It is

clearly in the public interest to have a system which permits more choice on the part of clients from a larger pool of advocates and which promotes high quality of service offered at competitive fees. Advocates should be employed on the basis of competence and "value added", not because of the existence of a monopoly. Indeed, the Bar should welcome the prospect of increased competition as it will guarantee those who survive the competition, and remain in the Bar, are the ones who deserve to do so.

33. Furthermore, it is unlikely that the number of solicitors who do acquire HRA is so large as to pose a threat to the existence of the Bar. Taking the experience of England as an example again, as at 31 July 2000, only 1,075 of the over 82,000 solicitors entitled to practise in England and Wales have been conferred with HRA. This figure, compared to the over 10,000 barristers who continue their practice in a strong and independent Bar, demonstrates that the extension of HRA to solicitors will not automatically lead to the Bar being overwhelmed by an army of solicitors who have acquired HRA.

V. Conclusion

34. The extension of HRA to solicitors would improve the delivery of legal services to the public. Members of the public who require the services of an advocate can be confident that the solicitor-advocates who have HRA have gained their HRA by satisfying a set of qualification rules, including undertaking specific training catered to sharpen the skills of litigators. They will have a larger and more competitive (both in terms of pricing and in terms of skills) pool of advocates to choose from. They will enjoy greater continuity of service from a solicitor or a team of solicitors throughout a case.

35. Another benefit of HRA is that it will result in more cost efficient litigation and thereby making Hong Kong a more attractive dispute resolution centre of choice. In recent years, partly because of the high cost of litigation in Hong Kong, certain areas of work have moved to other jurisdictions, for example Singapore, where dispute resolution and related services are often provided at lower costs.

36. Developing Hong Kong as a dispute resolution centre is a more pertinent consideration now than ever before. Following China's accession to the WTO, with the ensuing business opportunities which are opening up to foreign investors will come growing demands for means of resolving commercial contractual disputes involving China. Armed with the advantages of our close proximity to China, our mature legal system, our experienced and bilingual legal community, our sophisticated infrastructure, and our excellent hospitality industry, the Hong Kong legal profession is best placed to take advantage of the new business opportunities in dispute resolution involving China. The attractiveness of Hong Kong as a dispute resolution centre would be enhanced if the legal profession was able to provide

higher quality and more cost-efficient dispute resolution services. As seen in earlier parts of this paper, these can be brought about by extending HRA to solicitors.

37. Extending HRA to solicitors is not about fusion of the profession, it is not about bringing the Bar to an end. It is about ensuring high standards of advocacy. It is about eliminating the current anti-competitive situation. It is about delivering high quality legal services to those who need it, and at lower costs. No other significant jurisdiction maintains the rigid, arbitrary, arcane and anti-competitive barrier which prevents solicitors from appearing in higher courts, Hong Kong must catch up now rather than later.

Working Party on Higher Rights of Audience

The Law Society of Hong Kong

May 2002

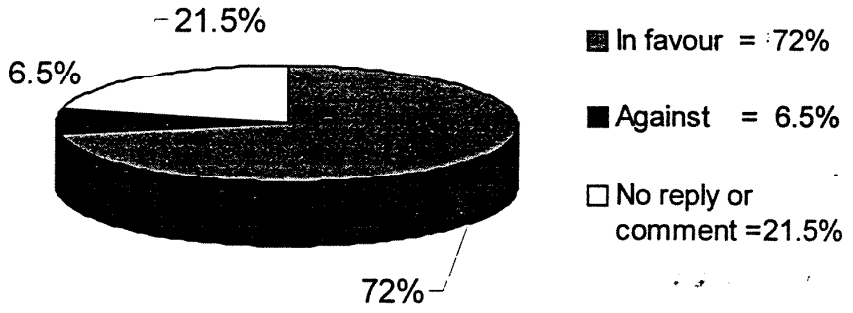
Appendix 1: Results of opinion poll on Law Society members on the Law Society's policy on extending solicitors' HRA

Poll form results:-

Practising certificate applications for 2002 received		4861	
Members registered without practising certificate		410	
Total		5271	

Poll forms:

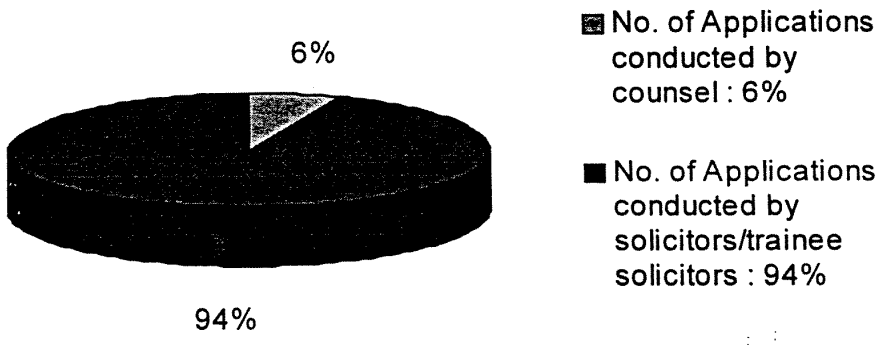
a. In favour		3793	(72%)
b. Against		344	(6.5%)
c. No comment	66		
d. No reply	1068	1134	(21.5%)
Total		5271	



Appendix 2: Survey results of solicitor firms instructions to barristers on interlocutory applications in the High Court

Period: 9 Nov 2000 – 9 Feb 2001

No. of firms responding	32	
Total number of interlocutory applications during the period	1628	
No. of applications conducted by counsel	98	(6%)
No. of applications conducted by solicitors/trainee solicitors	1530	(94%)



Appendix 3: Extract from Practice Rules

Practice Rule 16A (Solicitors acting as advocates)

Any solicitor acting as an advocate shall at all times comply with the Law Society's Code for Advocacy.[1]

Practice Rule 16B (Choice of Advocate)

1. A solicitor shall not make it a condition of providing litigation services that advocacy services shall also be provided by that solicitor or by the solicitor's firm or the solicitor's agent.

2. A solicitor who provides both litigation and advocacy services shall as soon as practicable after receiving instructions and from time to time consider and advise the client whether having regard to the circumstances including:

(i) the gravity, complexity and likely cost of the case;

(ii) the nature of the solicitor's practice;

(iii) the solicitor's ability and experience;

(iv) the solicitor's relationship with the client;

the best interest of the client would be served by the solicitor, another advocate from the solicitor's firm, or some other advocate providing advocacy services.

[1] The Law Society's Code of Advocacy is largely based on the English Bar's own advocacy code - this ensures a level playing field for all advocates, whether solicitors or barristers.

香港律師會對提升香港合資格律師於較高級法院出庭發言權（「出庭發言權」）之立場

I. 引言

1. 自從香港律師會在二零零零年二月對出庭發言權之提議「香港律師會對提升香港合資格律師出庭發言權之立場」（「二零零零年文件」）發表以來，律師會一直致力於尋求提升律師之出庭發言權至較高級法院，並且找尋達致此一目標之最適當途徑。律師會之出庭發言權工作小組亦曾諮詢香港大律師公會、司法機構、律政司，以及立法會法律界功能組別議員，聽取各方對此事之觀點。二零零零年文件所載列尋求提升律師出庭發言權之理據至今依然有力。本文件之目的在於澄清律師會對其提議提升律師出庭發言權之現時立場。

2. 自二零零零年文件發表以來，律師之出庭發言權並未獲得提升。現時律師在(1)仲裁庭；(2)各方可委託代表出席之法定審裁處；(3)處理裁判署及死因裁判法庭案件；(4)地方法院；(5)聆案官法院及高等法院之內庭；及(6)由聆案官審理之法庭上處理若干事宜（例如評估損害賠償）或（經由各方同意）訴訟已獲排期由聆案官審訊。律師依然無權處理高等法院審訊，或在公開聆訊之上訴庭發言，此等依然屬於大律師之專責。

3. 值得注意之處爲，自二零零零年九月以來，地方法院之財務司法權限制已顯著放寬，尤其是一般民事司法權及人身傷亡案件，其限制已由120,000 元增至 600,000 元。雖然此亦意味權限放寬將令更多案件可在地方法院審理，但對刑事執業，或專業領域則沒有影響。

II. 律師會之現有立場

不會融合有關專業

4. 律師會開宗明義指出並不會尋求律師專業之融合，融合意指將大律師及律師之專業合而爲一。兩者真正融合之司法權區例子爲美國。

5. 事實上，律師會支持大律師專業獨立存在。獨立之大律師乃專家意見之重要來源；對一般不尋求出庭發言權的執業律師而言，如需要在較高級法院處理訴訟時，獨立大律師的存在也屬不可或缺。

6. 律師會倡議的，是藉著一項評審程序提升律師之出庭發言權至較高級法院。律師會無意破壞大律師作爲一種獨立專業的地位，而律師會專注的是剔除大律師在較高級法院專享發言權之人爲及無理之壟斷。

出庭發言權必須通過評審制度獲取

7. 律師會並非要求一般發言權無限制地授予所有律師，反而此等律師若希望取得出庭發言權則必須通過一項評審制度。因此即使律師有權獲取出庭發言權，亦決不意味香港五千多名律師都將成爲訟務律師，從而開始在較高級法院代表客戶。事實上，預期只有全職從事訴訟之訟務律師才會尋求出庭發言權。而此等律師之中，只有滿足評審標準者才會獲授出庭發言權。

出庭發言權符合公眾利益

8. 律師會堅定相信，延展出庭發言權予律師符合公眾利益。由於轉聘大律師（大律師通常只在審訊開始前才參與）之摘要、對訴訟程序之增補及審核等重疊成本將得以免除，法律費用將會減低。客戶會因其案件由始至終均經由一組辯護律師處理而獲益，該組律師不僅熟悉其案件，亦由於與該客戶素有業務往來而熟知其事務。客戶可從一群更大及更具競爭力（就技巧及價格而言）之辯護律師中加以選擇，遠多於目前七百名左右的大律師（佔法律專業人員不足百分之十五）。事實上，在自由社會中，每位市民都有基本權利選擇適當之合資格辯護律師代表自己。獲得出庭發言權之律師均已符合一套資格規則，客戶對此可抱有信心。辯護律師人數增加將引入更大競爭，並可能推動辯護費用調整至更具競爭力之水平，確保大律師專業亦要面對「適者生存」之定律。

I. 評審

9. 在英國，*一九九零年法院及法律服務法案 (The Courts and Legal Services Act 1990)*（「一九九零法案」）設立了一項程序，律師可由此取得民事、刑事或所有訴訟之出庭發言權資格。根據一九九九年獲取公義法案 (*Access to Justice Act 1999*) 之規則進一步發展律師獲取出庭發言權之方式，使出庭發言權可經由豁免、評審及發展方式獲取。

9.1 *豁免*－ 取得執業資格後具有最少三年工作經驗（「獲取執業資格後經驗」）之律師，如能向律師會證明

他們具有在較高級法院之辯護或司法經驗，而在行使出庭發言權方面具有適當經驗及資格，均可取得豁免。

9.2 *評審*－ 具有最少三年獲取執業資格後經驗之律師必須符合律師會對其在程序、證據及道德方面擁有穩固經驗及知識之要求。這些律師必須接受辯護技巧評估。

9.3 *發展*－ 律師將需要參與程序、證據及道德準則之培訓及評估。

10. 雖然香港並非必須緊隨英國之方式，惟該方式可作爲日後發展方向之參考。

11. 在香港，可經由修訂*法律執業者條例*設立一項評審制度，在條例中引入制訂獲得出庭發言權之資格規則的機制，並委任一個授權機關（例如律師會，一如英國之情況）評估律師是否符合此等資格規則。資格規則須涵蓋以下領域：

11.1 *要求之經驗*－ 起點可設爲五年獲取執業資格後經驗，與委任裁判官或地方法院法官之規定年期相同。

11.2 *參與之培訓*－ 律師會將舉辦認可之課程，涵蓋下列對訟務律師特別重要之領域：

11.2.1 案件分析及草擬狀書

11.2.2 道德準則

11.2.3 證據

11.2.4 辯護 － 包括審訊辯護、上訴辯護、開審及結案陳辭

此等課程初期可由在英國提供此等課程者提供，但其內容需要作出修改以適應香港之制度。

11.3 *批准之準則*－ 由合資格評審人對上述各項之熟練程度進行評審。

12. 在英國，相關之頒授資格規則，即*二零零零年較高級法院資格規則 (Higher Courts Qualification Regulations 2000)*（「二零零零規則」）經由律師會理事會制定。根據二零零零規則，尋求出庭發言權申請須向律師會提出，該會負責指定申請人須參與之培訓及評估，同時亦決定申請者是否已符合相關之頒授資格規則。一九九零法案設立制訂及批准此等規則之機制，二零零零規則據此制訂：

12.1 *首席大法官法律教育及操守顧問委員會*（「**ACLEC**」）根據一九九零法案第二十節成立，以「*協助維護及發展提供法律服務人士之教育、培訓及操守標準*」。ACLEC 由一位主席（上訴法院法官或最高法院法官）及首席大法官委任之十六位成員（一位現任或前任巡迴法官、二位執業大律師、二位執業律師、二位具有法律教學經驗之人士及九位業外人士）組成。

12.2 ACLEC 在制訂相關資格規則上扮演重要角色，每當律師會（爲一九九零法案定義之「獲授權團體」之一）對其所授之出庭發言權作任何改動，或改動其任何資格規則或操守規例時，均須提呈相關規則或規例之副本（連同任何擬修訂之規則／規例，或對有關權利改動提議之陳述，以適用者爲準）予 ACLEC 考慮。ACLEC 將就其認爲必需之任何改動向律師會提出意見。在作出有關改動後，爲使有關規則／規例獲取一九九零法案規定之核准，需要向首席大法官作出一份核准申請。首席大法官在作出是否批准之決定前，將會尋求 ACLEC 及公平交易總幹事 (***Director General of Fair Trading***) 之意見。

13. 香港可以奉行類似模式。律師會可擔任制訂頒授資格規例之角色，同時評定申請人是否已符合頒授資格規例。香港可成立一個與 ACLEC 相近之監察委員會，監察及監督律師會執行此角色的表現。當然，規例制訂及監督之機制必須針對香港之特有情況。

14. 通過只對符合頒授資格規例之律師授予出庭發言權，可使獲得出庭發言權之辯護律師的能力及質素獲得保證。

II. 回應大律師就延展出庭發言權予律師問題之關注

大律師將不再成爲具吸引力之事業

15. 大律師之作業本質，不論是工作性質或執業本身之特點均與律師差異甚大。延展出庭發言權不會自動導致大律師及取得出庭發言權之律師扮演相同之角色。

16. 澳洲之經驗正好說明此點。律政司司長在一九九六年「*其他普通法司法權區之大律師行業狀況*」的研究報告中指出，儘管所有澳洲律師均在澳洲全部八個司法權區內擁有全面出庭發言權，在所有司法權區，不論其法律專業有所區分或融合，都有一群獨立辯護律師以顧問形式工作。

17. 正如澳洲之情況，毫無疑問香港也會有執業律師選擇繼續以獨立私人執業方式運作，而不選擇於律師行工作。後者的工作除法律工作以外，還包括業務之營運。

18. 授予出庭發言權予律師並不表示律師行聘用外間大律師將會大幅度減少，將來仍有很多情況需要外間大律師之專門經驗。事實上，隨著香港持續發展爲國際爭議解決中心，我們預期對此等專門經驗之需要將會增加。此外，聘用外間大律師很多時候更具成本效益，或符合客戶之最佳利益。

年青大律師之生計

19. 有人會爭議，年青大律師必須放棄律師受薪見習及繼而支取薪金之經濟上的保障，而選擇成爲無薪學徒，接著成爲自僱之年青大律師掙扎謀生。出庭發言權若延展至律師，勢將威脅年青大律師之生計，從而增加成爲大律師須付出之「代價」。

20. 首先，儘管律師會不宜評論大律師專業之內部情況，然而此一專業在英國之近期發展卻值得一提。在二零零一年二月，英國之大律師公會投票贊成爲所有學徒設立每年最少 10,000 英鎊的最低酬勞，違規者即違反大律師操守準則。這措施無疑有助有志者投身大律師專業。

21. 其次，律師會支持獨立之私人執業大律師存在，同時明白到在適當情況下聘用年青有爲的大律師之重要性（例如較不複雜之案件，由客戶

延聘資歷較淺的大律師較具成本效益），此舉可令年輕大律師獲取足夠經驗，日後成爲更具實力及經驗之大律師。

22. 第三，必須留意律師會並非尋求延展出庭發言權至所有律師。如選擇不求取出庭發言權的律師有需要在較高級法院從事訴訟，將會繼續延聘年青大律師上庭。

23. 年青律師若有志成爲大律師，將不會因大律師不再壟斷在較高級法院之發言權而動搖。舉英國爲例，儘管根據一九九零法案，律師有權獲取全面之出庭發言權，在二零零零／二零零一年度，大律師公會登記了 783 名見習大律師，代表大律師之數目按年增長接近百分之八。

大型律師行壟斷頂級大律師之服務，將損害小型律師行

24. 大型律師行招聘大律師擔任「內部辯護律師」從而壟斷頂級大律師之論點，純屬誤解。其他司法權區並未發生此一現象，便是最佳之反證。舉例而言，在英國，獨立執業之大律師繼續存在及增長。實際上，大型律師行並未招聘頂級大律師擔任「內部辯護律師」，而是繼續以以按次方式，在有適當案件時才延聘此等大律師上庭。此外，此等論點同樣忽略一項實際考慮因素，即對律師行來說，如爲獲取此等頂級大律師能夠提供予律師行之服務，即就某些涉及其廣泛經驗及專業知識的案件提供專家意見，而聘用此等頂級大律師擔任「內部辯護律師」，在經濟上並不划算。

25. 事實上，剛好與此一論點相反，授予具備訴訟經驗及才幹之律師出庭發言權大有可能推動經驗較深之大律師之間的競爭。在若干情況下，與審訊即將開始才獲聘之大律師相較，具備經驗之辯護律師顯然處於更佳位置爲客戶進行辯護。在此情況下，辯護專業知識稍遜的小型律師行，可善加運用獨立的年資較深的大律師之豐富經驗。

許多律師並不要求出庭發言權

26. 並無證據證明此乃事實。爲求知道真實狀況，律師會在二零零一年秋季收集其會員之意見，結果大比數會員支持律師會進行爭取出庭發言權之工作。意見調查結果顯示，百分之七十二之律師支持律師會延展出庭發言權至經驗適當及合資格的律師（見附錄一：香港律師會會員對律師會延展律師出庭發言權政策之意見投票結果）。

27. 在此必須強調，意見調查之結果並不表示有百分之七十二的香港律師將會申請及獲取出庭發言權，意見調查之目標僅爲確定香港的律師對律師會代表律師有關出庭發言權立場之觀點。律師會清楚表明，並非每名希望獲取出庭發言權之律師皆會獲授出庭發言權，只有適當之合資格律師才會得到認可。

28. 專門從事訴訟之律師在可能範圍內，早已行使出庭發言權；例如在聆案官聆訊之非正審申請，幾近九成經由律師進行（見附錄二：律師行就非正審申請延聘大律師之調查結果）。此外，並非所有律師均希望獲取出庭發言權此一事實不應對有意獲取出庭發言權者形成障礙。

律師達致「一站式經營」可享壓倒性優勢

有兩個獨立論點必須提出：

29. 首先，延展出庭發言權至律師確實可達致給予客戶更具連貫性之服務，符合客戶之最佳利益。成本之重覆得以避免，客戶之案件可由一組辯護律師由始至終處理，該等律師不僅從起首階段即明瞭案情，並且自過往與客戶之業務交往中，熟知其客戶之業務。但是，這並不表示大律師再無存在必要。事實上，在特別領域內具備專業知識之大律師對客戶案件極有幫助。

30. 其次，有論點認爲律師難免會鼓勵客戶聘用其律師行的其他成員，而非更爲合適之大律師爲該客戶辯護，但並無證據支持此一論點。在任何情況下，此等風險皆可藉訂立操守規則予以控制，杜絕律師要求其客戶聘請自己擔任辯護律師，並令律師有義務向其客戶提供選擇合適（按照成本及才能）辯護律師之意見。

31. 在英國，律師會在首批律師／辯護律師於一九九三年獲頒資格前，即針對類似之顧慮訂立多條執業規則。附錄三列出相關執業規則之摘錄。在引進出庭發言權予律師時，亦可在香港制訂類似之執業規則。

相對於大律師之數目，有意獲取出庭發言權之律師人數不少

32. 頒授出庭發言權予律師確實會增加對大律師之競爭，但這不應被視爲負面結果。若制度容許客戶在較大辯護律師群中作選擇，並推動法律專業以更具競爭力之費用提供高質素服務，公眾必然受惠。聘請辯護律師時應以其能力及提供增值服務能力爲準則，而不是基於壟斷之存

在。事實上，大律師對於未來加強競爭應表歡迎，因這可證明在競爭中仍屹立不倒的大律師，均屬實至名歸。

33. 此外，獲取出庭發言權之律師人數，亦不可能大至足以對大律師專業形成威脅。再次以英國之經驗爲例，在二零零零年七月三十一日，於 82,000 多名有權在英國及威爾斯執業之律師中，僅 1,075 名獲頒授出庭發言權。此一數字相比於 10,000 多名大律師在強大及獨立之大律師專業內繼續執業，顯示延展出庭發言權至律師將不會自動導致大律師被獲取出庭發言權之律師大軍所壓倒。

III. 結論

34. 延展出庭發言權至律師可改善向公眾提供的法律服務。需要辯護律師服務之公眾人士亦可抱有信心，具有出庭發言權之律師／辯護律師均須符合整套資格規則，包括參與著眼於增強其訴訟技巧的指定培訓，才可獲取出庭發言權。客戶可從更大及更富競爭力（就價格及技巧兩者而言）之辯護律師群中作出選擇，客戶亦可享有一位或一組律師在案件進行過程中更具連貫性之服務。

35. 延展出庭發言權之另一益處，是通過提高訴訟之成本效益，從而使香港成爲一個更具吸引力的爭議調解中心選擇。近年來，若干法律工作已轉移至其他司法權區如新加坡（當地通常能夠以較低成本提供爭議調解及相關服務），部份原因即香港之訴訟成本高昂。

36. 與以往相比，現時發展香港成爲爭議調解中心更屬迫切之考慮。隨著中國加入世貿組織，開放予海外投資者之商機接踵而來，對調解涉及中國商業合約糾紛之需求亦將增長。我們既享有毗鄰中國之地利，法律制度成熟，法律團體經驗豐富及通諳雙語，基礎設施完備，以及酒店旅遊業卓越等多個有利因素，香港法律專業正佔最佳形勢，掌握時機調解涉及中國糾紛之最新商機。若法律專業能夠提供更高質素及更具成本效益之爭議調解服務，則香港作爲爭議調解中心之吸引力大爲加強，自不待言。本文件先前部份亦有提及，藉延展出庭發言權至律師，上述目標可望達致。

37. 延展出庭發言權至律師並非關乎律師專業之融合，亦不會令大律師專業消失，而是關乎確保辯護律師之高水平，關乎消除現存之反競爭情況，關乎以較低成本提供高質素法律服務予有需要之人士。其他重要

司法權區均無維持僵化、武斷、不可理解及反競爭之壁壘，阻止律師在較高級法院出庭，香港必須立刻行動，迎頭趕上。

提升律師出庭發言權工作小組
香港律師會
二零零二年五月

附錄一：香港律師會會員對律師會延展律師出庭發言權政策之意見投票結果

投票結果：

接獲二零零二年執業證書之申請		4861	
並無執業證書之登記會員		410	
合計		5271	
投票：			
a. 贊成		3793	(72%)
b. 反對		344	(6.5%)
c. 不表意見	66		
d. 無答覆	1068	1134	(21.5%)
合計		5271	

贊成＝72%

反對＝6.5%

無答覆或不表意見＝21.5%

附錄二：律師行就高等法院非正審申請延聘大律師之調查結果

期間：二零零零年十一月九日至二零零一年二月九日：

回應律師行數目	32	
期間內非正審申請之總數	1628	
由大律師進行之申請數目	98	(6%)
由律師／見習律師進行之申請數目	1530	(94%)

由大律師進行之申請數目：6%
由律師／見習律師進行之申請數目：94%

執業規則 16A（律師擔任辯護律師）

任何律師擔任辯護律師者須於所有時間遵守律師會之辯護守則[1]。

執業規則 16B（選擇辯護律師）

1. *律師不得於提供訴訟服務時，以辯護服務須同樣由該律師，或該律師之事務所或該律師之代理人提供爲條件。*

2. *律師同時提供訴訟及辯護服務者在獲聘用後，須於可行範圍內盡早及不時考慮包括下述情況：*

   (i) 案件之嚴重性及複雜性，以及可能之成本；
   (ii) 律師執業之性質；
   (iii) 律師之能力及經驗；
   (iv) 律師與客戶之關係；

   並就究竟有關服務由該位律師、該律師事務所另一位辯護律師，或其他提供辯護律師服務之辯護律師提供，方符合客戶之最佳利益提供意見。

[1] 律師會之辯護守則很大程度基於英國大律師公會本身之辯護守則，此乃確保所有辯護律師，不論律師或大律師，均有公平之作業環境。

Solicitors' Higher Rights of Audience – the Facts and the Fiction

By a series of articles, the Law Society's Working Party on Solicitors' Higher Rights of Audience will clarify the changes sought to current practice in Hong Kong. Members are invited to let the Working Party have their thoughts on this important and pressing issue

The Law Society does not seek fusion of the profession. Rather, the Law Society seeks an extension of rights of audience for solicitors into the higher courts.

What is meant by 'fusion'? It means there being only one branch to the profession – no distinction between legal practitioners.

Fusion might be said to exist in the US, Germany, and, closer to home, Singapore. In such jurisdictions those who are admitted, or called, as lawyers may practise law in any professional arrangement they choose, and they have full rights of audience before the courts in which they are admitted. There is only one regulatory body for all legal practitioners.

Fusion, as defined above, does not occur simply because all legal practitioners, including those who practise *qua* solicitor, have full rights of audience. For example, in certain states of Australia, legal practitioners are admitted, or called, as barristers and solicitors. There remains in those jurisdictions lawyers who practise in partnership within the environment we would recognise as a firm of solicitors. At the same time, other lawyers elect to practise as 'barristers sole', much as barristers practise here in Hong Kong. Further, there commonly remains two regulatory bodies – a Law Society supervising the conduct of legal practitioners who practise *qua* solicitor, and a Bar Association supervising those who practise *qua* barrister.

In short, the fact of solicitors having higher rights of audience does not lead, in itself, to a fusion of the branches.

The Law Society does not seek, or advocate, fusion of the profession. The Law Society supports the existence of an independent private Bar. Indeed such a Bar is vital both for solicitors who choose not to pursue higher rights of audience, and those who do. An independent Bar provides an important source of referral advice, and the facility for general practitioners to engage in High Court litigation.

The existence of both an independent private Bar and solicitors with higher rights of audience would allow each branch of the profession to develop into two strong, but complementary, branches adapted to, and able to develop in accordance with, the needs of Hong Kong's public.

Denis Brock
Chairman
Working Party on
Solicitors' Higher Rights of Audience

Solicitors' Higher Rights of Audience – The Facts and the Fiction (Part 2)

By a series of articles, the Law Society's Working Party on Solicitors' Higher Rights of Audience will clarify the changes sought to current practice in Hong Kong. This is the second article in the series. Members are invited to let the Working Party have their thoughts on this important and pressing issue

The Law Society seeks an extension of rights of audience for solicitors into the higher courts. But this begs the question of what rights of audience solicitors presently enjoy. Instances of where solicitors currently enjoy higher rights of audience include:

- In arbitration;
- Before statutory tribunals where the parties may be represented (eg the Solicitors Disciplinary Tribunal and the Lands Tribunal);
- In Magistrates Court and Coroner's Court matters;
- In the District Court.

A detailed list is set out in Law Society Circular 00-56(PA).

None of the above will come as a surprise. Where there is some confusion is in matters before the higher courts, ie the Court of First Instance (CFI), Court of Appeal (CA) and Court of Final Appeal (CFA). The current situation is as follows:

- In chambers hearings, solicitors have rights of audience. Thus, before both a Master and a Judge (whether of the CFI or CA) in Chambers, solicitors may appear, regardless of the nature or magnitude of the application. Solicitors are not restricted to appearir upon routine administrati matters, such as tir summonses.
- Solicitors have rights audience before the Master Court when dealing with, f example, the assessment damages, or where (by conse of the parties) the action h been listed to be tried by Master (this provision seems be rarely used, and yet wou permit solicitors to appear the trial of any matter in tl CFI).

In chambers hearings, solicitors have rights of audience

- Solicitors have rights of audience before the High Court on the hearing of appeals from the Magistrates Court.
- Pleadings and affidavits are central to litigation and may be settled by solicitors – there is no requirement that a barrister be retained. There is no mystical art to drafting pleadings. The arcane and archaic language which one often reads in pleadings is usually an example of bad drafting, where the pleader (if any thought has been given to the language) wants the pleading to have gravitas simply through its language not its content. The purpose of a pleading is to persuasively tell the other party and the court the story of the client and identify either the cause of action or defence. If sight is lost of that purpose, then the pleading is useless. Members are recommended to read *Pleadings Without Tears* by William Rose (Blackstone Press Ltd), an easy, even enjoy read in which the aut dispels the myst surrounding pleadings.

The arcane and archaic language which one often reads in pleadings is usually an example of bad drafting

Solicitors' Higher Rights of Audience – The Facts and the Fiction (Part 3)

By a series of articles, the Law Society's Working Party on Solicitors' Higher Rights of Audience will clarify the changes sought to current practice in Hong Kong. This is the third article in the series. Members are invited to let the Working Party have their thoughts on this important and pressing issue

Opening the Floodgates?

It is often said that if solicitors' rights of audience are extended to the higher courts some 5,000 solicitors will suddenly take to the courts and start representing their clients at trial. Any rational person will realise that this fear is nonsense and can be tested by the simple question: Why would solicitors who do not engage in litigation at present suddenly jettison their current transactional practices to become advocates? The answer is easy – they simply would not. In Hong Kong, where sole practitioners and small practices comprised of 2-5 partners account for almost 90% of all practices, the vast majority of practitioners will still find it more economical for themselves and their clients to continue to instruct barristers to attend court.

Which solicitors might seek higher rights of audience? It is more likely to be those solicitors who are presently engaged in full time civil and/or criminal litigation practice and who, in the best interests of their clients, would wish to represent their clients at trial and in appeal cases.

Audrey Eu, SC, former Chairman of the Bar, stated in the May issue of *Hong Kong Lawyer*: 'probably it would help both sides if everyone starts off becoming solicitors and eventually, if you feel that you really want to turn to specialised litigation, then you apply to join the Bar, or something like that, and you get accredited'. (p 41) This is interesting but, as a whole, is a far-reaching proposal and would require a major overhaul of our profession. Whe Ms Eu is undoubtedly correct is th there should be accreditation. Ar if one follows the closest model have, the UK, the accrediting bc would be the Law Society.

Accreditation

Plainly, there would need to credible accreditation, otherw any 'experiment' could be ea discredited by the poor individ performances of just a f accredited solicitors. It would be in the interests of membership to set the thresh too low. The standard should sufficiently high that o appropriately qualified solici

> Why would solicitors who do not engage in litigation at present suddenly jettison their curren transactional practices to become advocates?

there would need to be credible accreditation, otherwise any 'experiment' could be easily discredited by the poor individual performances of just a few accredited solicitors

would be accredited. Accreditation requirements could include:

- A minimum period of practice, eg three years in full time litigation practice and a longer period for general practitioners with significant litigation experience;
- Attendance at and assessment by an intensive advocacy course that would test the basics, such as the 'trial plan', evidence, examination techniques, drafting pleadings and drafting skeleton arguments.

In reality this would mean that in the first few years less than 100 solicitors would be accredited and fewer still would actively exercise those rights. As such, there is no 'floodgate' for the Bar to fear.

Denis Brock
Chairman
Working Party on Solicitors' Higher Rights of Audience

Please address comments and thoughts to:
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Solicitors' Higher Rights of Audience (Part 4) – A Client's View

In a series of articles, the Law Society's Working Party on Solicitors' Higher Rights of Audience will clarify the changes sought to current practice in Hong Kong. This is the fourth article in the series. Members are invited to let the Working Party have their thoughts on this important and pressing issue

As extensive users of legal services internationally we never cease to be both bemused and frustrated by what used to be the strict separation of solicitors and barristers in London and by what is still the position in Hong Kong.

One of us is stationed in the United States, where such distinctions do not exist, and the other is originally from New South Wales, where the distinction still exists but where it has no relevance to rights to appear in court – both barristers and solicitors enjoy equal rights of audience.

The first and foremost concern for a client is to obtain the services of a lawyer (to use a neutral term in this debate) in whom the client has confidence and who will take the time to understand not just a particular case but also one's business and how that case may relate to the bigger picture. This understanding can, in the case of a large multinational organisation such as we represent, only be built up over time.

Solicitors obtain this knowledge and understanding of their clients' businesses because they are consulted regularly on a variety of matters. Solicitors also appreciate the need for this type of in-depth understanding of their clients' affairs. Barristers, on the other hand, generally adopt a more removed stance and tend to be one-case focused. Therefore, when we have litigation we find that the time and waste of resources necessary to brief a stranger to appear in court for us is unacceptable in the modern business environment.

This is not to say that barriste are not necessary. Of course, cases requiring specialist skills ar legal expertise we know this ne and appreciate the skills that good barrister can bring to be on our behalf. We use the services, often extensively, ev in places where solicitors m appear.

One of the greatest benefits using solicitor advocates in lar cases which require the servic of counsel is that the solicitor w is so familiar with our busine and our case may act as juni counsel and so have th knowledge more readily at t senior counsel's disposal, assisti

when we have litigation we find that the time and waste of resources necessary to brief a stranger to appear in court for us is unacceptable in the modern business environment

the senior counsel in the presentation of the case in court. What is important from a business point of view is flexibility and the right to have a choice.

In no other jurisdiction which puts itself forward as a world class financial centre do we face this problem – not in New York, London or Singapore. Hong Kong, on the other hand, by maintaining these artificial and archaic barriers is in danger of being seen as backward.

Not only is there the danger of such a perception but there is the even more serious and readily apparent disadvantage of cost. From our point of view, in big cases when we have to brief counsel we also need to have our solicitor and probably his/her assistant in court at the same time. Solicitors who handle these types of cases do not come cheaply. When we have a solicitor who is quite capable of presenting our case why should we then have to pay a substantial extra amount to hire a barrister? This certainly works to Hong Kong's disadvantage when compared to other Asian business centres.

In no other jurisdiction which puts itself forward as a world class financial centre do we face this problem – not in New York, London or Singapore

Richard R Murray
International Director of
Legal & Regulatory Affairs
Deloitte Touche Tohmatsu

Peter Griffiths
General Counsel
Deloitte Touche Tohmatsu

Solicitors' Higher Rights of Audience (Part 5) – A Matrimonial Solicitor's View

In a series of articles, the Law Society's Working Party on Solicitors' Higher Rights of Audience will clarify th changes sought to current practice in Hong Kong. This is the fifth article in the series. Members are invited to l the Working Party have their thoughts on this important and pressing issue

In matrimonial proceedings solicitors have the right of audience in the High Court as well as the District Court to conduct cases, as advocates, that involve not only several millions of dollars but often complicated company law and trust structures. Matrimonial solicitors regularly deal as advocates with litigation where assets have been disposed of, hidden or squandered. Matrimonial solicitors are often involved in following an international paper trail which may involve legal applications in foreign jurisdictions. They deal in litigation concerning properties and assets throughout the world where beneficial interests are unravelled or asserted in the most complex financial structures. Matrimonial solicitors, as advocates, handle emotionally fraught legal issues concerning children, ranging from custody and access to international Hague Convention applications concerning abduction. Cross examination of witnesses often plays a crucial part in the process.

Matrimonial solicitors work in an area of the law where success or failure has a huge impact on the client as it involves not only the private individual's own finances but the lives of their children. There are no insurance companies to soften the financial blow for the litigants. No cheque from a wealthy company or financial institution is going to pay the legal fees or the financial settlement. It is real life litigation, grown up and fraught with financial risk.

Matrimonial solicitors work in an area of the law where success or failure has a huge impact on the client as it involves not only the private individual's own finances but the lives of their children

There are no protests from th Bar or the Judiciary that matte as complex as this, involvin considerable sums of money, shoul not be left to the advocacy skills solicitors because, in the main, a matrimonial proceedings ar conducted in chambers, even in th High Court. Therefore, the wear old argument that solicitors are n qualified to be advocates in suc matters simply cannot be applied

It seems an odd sort of distinctic to make. Are chambers proceedin less important? Do they involve le complex law? Are the needs an requirements of litigants i chambers less important and le complicated than those in ope court? Are the legal determinatio made by the judges in chambers the High Court or the District Cou less relevant to the litigants, for the development of justi generally? Since the answer to th above questions must be 'no', th higher rights of audience argume seems difficult to maintain in th

day and age and in Hong Kong's judicial system.

The debate about higher rights of audience always seems to turn on how solicitors can pacify and reassure the Bar that their supply of work will not dry up once those rights are granted. This is rather like looking down a telescope from the wrong end. It means we keep further and further from our sights the more important issues of what is in the public's best interest and what is the preference of the fee-paying client. One's role as a lawyer is to offer a client options so the client can make an informed choice about how they want their own legal proceedings to be pursued. Illogically, solicitors cannot offer their client any option whatsoever when it comes to High Court actions that are not in chambers, and even higher court appearances. In those circumstances clients are obliged to accept and pay for additional and duplicative costs because of a system which requires a barrister, who might never have been involved in the client's case before trial, to appear in a higher open court. Clients are right to be frustrated by the lack of choice in the matter and outraged by the additional expense.

Since solicitors in debating higher rights of audience do ultimately have to put forward arguments to pacify the Bar, let me do so now. The reality is that not all solicitors will exercise higher rights of audience, even when that right is granted to them. Some will, when the client so chooses it to be that way. In matrimonial proceedings where there is no obstacle to arguing one's client's case (until it comes to an appeal in the Court of Appeal) many solicitors do continue to instruct counsel.

In matrimonial proceedings there is a small and, in the main, highly specialised Bar. This specialised Bar is instructed for all the usual, sensible and logical reasons that apply to all areas of litigation. Those reasons will continue to exist even after higher rights of audience are granted. Solicitors recognise the importance of accomplished and intelligent advocates, but not all barristers can be described in this way. Solicitors recognise it can be in their client's best interest to have the best person for the job appear in court for their client. This will often mean that, notwithstanding the right of a solicitor to argue one's client's case, that solicitor will advise the client that counsel is the best option. It is the client who then decides.

The Bar will continue to exist and the need for the Bar will not be extinguished by higher rights of audience for solicitors. Indeed, few solicitors could afford the time to devote themselves to the preparation and conduct of a trial. In matrimonial proceedings, barristers frequently conduct matrimonial trials as well as all the difficult interlocutory matter Such hearings can last for day weeks or months. Solicitors hand a large workload from sever clients and have to juggle th preparation of a client's case wi correspondence on numero clients' cases, not to mention th never ending phone calls fro clients. They have the business running a firm in addition to the legal work.

When granted higher rights audience, solicitors will continue instruct competent counsel, as th do now. All that will change is th it will become the consume decision, the client, who choos how the case is to be conducted, r the Bar.

> we keep further and further from our sights the more important issues of what is in the public's best interest and what is the preference of the fee-paying client

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We welcome any views or opinions with respect to any articles published in the *Hong Kong Lawyer*. Please contact:

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Solicitors' Higher Rights of Audience (Part 6) – The Case of *Lai Yin Shan*

In a series of articles, the Law Society's Working Party on Solicitors' Higher Rights of Audience will clarify the changes sought to current practice in Hong Kong. This is the sixth article in the series. Members are invited to let the Working Party have their thoughts on this important and pressing issue

In the recent High Court case of *Re Lai Yin Shan* [2001] 3 HKC 232, the judge ruled that solicitors may continue to represent their clients in contested bankruptcy proceedings before the High Court. The court faced a number of questions. In answering these questions, the court referred to the previous history of the Bankruptcy Court in England, the adoption of the English practice into Hong Kong and the undisputed fact that for a very considerable period solicitors have actually exercised a right of audience in contested bankruptcy cases.

Historical Background

The court's analysis of the history of solicitors' rights of audience in the Bankruptcy Courts may be summarised as follows.

Background in England

The court pointed out that, under s 10 of the Bankruptcy Act of 1831, solicitors could be admitted and have their names enrolled in the Court of Bankruptcy and 'may appear and plead in any proceedings in the said Court without being required to retain Counsel'.

Further, s 151 of the Bankruptcy Act of 1883 confirmed that 'all solicitors or other persons who had the right of audience before the Chief Judge in Bankruptcy shall have the right of audience in Bankruptcy matters in the High Court'.

Finally, the current position in England under r 7.52 of the Insolvency Rules preserves the right of audience in insolvency proceedings as that which obtained before the coming into force of those rules.

Background in Hong Kong

Ordinance VI of 1845 provided that 'the Law of England shall be in full force in the colony of Hong Kong except where the same shall be inapplicable to the local circumstances of the colony or its inhabitants'. It was therefore likely that the Bankruptcy Act 1831 would have applied in Hong Kong. Section 17 of the Supreme Court Ordinance (Cap 4) also provided that, subject to rules of court, the practice of the Supreme Court of Judicature in England should be in force in the courts in Hong Kong.

Further, s 12 of the Hong Kong Reunification Ordinance (Cap 2601) provides that 'Every person who immediately before 1 July 1997 enjoyed a right of audience before any court, magistrate, statutory tribunal or statutory board shall on or after the date continue to enjoy such right before the corresponding court, magistrate, tribunal or board of the HKSAR'.

The court also pointed out that solicitors had for many years appeared in open court as advocates in contested bankruptcy proceedings. Thirteen reported cases from 1908 to 1997 reflected such representation.

The Bar's Argument

The Bar, which was represented at the hearing by solicitors and Counsel, made submissions against the right of solicitors to appear in contested bankruptcy proceedings in open court. The Bar sought to explain away the position prior to 1987 by reference to s 17 of the Supreme Court Ordinance. Since that date there had been no collegiate decision of the judiciary to establish the practice that

solicitors could appear in open court in such cases. Hence, the Bar contended, the practice should be the same as in other civil proceedings, with the result that such rights of audience would have ceased to exist after 1997.

The Bar further argued that s 99(1) of the Bankruptcy Ordinance (Cap 6) required that representation be limited in the same way as in other High Court proceedings. Section 99(1) provides that '[t]he rules and practice of the High Court for the time being for regulating the ordinary civil procedure of the Court shall, so far as the same may be applicable and not inconsistent with the provisions of [the Bankruptcy Ordinance], be applied to bankruptcy proceedings'.

The Court's Decision

The court found as a fact that solicitors did enjoy a right of audience in contested bankruptcy proceedings in open court before 1 July 1997. The repeal of s 17 of the Supreme Court Ordinance in 1987 did not destroy this pre-existing right – after the repeal, the judges continued to follow the existing practice. While a collegiate decision would have been needed to modify the practice, no such decision was required to maintain the status quo.

As to s 99(1) of the Bankruptcy Ordinance, given the unique practices of the Bankruptcy Court, the ordinary rules and practice of the High Court did not apply. The language of s 99(1) was plainly broad enough to accommodate this practice.

Accordingly, the court decided that the proceedings could continue with the petitioner being represented by its solicitors in open court.

Comment

The court held that 'It is clear from the above that the right of solicitors in England to appear in open court in the High Court in contested bankruptcy proceedings was founded in statute' (at p 235E).

This commentary is no place for an exegesis on the (extremely complex) development of the bankruptcy law as a result of the rapid expansion of economic activity flowing from the Industrial Revolution in the United Kingdom. It is, however, important to bear in mind in considering rights of audience that, prior to the Supreme Court of Judicature Act 1873, there existed in England a plethora of separate courts each having its own procedural rules.

The London Bankruptcy Court certainly existed by 1831 since under the 1831 Act referred to in the court's judgment Official Assignees (the ancestor of the Official Receiver) were attached to it by that statute. There is no particular reason to think that rights of audience in that court were limited to counsel in cases that had to be heard in open court. Compare by way of analogy the Mayor's and City of London Court.

The position is further complicated by the fact that until 1842 bankruptcy proceedings were initiated not by petition but by suing out a commission under the Great Seal to take over the affairs of the bankrupt and to make a distribution of his/her property. The Bankruptcy Act 1842 established a new Court of Bankruptcy and Court of Review and also vested limited jurisdiction in bankruptcy in the County Courts.

The Supreme Court of Judicature Act 1873 'transferred to and vested in' the High Court of Justice the jurisdiction that was capable of being exercised by, among others, the London Court of Bankruptcy (s 16(8)) and assigned to the Exchequer Division of the High Court all matters pending in the London Court of Bankruptcy at that time (s 34, third (3)). By s 87 of the 1873 Act, all persons admitted as solicitors, attorneys or proctors of any court were to be called 'Solicitors of the Supreme Court' and were to be entitled to 'the same privileges and be subject to the same obligations ... as if this Act had not been passed'.

This right of audience was, of course, subsequently confirmed expressly, as the court in *Lai Yin Shan* explained, by the Bankruptcy Act 1883. However, it seems likely that solicitors would in any event have had this right prior to the repeated modifications and clarifications of the law during the 19th Century.

Mark Bradley
Partner
Deacons

[*Note:* For a summary of the *Lai Yin Shan* case, see Case Update.]

Solicitors' Higher Rights of Audience (Part 7) – The Facts and the Fiction

In a series of articles, the Law Society's Working Party on Solicitors' Higher Rights of Audience will clarify th changes sought to current practice in Hong Kong. This is the seventh article in the series. Members are invite to let the Working Party have their thoughts on this important and pressing issue

In the Public Interest?

Opponents to the extension of higher rights of audience to solicitors often say (usually in muttered tones or by unfounded inferences) that because solicitors are an unethical band of rogues and ragamuffins clients will lose out because solicitors will brief themselves or their partners and never use barristers, even when it is in the interest of clients to do so. The argument is nonsense, made merely in the self-interest of barristers and wrapped up in the catch-all phrase of 'in the public interest'. The fact is that in numerous other common law jurisdictions lawyers practising *qua* solicitor will, when it is in the interest of the client, brief other lawyers practising *qua* barrister.

But let's not kid ourselves – there is always a 'bad apple in every barrel'. So, even if the fear is more apparent than real, there are reasons for practising a little prevention rather than just cure. Indeed, 'prevention rather than cure' was the approach of the Law Society in England when the first batch of solicitor-advocates was about to be qualified. There, two new practice rules were introduced on 8 December 1993: Practice Rule 16A (solicitors acting as advocates) and Practice Rule 16B (choice of advocate).

Practice Rule 16A: Solicitors Acting as Advocates

Practice Rule 16A provides that '[a]ny solicitor acting as an advocate shall at all times comply with the Law Society's Code for Advocacy'. The Law Society's code is largely lifted from and mirrors the English Bar's own advocacy code, thus establishing a level ethical playing field for all advocates, whether solicitor or barrister, including the 'cab rank' rule.

Practice Rule 16B: Choice of Advocate

Practice Rule 16B provides that:

(1) A solicitor shall not make it a condition of providing litigation services that advocacy services shall also be provided by that solicitor or by the solicitor's firm or the solicitor's agent.

(2) A solicitor who provides both litigation and advocacy services shall as soon as practicable after receivin instructions and from time t time consider and advise th client whether having regar to the circumstances including:

(i) the gravity, complexit and likely cost of the cas

(ii) the nature of the solicitor practice;

(iii) the solicitor's ability an experience;

(iv) the solicitor's relationshi with the client;

the best interests of the clie would be served by the solicito another advocate from th solicitor's firm, or some oth advocate providing advocac services.

We welcome any views or opinions with respect to any articles published in the Hong Kong Lawyer. Please contact:

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Such practice rules are nothing more than good common sense which ethical solicitors in Hong Kong would normally follow as a matter of routine

Thus, when coupled with the Code for Advocacy (specifically Rule 4.1 – The Decision to Appear), it is plain that solicitor-advocates must consider with and advise the client whether 'the best interests of the client would be served by' retaining a barrister, rather than a solicitor-advocate. One of the elements specifically identified by the English Law Society was the need to advise the client of the relative cost of a barrister versus a solicitor-advocate. It should also be noted that breach of a practice rule is a disciplinary matter.

Such practice rules are nothing more than good common sense which ethical solicitors in Hong Kong would normally follow as a matter of routine. That being the case, such rules should nevertheless be introduced in Hong Kong upon the introduction of extended higher rights of audience, if only to allay the aforementioned mutterings and unfounded inferences!

Denis Brock
Chairman
Working Party on Solicitors' Higher Rights of Audience

Please address comments and thoughts to:
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The Law Society
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71 Des Voeux Road
Central, Hong Kong

擴大事務律師出庭發言權：真相與假象

自本期起，律師會轄下的擴大事務律師出庭發言權工作小組將在本刊撰文，解釋該小組對現行實務將尋求哪些改變。該小組促請所有律師會會員就這項重大而急切的問題發表意見

律師會所尋求的並不是將事務律師界和大律師界合併，而是將事務律師的出庭發言權伸展至上級法院。

「合併」是什麼意思？它指法律界只有一個分支，即法律執業者之間沒有任何區分。

合併可說是存在於美國、德國及較接近我們的新加坡。在這些司法管轄區，那些獲認許為律師的人，可根據他們隨意選擇的任何專業實排而執業，而他們在獲認許的法院一律享有十足的出庭發言權。此外，所有法律執業者均只受到單一個團體監管。

根據上述定義，合併並不是純粹因為所有法律執業者 — 包括那些以事務律師身分執業的人 — 得享十足出庭發言權便告出現。舉例說，在澳大利亞的某些州，法律執業者均獲認許為大律師及事務律師。在那些司法管轄區，仍有律師以等同於我們稱為事務律師行的合夥形式執業。與此同時，亦有律師選擇以「純粹為大律師」的身分執業，這與香港大律師的執業方式無甚分別。此外，該些司法管轄區存在著兩個監管團體，分別是律師會以及大律師公會，前者專責監管以事務律師身分執業的法律執業者的操守行為，後者則專責監管以大律師身分執業的法律執業者的操守行為。

簡言之，事務律師得享較大出庭發言權的事實，本身不會令事務律師界和大律師界合併起來。

律師會重申，它並非尋求或提倡兩個法律專業界別的合併。事實上，律師會支持獨立大律師界的存在，這個界別對於選擇和不選擇行使較大出庭發言權的事務律師來說均不可或缺。獨立的大律師界既是經轉介的專業意見的重要來源，亦讓一般執業者能藉以參與高等法院訴訟。

倘若獨立的大律師界以及享有較大出庭發言權的事務律師界能夠在本地並存，將容許兩個界別發展成強大且相輔相成的法律界分支，從而令律師專業更能配合普羅大眾的需要，並與香港一起成長。

白德榮律師
律師會擴大事務律師出庭發言權
工作小組主席

擴大事務律師出庭發言權：真相與假象（二）

自上期起，律師會轄下的擴大事務律師出庭發言權工作小組在本刊撰文，解釋該小組對現行實務將尋求哪些改變。該小組促請所有律師會會員就這項重大而急切的問題發表意見

律師會所尋求的是將事務律師的出庭發言權伸展至上級法院。但大家是否清楚知道事務律師現時享有哪些出庭發言權？

事務律師目前享有出庭發言權的情況，已詳列於《律師會公告》第00-56號（執業者事務），一些例子包括：

- 在仲裁案件中；
- （在與訟各方可委聘律師代表出庭的情況下）在法定審裁處席前，例如律師紀律審裁組和土地審裁處；
- 在裁判法院和死因裁判法院席前；
- 在區域法院席前。

相信大家都熟悉上述情況。但令不少人產生誤解的是事務律師在上級法院 — 即原訟法庭、上訴法庭和終審法院 — 的出庭發言權範圍。現時的情況是：

- 事務律師在內庭聆訊中享有出庭發言權。故此，在聆案官或內庭法官（不論是原訟法庭還是上訴法庭法官）席前，不管有關申請的性質或重要性為何，事務律師均可出庭發言。事務律師的權利並不限於出席「例行」事項（例如延展時限申請）的聆訊。
- 假如聆案官所處理的是（舉例說）損害賠償的評估，或假如案件在各方同意下已排期由聆案官審理，事務律師亦可出庭發言。將案件排期由聆案官審理的做法似乎已相當罕見，但原則上這做法將容許事務律師在涉及任何事項的原訟法庭審訊中出庭發言。
- 在裁判法院上訴案件的聆訊中，事務律師可在高等法院出庭發言。
- 在訴訟中佔著舉足輕重的地位的狀書和誓章，均可由事務律師擬定。法律沒有規定延聘大律師擬定這些文件，而草擬狀書本身亦不是高深莫測的藝術。我們在狀書中經常看見陳舊和晦澀的文字，這其實是草擬狀書方式欠佳的結果。不少草擬者即使有考慮過所用的文字，也誤以為單靠文字（而不是內容）已能令狀書變得有[illegible]量。我們要明白，狀書的作[illegible]是把當事人的案情以具說服[illegible]的方式告知其他與訟方和[illegible]院，以及認清訴因或抗辯[illegible]由。任何不能發揮這些作用[illegible]狀書，均無異於一堆廢紙。[illegible]者欲向會員們推薦一本[illegible] William Rose 著、名[illegible] *Pleadings Without Tears* 的[illegible]（Blackstone Press Ltd [illegible]版），書中作者使用淺白的[illegible]言和生動有趣的例子解釋了[illegible]擬狀書方面各種看似難以捉[illegible]的問題。

白德棠律[illegible]
律師會擴大事務律師出庭發言[illegible]
工作小組主[illegible]

【註：會員們如欲發表意見，請[illegible]函香港律師會擴大事務律師出庭[illegible]言權工作小組執業者事務總監 Joy[illegible] Wong 女士（地址：香港中區德輔[illegible]中 71 號永安集團大廈三樓）。】

擴大事務律師出庭發言權：真相與假象（三）

自本年 4 月號起，律師會轄下的擴大事務律師出庭發言權工作小組在本刊撰文，解釋該小組對現行實務將尋求哪些改變。該小組促請所有律師會會員就這項重大而急切的問題發表意見

打開「水閘門」？

不少人認為，一旦事務律師的出庭發言權得以擴大至各類上級法院訴訟，便會有多達五千名事務律師穿起袍子，在審訊中代表當事人出庭訟辯。任何明智的人都會知道這種憂慮是荒謬的。我們只要問：為何現時不從事訴訟業務的律師要在轉瞬間拋下他們的工作來擔任訟辯律師的角色呢？答案很簡單 — 他們根本不會這樣做。香港事務律師的經營模式，有百分之九十以上屬於獨資經營或由兩名至五名合夥人組成的小型業務，在這情況下，絕大部分的律師都會認為，繼續延聘大律師進行出庭訟辯工作，對於律師和當事人來說都是較為划算的。

哪些事務律師最有可能要求享有更大出庭發言權？答案是現時專門從事民事及/ 或刑事訴訟工作、而且相信在審訊和上訴案件中代表當事人將符合當事人最佳利益的律師。

本刊 2001 年第 5 月號的「立法會專欄」文章中，受訪的大律師公會前主席余若薇資深大律師曾說：「我覺得一個更好的做法是讓畢業生們先任職事務律師，過了一段時間，那些有意從事專門訴訟工作的人便可申請轉職為大律師和得到有關的認可。」（第 42 頁）這是一項有趣的建議，但一旦付諸實行，將令整個法律界出現翻天覆地的改變，影響極為深遠。不過，余大律師認為有需要設立認可機制的說法無疑是正確的，而假如我們跟隨最為接近我們的模式（即英國的制度），律師會將成為負責發出認可的機構。

認可制度

認可制度顯然必須具有公信力，否則任何「試驗計劃」都會因為少數獲認可律師的表現差劣而失去公信力。將認可的資格定得過低，對於整個業界來說是沒有益處的。認可標準應達到一定的水平，令只有妥為符合資格的律師才會獲認可。認可要求可包括：

- 從事訴訟事務至少要達到某個時間，例如全時間從事訴訟事務達三年或以上，從事一般事務（但具備豐富訴訟經驗）則需要一段更長的時間等等；
- 參加緊密的訟辯課程並接受測試或評估，以確保律師具備基本訟辯技巧，例如預備審訊辯、證據、主問和盤問的巧、擬備狀書、擬備論據綱等。

實際上，這意味著，在認可機實施的首數年，獲認可的事務律人數將不到一百名，而活躍地行出庭發言權的事務律師人數將會少。這樣，大律師界所擔心的所「打開水閘門」根本不會存在。

白德榮律
律師會擴大事務律師出庭發言
工作小組主

【註：會員們如欲發表意見，請
函香港律師會擴大事務律師出庭
言權工作小組執業者事務總監 Joyc
Wong 女士（地址：香港中區德輔
中 71 號永安集團大廈三樓）。】

擴大事務律師出庭發言權：真相與假象（四）

自本年 4 月號起，律師會轄下的擴大事務律師出庭發言權工作小組在本刊撰文，解釋該小組對現行實務將尋求哪些改變。該小組促請所有律師會會員就這項重大而急切的問題發表意見。

本文兩位作者 Richard Murray 與 Peter Griffiths 是一家跨國企業的要員，他們將嘗試從客戶或當事人的角度去看上述問題

作為經常使用各國法律服務的人，我們對於倫敦昔日以至香港現今在事務律師與大律師之間劃清界線的做法，一直都深感困惑和懊惱。

我們二人分別駐守美國和來自澳洲新南威爾斯。美國律師沒有事務律師和大律師之分；而在新南威爾斯，縱使存在著該等區分，但這並不影響律師的出庭發言權，因為當地的事務律師和大律師享有同等出庭發言權。

對於使用律師服務（「律師」一詞在這裡的意思是中立的）的客戶來說，首要的關注是律師能否給予客戶信心和是否願意花時間瞭解客戶 — 這不但指客戶所面對的法律問題，還包括客戶的業務以及該法律問題與客戶的「整體情況」是否有任何關連。誠然，假如客戶是具規模的跨國企業（例如我們二人所代表的公司），律師要經過一段漫長的時間才能真正瞭解客戶。

事務律師明白到深入瞭解客戶事務的需要，加上客戶經常就各項事宜尋求事務律師的意見，故此事務律師往往能輕易掌握客戶的業務資料。反之，大律師一般與客戶保持一定的距離，而且他們根據個別案件工作。因此，我們認為，在訴訟案件中延聘一名陌生人代表我們出庭，是浪費時間和資源的做法，在現代商業環境下是不能接受的。

但這絕不是說大律師毫無必要。我們固然明白到，在一些涉及專門範疇的案件中，大律師所具備的專門知識和技能是極為有用和寶貴的。在這類案件中，即使事務律師本身已可代表我們出庭，我們仍會毫不猶豫地使用大律師的服務。

就那些涉及出庭訟辯的大型案件而言，委聘事務律師為訟辯人的最大好處之一是，事務律師既已充分瞭解客戶的業務和法律問題，他/ 她便可擔任初級訟辯人一職，運用其對於客戶的知識協助資深訟辯人在法庭上提案。從商業角度來說，最重要的是靈活性和選擇權。

環顧全球數一數二的金融中心（例如紐約、倫敦、新加坡等），它們都不用面對上述問題。反之，香港仍維持事務律師與大律師之間的分野，這可能令香港被視為落伍或與時代脫節。另一個更嚴重和更顯然易見的缺點，便是訟費問題。在大型案件中，我們除了需要聘請事務律師（或很可能是他/ 她的助理）出庭外，還要延聘大律師出庭。委聘適當的事務律師，已不是一件廉宜的事，而當我們已聘得一名有能力代為處理案件的事務律師時，我們為何還要付出另一筆巨額費用來延聘大律師呢？與其他亞洲商業中心比較起來，上述問題對於香港是有百害而無一利的。

Richard R Murray
德勤・關黃陳方會計師行
法律及監管事務國際董事

Peter Griffiths
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總法律顧問

擴大事務律師出庭發言權：真相與假象（五）

自本年4月號起，律師會轄下的擴大事務律師出庭發言權工作小組在本刊撰文，解釋該小組對現實務將尋求哪些改變。該小組促請所有律師會會員就這項重大而急切的問題發表意見。在本文中施瑞玲將從婚姻事務律師的角度探討上述問題

在婚姻法律程序中，事務律師在高等法院和區域法院均享有出庭發言權，意思是，即使有關案件牽涉數以百萬元計的巨額款項和複雜的公司法和信託安排，事務律師仍有權以出庭代訟人身分進行案件。婚姻事務律師經常以出庭代訟人身分處理涉及被處置、隱藏或耗散的資產的訴訟。他們經常追蹤連串跨國文件，而這往往涉及在境外司法管轄區提出適當申請。他們需要處理涉及至為複雜的財政安排和遍佈世界各地的資產的訴訟，在千絲萬縷的案情中弄清實益權益誰屬。他們亦要以出庭代訟人身分處理各項牽涉兒童並且往往觸及與訟各方的情緒的法律問題，例如管養及《海牙公約》下針對誘拐兒童的申請。盤問證人往往是整個過程的關鍵部分。

在婚姻事務律師所處理的法律範疇內，訴訟的成敗對於當事人可造成莫大影響，因為訴訟結果不但涉及個人的財政狀況，而且關乎他們的子女的生活。訴訟對於訴訟人的財政打擊，不會得到保險公司代為承擔；所涉的訟費和庭外和解協議下的款項，亦不會得到財力雄厚的機構代為支付。婚姻訴訟各方時刻要面對巨大財政風險的殘酷現實。

有人認為，婚姻訴訟往往極為複雜和牽涉巨額款項，故此不應因這類訴訟（包括在高等法院提出的訴訟）一般在內庭進行而完全取決於事務律師的訟辯技巧。大律師界或司法界並沒有反對這種說法。因此，簡單地說，指事務律師沒有資格在這類訴訟中擔任出庭代訟人的過時論據並不適用。

作出上述區分，看來是頗為奇的做法。難道在內庭進行的法律序的重要性較低？該等程序所牽的法律是否較為簡單？內庭訴訟方的需求是否較公開法庭訴訟各的需求次要和簡單？高等法院法在內庭所作的裁決（或區域法院官所作的裁決）對於訴訟人以至義制度的發展來說是否不足掛齒這些問題的答案必然是「否定的，因此，在今時今日的香港司制度下，擴大出庭發言權的論據乎沒有立足之地。

在擴大出庭發言權的問題上，論的焦點似乎總是事務律師如何

就內庭程序以外的高等法院訴訟
以及更上級法院的案件而言，
事務律師無法向當事人提供任何選擇…
當事人因缺乏選擇及額外開支而感到沮喪，
是絕對可以理解的

向大律師界一再保證，即使事務律師獲賦予出庭發言權，大律師的生意亦不會受影響。這情況恍如從錯誤的一端看進望遠鏡內，意思是我們愈來愈不能看到更加重要的問題，包括什麼才合乎公眾的最佳利益以及支付律師費的當事人的喜好。律師的職責之一是向當事人提供選擇，讓當事人能夠就他/她希望如何進行訴訟程序作出知情的決定。然而，就內庭程序以外的高等法院訴訟以及更上級法院的案件而言，事務律師無法向當事人提供任何選擇。在這情況下，根據現行制度，當事人的唯一選擇是聘用大律師，從而支付額外和重覆的費用。但獲委聘的大律師可能從未參與有關案件的審訊前程序。這種情況在邏輯上是說不過去的。當事人因缺乏選擇及額外開支而感到沮喪，是絕對可以理解的。

爭取較大出庭發言權的事務律師，最終要提出論據以安撫大律師界。就讓筆者藉此提出有關論據。現實是，即使事務律師得享更大出庭發言權，他們仍不會行使該權利，除非當事人如此要求。即使在婚姻法律程序中，儘管事務律師可代表當事人進行訟辯（直至案件交由上訴級法院審理為止），不少事務律師仍繼續延聘大律師為當事人的代訟人。

從事婚姻法律事務的大律師人數不多，而這類工作亦可說是高度專門。延聘這批大律師的理由，與適用於所有訴訟的通常、合理和合乎邏輯的理由相同，而該些理由不會因事務律師獲賦予更大出庭發言權而消失。對於事務律師來說，兼備能力和智慧的訟辯大律師無疑相當重要，但並非所有大律師均可如此被描述。事務律師知道，委派最稱職的人代表當事人出庭，是合乎當事人的最佳利益的，而這通常意味著，縱使事務律師有權代表當事人出庭訟辯，他們仍會向當事人指出延聘訟辯大律師是最理想的選擇，並交由當事人決定是否採納該選擇。

大律師界將繼續存在，而各界對於大律師的需求不會因事務律師得享更大出庭發言權而滅絕。事實上，絕大部分事務律師的工作均相當忙碌，很難抽空親身預備和進行某些案件審訊。在婚姻法律程序中，大律師經常獲延聘參與審訊以及所有困難的非正審事宜，而有關聆訊歷時可由數天至數以月計不等。事務律師的日常工作相當繁重，他們要不斷監察當事人個案的進程，代表當事人進行大量而頻密的書信往來，還要接聽永無止境的當事人來電。不少事務律師除了從事日常法律工作外，更要兼顧經營律師行和管理其運作的重任。

因此，即使事務律師獲賦予更大出庭發言權，他們仍會一如既往，繼續委聘有能力和稱職的訟辯大律師。唯一的轉變是，決定如何進行案件的人將不再是大律師，而是消費者（即當事人）本身。

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施瑞玲律師
咸頓金仕騰律師行

擴大事務律師出庭發言權：真相與假象（六）

自本年4月號起，律師會轄下的擴大事務律師出庭發言權工作小組在本刊撰文，解釋該小組對現行實務將尋求哪些改變。該小組促請所有律師會會員就這項重大而急切的問題發表意見。在本文中，鮑德禮將探討本地事務律師在破產法律程序中的出庭發言權以及一宗相關的近期案例

在一宗近期案例 *Re Lai Yin Shan* [2001] 3 HKC 232 中，高等法院原訟法庭裁定，在高等法院席前的受爭辯破產法律程序中，事務律師可繼續代表當事人出庭發言。原訟法庭審理涉案各個問題時，曾經提述英國破產訟案法院的歷史、英國慣例在香港被採納，以及這一項未經爭辯的事實：多年來事務律師在受爭辯破產案件中一直在行使出庭發言權。

歷史背景

原訟法庭對於事務律師在英國破產訟案法院的出庭發言權的分析，可歸納如下：

英國的背景

原訟法庭指出，根據《1831 年破產法令》第 10 條，事務律師可獲破產訟案法院認許及可在該法院登記其姓名，並且「可在該法院的任何法律程序中出庭及陳詞，毋須聘用大律師」。

此外，《1883 年破產法令》第 151 條確認：「任何在破產訟案首席法官席前具有出庭發言權的事務律師或其他人，在高等法院席前的破產事宜上均具有出庭發言權」。

最後，現時的《無力償債規則》第 7.52 條保留了事務律師在無力償債法律程序中的出庭發言權，該權利的內容與上述規則生效前所存在的對等權利相同。

香港的背景

《1945 年第 VI 號條例》規定：「除英國法律不適用於香港殖民地或其居民的當地情況外，英國法律在香港殖民地具有十足法律效力。」因此，上述的《1831 年破產法令》很可能曾適用於香港。當年的《最高法院條例》（第 4 章）第 17 條亦規定，在受制於法院規則的情況下，英國最高法院的慣例須在香港法院具有法律效力。

此外，《香港回歸條例》（第 2601 章）第 12 條規定：「在緊接 1997 年 7 月 1 日之前具有於任何法院、裁判法院、法定審裁處、法定委員會或法定仲裁處出庭發言的權利的每名人士，在該日及之後繼續享有於【香港特別行政區】的相應法院、裁判法院、審裁處、委員會或仲裁處出庭發言的權利。」

原訟法庭亦指出，在受爭辯的破產法律程序中，本地事務律師多年來一直享有以代訟人身分出席公開法庭的權利，這可從十三宗自 1908 年直至 1997 年間的經彙報案例中反映出來。

大律師界的論據

由事務律師和大律師代表出席聆訊的大律師公會，向原訟法庭提出理由，以期反對事務律師在受爭辯破產法律程序中具有於公開法庭出庭發言的權利。對於 1987 年以前的情況和做法，大律師公會尋求引述當時的《最高法院條例》第 17 條以作解釋。自 1987 年以來，司法機構未有集體決定確立事務律師可在上述案件中在公開法庭發言的慣例。據

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此，大律師公會認為，有關慣例應無異於其他民事法律程序，結果是，事務律師的出庭發言權於 1997 年後已不復存在。

大律師公會亦認為，《破產條例》（第 6 章）第 99(1) 條規定，破產法律程序的法律代表方式須像其他高等法院法律程序般受到同樣限制。第 99(1) 條規定：「高等法院當其時用以規管法院一般民事訴訟程序的規則及慣例，均適用於破產法律程序，但僅以可適用者及不抵觸【《破產條例》】規定者為限…」。

原訟法庭的判決

原訟法庭裁定，1997 年 7 月 1 日以前，事務律師在受爭辯的破產法律程序中確實享有在公開法庭席前發言的權利。這種權利並沒有隨著《最高法院條例》第 17 條於 1987 年被廢除而湮滅 — 第 17 條被廢除後，法官們繼續依循現存慣例。儘管更改慣例將需要法官們的集體決定，但維持現狀並不需要該等決定。

至於《破產條例》第 99(1) 條，鑒於破產訟案法院的慣例獨特，故高等法院的一般程序規則和慣例並不適用。第 99(1) 條的文字內容，足以包容一般民事法律程序和慣例以外的其他做法。

據此，原訟法庭裁定，案中的法律程序可繼續進行，呈請人亦可繼續委聘事務律師代表出席公開法庭。

短評

原訟法庭裁定，「由此可見，英國事務律師在受爭辯破產法律程序中在公開法庭席前發言的權利，乃建基於當地的法規」（見彙報第 235 頁 E 段）。

昔日隨著英國的工業革命，經濟活動日趨頻繁，從而令破產法律迅速發展。鑒於篇幅所限，筆者不欲對這一點詳加解釋。不過，我們考慮出庭發言權的問題時需要緊記，早在《1873 年最高法院法令》制定前，英國當地已存在著多個互不相干的法院，而每個法院都設立了屬於自己的程序規則。

倫敦破產訟案法院於 1831 年以前已經存在，因為《1831 年破產法令》規定將一名破產承讓人（即現時破產管理署署長的始祖）派駐該法院。當時並沒有特別原因令人們認為在由該法院的公開法庭聆訊的案件中，只有大律師才享有出庭發言權。我們可比較市法院和倫敦市法院的情況。

令情況更形複雜的是，直至 1842 年為止，破產法律程序並非透過呈請展開，而是向法院請求給予蓋有「大印章」的委任狀，以接管破產人的事務和分配該人的財產。《1842 年破產法令》規定成立新的破產訟案法院及覆核法院，並向郡法院賦予有限的破產案件司法管轄權。

《1873 年最高法院法令》將可以由倫敦破產訟案法院及其他法院行使的司法管轄權「移交及轉歸」高等法院（見第 16(8) 條），並且將當時有待倫敦破產訟案法院審理的所有事宜轉移至高等法院財政分部（見第 34(3) 條）。根據同一法令第 87 條，所有獲認許為任何法院的事務律師、大律師或代訴人的人士，均須稱為「最高法院律師」，並可享有「與猶如本法令未被通過時相同的特權，及受到與猶如本法令未被通過時相同的責任限制」。

正如原訟法庭在 *Lai Yin Shan* 一案中指出，出庭發言權後來得到《1883 年破產法令》明確確認。不管如何，即使在有關法律於十九世紀屢被修改和得到澄清以前，事務律師很可能已享有這種權利。

【出庭發言權】

沒有隨著《最高法院條例》第 17 條於 1987 年被廢除而湮滅 — 第 17 條被廢除後，法官們繼續依循現存慣例

鮑德禮律
的近律師行合夥

【註：*Re Lai Yin Shan* 一案摘要，載於本期「案例」一欄。】

擴大事務律師出庭發言權：真相與假象（七）

自本年 4 月號起，律師會轄下的擴大事務律師出庭發言權工作小組在本刊撰文，解釋該小組對現行實務將尋求哪些改變。該小組促請所有律師會會員就這項重大而急切的問題發表意見

「公眾利益」論據

反對向事務律師賦予更大出庭發言權的人，通常以低沉模糊的聲線或根據毫無基礎的推斷而指出，事務律師是一群視道德如無物的流氓，即使委聘大律師合乎當事人利益，事務律師也寧願自行（或委託其律師行合夥人）代表當事人，結果令當事人敗訴和蒙受損害。這種說法是荒謬的，它以「合乎公眾利益」這類籠統字句為名，背後其實是在維護大律師的利益。我們要知道，在很多普通法司法管轄區，每當委聘以大律師身分執業的律師乃合乎當事人利益的時候，以事務律師身分執業的律師是會如此行的。

但我們亦不要哄騙自己 — 打個譬喻說，一桶蘋果中總會有一個是腐爛的。即使我們可能是過份緊張，我們亦有理由做點工作，以防範於未然。事實上，在英國，首批身兼代訟人的事務律師（以下簡稱「代訟律師」）取得資格前，當地的律師會正正採取了「預防勝於治療」的做法，於 1993 年 12 月 8 日引入了兩項新的執業規則，內容如下：

執業規則第 16A 條：以代訟人身分行事的事務律師

第 16A 條規定：「任何以代訟人身分行事的事務律師，在所有時間均須遵守律師會的《訟辯守則》。」該守則的內容大致上仿傚當地大律師公會本身的訟辯守則而制定，因此當地所有代訟人（不論是事務律師還是大律師）均受制於相同的道德標準，包括所謂「司機不得揀客」的原則。

執業規則第 16B 條：選擇代訟人

第 16B 條規定：

一、 事務律師不得為其提供訴訟服務設立以下條件，即該事務律師或其所屬律師行或其代理人將同時提供訟辯服務。

二、 同時提供訴訟及訟辯服務的事務律師，須於收取指示後在切實可行範圍內儘快並不時考慮及知會當事人，在顧及有關情況（包括下列情況）下，由該事務律師、其所屬律師行內的另一名代訟人或某些其他代訟人提供訟辯服務是否將符合該當事人的最佳利益：

(i) 案件的嚴重性、複雜程度及可能涉及的訟費；

(ii) 該事務律師的執業事務性質；

(iii) 該事務律師的能力及經驗；

(iv) 該事務律師與該當事人的關係。

故此，假如與《訟辯守則》（特別是關於「決定代表出庭」的第 4 項守則）一併理解，代訟律師顯然要考慮和告知當事人，委聘大律師而不是代訟律師是否「符合該當事人的最佳利益」。英國律師會特別指出，事務律師需要就大律師相對於代訟律師的費用向當事人提供意見。我們亦要注意，違反任何上述執業規則的個案，將交由紀律當局處理。

誠然，上述執業規則不外是常理，任何合乎道德標準的本地律師都必會遵循。縱然如此，當事務律師正式獲賦予更大出庭發言權時，上述規則仍應同步在香港實行 — 即使僅僅為了制止文本開首所提及的聲音和毫無根據的推斷！

白樂德律師
律師會擴大事務律師出庭發言權
工作小組主席

【註：會員們如欲發表意見，請致函香港律師會擴大事務律師出庭發言權工作小組執業者事務總監 Joyce Wong 女士（地址：香港中區德輔道中 71 號永安集團大廈三樓）。】