

**STATEMENT 1.305  
GENERAL GUIDANCE  
DIRECT PROFESSIONAL ACCESS**

*(Issued April 1995; revised September 2004 (name change))*

**Introduction**

1. This Statement has been prepared for the sole use of members intending to instruct counsel directly. Members are reminded that this Statement is for the purpose of guidance only. No liability attaches to the Council of the Hong Kong Institute of Certified Public Accountants (HKICPA) or anyone involved in the preparation or publication of this Statement.
2. On 23 March 1995, the Bar Council of the Hong Kong Bar Association granted Direct Professional Access (DPA) to members of the HKICPA. Members of the HKICPA are therefore permitted to instruct counsel directly, without the use of a solicitor, to the extent and subject to the limitations described in greater detail in this Statement, which has been issued to assist members.
3. DPA, as referred to in this Statement is limited to "direct professional access", that is access from members of other professional bodies recognised by the Bar Council from time to time. It does not extend to access to the barrister from lay clients, which the Bar's Code of Conduct does not permit.
4. The use of DPA by members of the HKICPA is restricted to matters relating to the practice of public accounting which is what this Statement is about. It does not extend to matters of a personal nature in which a member has a direct interest nor to members acting as officers of a company or organisation in matters in which the organisation has a direct interest, except acting as officers in insolvency appointments.
5. This Statement examines the uses of direct professional access, indicating what barristers are able to offer to members and also (just as important) what it is unrealistic to expect of them. It also includes some practical advice and suggestions on how members should go about instructing barristers if they are to get the best results from direct professional access.
6. It is likely that direct professional access as regards members will most often relate to specialist matters. There may well be cases within the expertise of members where they would find it useful to be able to instruct counsel directly - for example on some matters relating to company or partnership law, however, it is in the taxation and insolvency fields that direct professional access to counsel has its greatest impact for members. Appendix 1 therefore deals in some detail with these aspects.
7. The aim of this Statement is to establish the requirements as regards the instructing member when he uses direct professional access.
8. The Bar Council has approved a set of Recommended Standard Terms of Engagement of a Barrister Undertaking Direct Professional Access Work. These Recommended Standard Terms of Engagement are reproduced in Appendix 2 of this Statement. Members of the HKICPA will be deemed to instruct a barrister on these Standard Terms unless and to the extent that they are excluded or varied by agreement between that member and the barrister whom he instructs in any particular matter.

**General principles**

9. Members in practice, acting in a professional capacity may instruct barristers using direct professional access. It does not extend to matters of a personal nature in which a member has a direct interest nor to members acting as officers of a company or organisation in matters in which the organisation has a direct interest, except acting as officers in insolvency appointments. In direct professional access cases, the member is the principal acting for the client, and the barrister is providing advice to the member. The barrister, however, has the right at any time to insist a solicitor be instructed if in his view it is in the interests of the lay client that one be appointed.

10. When instructing a barrister the member must do so personally so that in all cases the barrister can identify the individual responsible for briefing him.
11. It is the obligation of the instructing member to ensure that he has adequate professional indemnity insurance to cover his advice (upon which he is instructing the barrister) given to his client.
12. Instructing members undertaking direct professional access work are required to keep appropriate, detailed and accessible records.
13. It is the obligation of instructing members to settle the barristers' fees promptly. Where a member does not comply with any agreed terms as to payments, a complaint may be referred by the Bar Council to the Registrar and such conduct is likely to give rise to a disciplinary offence.

#### **Advantages of DPA**

14. If a member has a matter in progress for a client where he thinks that some legal input may be useful it has of course always been possible to obtain the services of a barrister. At present this requires the intervention of a solicitor, who sometimes acts as little more than a postbox to pass on instructions prepared by the member. There may be cases where a member or his client is put off from using a barrister's services by the need to involve the solicitor, either on grounds of inconvenience or cost, or from a feeling that the client's affairs are the member's province, not the solicitor's. Direct professional access would remove this inhibition.
15. In some areas direct professional access can have an important role to play in advocacy, but the exclusion of the higher, district and magistrates courts from direct access means that direct access will rarely be of use in advocacy situations. Where a member is party [in his professional capacity eg. liquidator] to proceedings before a labour or industrial tribunal at which he cannot be represented and the intervention of a solicitor does not appear to be necessary, savings in legal fees can be achieved by consulting a barrister directly for advice before the proceedings.
16. Another advantage to members and their clients of direct professional access would be, for example, in connection with certain contested taxation cases. In most small or medium-sized cases the member tends to represent the client himself - sometimes excellently; but many members may feel that advocacy is not really their forte, and may be attracted by the idea of instructing a barrister to present the case if they can do so without having to bring solicitors in. Another point here is that the member is sometimes a witness. In such a case it will be easier for him, and more conducive to a structured Board of Review hearing, if a barrister acts as the advocate who presents the client's case.
17. To some extent it may operate as a protection to a member in a difficult or complicated matter for him to consult counsel. If he gives counsel adequate instructions (practical suggestions about this appear later in this Statement) and then is guided by counsel's advice, there is likely to be less risk that he would be held to be at fault if something goes wrong. However, this point should not be overstated. The member remains the principal professional adviser to the client and hence if the member has reason to think that a barrister's advice may be wrong, he should seek clarification and check it himself rather than follow it without question.

#### **How to instruct counsel**

18. The following sections should provide guidance to members as to how to deal with barristers and explain their operating procedures.

#### **Finding the right barrister**

19. The member will often know members of the Bar already and will have no problem over deciding whom he wants to instruct in a particular case. Other members may find it helpful to ask for suggested names from their professional colleagues or solicitors. The Bar Association also provides a listing of all barristers prepared to take on direct professional access cases, which may be used.

20. The member will have to gauge the seniority of the barrister he requires against the weight of the matter. The Bar ranges from well-known Queen's Counsel, to recently qualified junior barristers. If the member has experience of a particular set of barristers' chambers, a talk on the telephone with one of the barristers will probably produce helpful suggestions.

21. In Hong Kong, Queen's Counsel when appearing in any court or tribunal must do so with a junior barrister.

**Preliminary approach to the barrister**

22. A lot of the administration of a barrister's practice is handled by a clerk but all important matters are handled by barristers themselves. If a member has decided that he would like to send direct instructions to Barrister X, he will be well advised to contact him by letter or telephone, to check on at least three points:

a. *Availability.* This can be a problem and results from barristers being sole practitioners. The benefit to the client is that, if he instructs Barrister X, he can reasonably assume that Barrister X personally will deal with his matter: he will not get the efforts of Barrister X's employed assistants - because barristers do not employ assistants. The disadvantage is that if Barrister X has a lot of clients or is already booked to appear in another case on the vital day, he may not be available when the member wants him. The solution is to find this out in advance and then to try to identify another barrister of similar seniority or standing who will be available.

b. *Fees.* Matters where members would like to instruct barristers directly may be rather smaller (in terms of the amounts involved) than matters in which solicitors are also involved. Thus many direct professional access matters will be likely to support smaller fees. It is obviously desirable to sort this out in advance. Barristers are no longer prohibited from discussing their own fees, and a member who wishes to discuss likely fees should contact him, usually by telephone. Barristers have telephone discussions of this sort all the time, and fully expect to be telephoned by the professional client - solicitor, HKICPA member or other professional - to talk about fees. Barrister X may not be able to tie himself in advance to a definite fee, but he will give an indication of the range. If the member thinks it is too high, he may need to discuss it further. Perhaps the member will decide instead to instruct Barrister Y, who is more junior and charges lower fees. The barrister will, of course, always be able to give an indication of the ranges of experience, seniority, and likely fees, of all the barristers in his chambers (see also paragraphs 44 to 52).

c. *Diary bookings.* If the member would like a conference or wants counsel to appear on a contested appeal, he should ask the barrister to reserve the time in the diary. Once the barrister has been booked, instructions have been accepted and fees have been agreed, the barrister is committed to fulfil his obligation except in exceptional circumstances. It should be noted that under the Code of the Bar Association, where a barrister accepts a brief, and an earlier brief is overrun, he is allowed to return the later brief.

23. It should be noted that under the Bar Code, the first point of contact in instructing a barrister (or a member of his staff authorised to accept instructions on his behalf) in a matter must be by the instructing member personally and not by a member of his staff. A barrister may not accept instructions from a member without having made this first point of contact.

**Written instructions**

24. Counsel do sometimes advise in conference "blind" - ie. without any prior warning about the nature of the point. In urgent cases, counsel will try to give quick attention to a matter. If a particular barrister is tied up, he will notify the member as soon as possible and if required will suggest an alternative barrister. But in non-urgent cases it is not the best way to obtain the fullest benefit for the client for counsel to advise blind, and it is much better for instructions to be given to counsel beforehand, if at all possible in writing but where necessary over the telephone. It is obviously essential to give written instructions for advocacy work. The whole exercise of using counsel is likely to work out much better if some thought and care is given in advance to formulating his instructions so that he can be well prepared.
25. Counsel should not simply be sent a file with a short covering letter to the effect that he should please advise on the problem which he will see from reading it. Specific questions to counsel are more likely to produce the desired useful advice than a general request to read a file.
26. The first step is to decide what background documents counsel needs - accounts, tax computations, relevant correspondence, key legal documents, etc. - and copy them to the barrister. The copy documents should be placed in an indexed folder with either numbered or marked tabs. Care should be taken to ensure that copies are legible and logically ordered and the folder is easy to use and refer to.
27. Next some form of written instructions should be prepared so as to efficiently introduce counsel to whatever he is being asked to consider or do. As most members will know, solicitors have a customary layout for this in the form of "Instructions (or Brief) to Counsel" with a backsheet and other legal conventions (eg. referring to "counsel" rather than "you"). Members may want to follow the same pattern, but it is also acceptable to simply put the instructions in a letter to counsel. What matters is the content, not the layout.
28. The content of the instructions or letter will obviously be dictated by and vary with the nature of the case. Here follows a broad suggested framework which will probably fit, with a few adaptations, in most circumstances.
  - a. List the enclosed documents.
  - b. In one or two sentences encapsulate the crucial point of the instructions, so that when counsel reads on his attention is properly focused. For example: "You are asked to represent our client Mr. X before the Board of Review on an appeal against an assessment made on the basis that a gain which he made on the sale of the property was a profit of an adventure in the nature of trade". Or, "You are asked to advise the liquidator of A Ltd. with regard to a possible claim of voidable preference against XY Bank Ltd. following payments of monies into A Ltd's overdrawn account with the bank which benefitted Mr. X, a creditor of A Ltd. and a guarantor of the overdraft on that account".
  - c. If there is an important time limit coming up, whether statutory (eg. for an appeal or a claim) or non-statutory (eg. a contract deadline) or the date for a hearing has been fixed, state this prominently. This is important since once the barrister has accepted the instructions he is committed to appearing or completing his advice, unless exceptional circumstances arise.
  - d. Summarise the facts that matter, cross-referring as appropriate to the enclosed documents.
  - e. Set out the point of the instructions. For example, if they relate to an appeal, indicate the Inland Revenue Department's argument and the basis of disputing it. If they relate to a proposed transaction, set out what it is, what it is hoped to achieve by it, and why it is believed that the transaction will accomplish the objective.

- f. Add whatever comments or discussion the member would like counsel to keep in mind. A certain amount of this is helpful: it stimulates the barrister's thoughts and may direct him in helpful directions. But there can be too much of it. Instructing members will soon develop a feel for the right balance.
  - g. Sum up by listing what counsel is asked to do: for example, to advise on the evidence and documents needed for the appeal and in due course to appear at it; or to consider and give his view on a number of crucial questions on which he is asked to advise. In the last sort of case if there are, say, five questions, it is common to add - "6. Generally". The purpose is to make it clear to counsel that if he notices some important point himself he should raise it. (Counsel would usually raise such a point anyway, whether the word "Generally" appears or not, but they do sometimes feel hesitant over doing so in case the HKICPA member or solicitor who prepared the instructions deliberately left the point out of the questions because he did not want it to be addressed. In such cases barristers sometimes in the first instance raise the point in an informal telephone call to the HKICPA member or solicitor.)
29. It should be noted that under the Bar Code, a barrister must ensure that on every occasion when he appears before a court, which is defined to include any court or tribunal, he has in his possession a backsheet prepared and signed personally by the instructing member, bearing the following information:
- a. the name of the case, and if available, of the number assigned to the case by the court;
  - b. the name of the barrister;
  - c. the name of the instructing member;
  - d. the name of the firm of the instructing member;
  - e. the file reference of the instructing member for the case;
  - f. the court in which the case is listed for hearing;
  - g. the date or dates of hearing;
  - h. the nature of the work to be done;
  - i. the agreed fee.

Unless provided by the instructing member with a backsheet satisfying the aforesaid requirements, a barrister may not appear in the case in question.

### **Conferences**

30. Usually conferences are held at counsel's chambers in accordance with the Code of the Bar. There are also good practical reasons for this practice. In many cases it proves desirable in a conference to refer to law reports or legal text books. The barrister has all those materials available in Chambers, whereas they would often not be available in conferences held elsewhere. Nevertheless a barrister can be asked whether in a particular matter he will go to the member's offices or the client's premises if there is a good reason to depart from the general rule. This makes sense, for example, if a lot of people will be present and the meeting can be better accommodated out of chambers, or if there is a large quantity of papers which would make a conference in chambers very unwieldy, or if the case is of a kind where a property is involved and it is useful for the barrister to go and see it.
31. The member should exercise his own judgement about who should attend a conference. Obviously he or some other representatives from his firm with detailed knowledge of the matter should attend. In most cases it makes sense to take the client as well. It is not acceptable, however, for the client or his employees to attend a conference alone. If the member is uncertain about who to bring with him to a conference he can always telephone the barrister beforehand and discuss the point with him.

32. Where advice is needed urgently, an increasingly common practice is for counsel's instructions to be sent by fax with a request for him to advise on the matter in a telephone discussion later in the day. This works best if counsel's availability is checked first. Normally the member will prepare a file note of the conference and the barrister will read and sign it to confirm that he agrees with it. (See also paragraphs 40 to 43)

#### **Drafting documents**

33. When a barrister settles pleadings, it is a convention (and sometimes a procedural requirement) that his name appears on the pleading. Such documents should therefore not be amended except by the barrister concerned, alternatively the amended document should not be issued until he has had a fair opportunity to check it and agrees that it may go forward with his name on it.

#### **Preparing for hearings: Documents and evidence**

34. If a barrister is instructed to represent a client at a hearing there are two important matters on which preparatory work is essential—the documents and the evidence. The member and the barrister will have to work together on them and, except in very straightforward cases, a preliminary conference is a good idea.
- a. *The documents.* The barrister will advise, with the help of the member, what documents are needed for the hearing. They will then need to decide how the documents can best be presented, and organise them into one or more logically ordered bundles. Because the member will almost certainly have a larger office organisation the barrister will usually assume that the member will arrange for the physical work of preparing the bundles.
  - b. *The evidence.* The barrister will advise, again with the help of the member, what witnesses should be called and what points of fact their evidence should be directed to proving. He will assume that the member will contact the witnesses and arrange for them to attend the hearing. But there is another important matter: preparing a "proof of evidence".
35. A proof of evidence is a written summary, in narrative form, of the evidence that the witness can give. The questions which the barrister puts to the witness will not necessarily track the proof exactly, but no barrister ever likes to examine a witness for his own side without having seen his proof of evidence first. Preparing the proof is also very useful for the witness: it makes him think about his evidence in advance, and tends to concentrate his mind on the points that matter, not on peripheral matters. A witness's evidence always comes out better if he has been efficiently "proofed" beforehand.
36. A proof is prepared by interviewing the witness first, then preparing a draft proof, and having him read it in order to confirm or amend it. Who should do this? When a barrister is instructed by a solicitor, the solicitor usually prepares the proof. The barrister has always been able to talk to the lay client or to an expert witness in the presence of a solicitor, but it is usually the solicitor who initially interviews the witness and prepares the proof. In some cases a barrister may proof a witness with the assistance of a solicitor. In direct professional access matters the same principle will apply. In direct professional access matters, it will be up to the member and the barrister to decide between themselves which of them will be responsible for preparing the proofs of evidence. The barrister will advise on what evidence is needed before the proof is prepared (see paragraph 34.b.), and the member will probably not find it difficult to interview the witness and prepare the proof. On points of difficulty he can always telephone the barrister and discuss them. If a case is a big one and proofing the witnesses is a daunting task for the member, it would probably make sense for a solicitor to be brought in (see also Appendix 1, paragraph 15). In the case of the barrister responsible for preparing the proof, the member or his representative must be present when interviewing lay clients for the purpose of the proof.

### **Professional indemnity insurance**

37. Members wishing to instruct barristers using direct professional access should have adequate professional indemnity insurance (PII). The insurance should indemnify the member with respect to the professional services he is rendering his client and the level of indemnity should be adequate in relation to the matter.
38. The minimum level of indemnity of the HKICPA's PII Master Policy, which covers liability arising from direct professional access work, would in many cases be regarded as adequate but the minimum level of indemnity which would be appropriate will vary from case to case and should be separately assessed on each occasion.
39. Under the Bar Association's Direct Professional Access Rules, a barrister may accept instructions from a member of the HKICPA only if the member has confirmed that he has insurance coverage for professional liability in respect of such instructions for an amount which he considers to be reasonable having regard to the nature of the work giving rise to such instructions. The HKICPA shall maintain a list of members who have PII cover for DPA work for access by members of the Bar Association. For this purpose, members who wish to use DPA should furnish the HKICPA with a declaration, certified by their insurance broker, that the member has Professional Indemnity Insurance which covers the member's professional liability in respect of DPA work. The member should advise the HKICPA as soon as is practicable, once such insurance is terminated.

### **Record keeping**

#### **Records and documents**

40. It is important to note that these record-keeping requirements are of two kinds: records and documents. In summary:
  - a. *Records.* The records that must be made are those that record details of all instructions given. These records include such matters as the identity of the member, the date the instructions were given, the nature of the instructions and any agreed time within which the instructions will be undertaken. These records must be kept at the member's office.
  - b. *Documents.* The documents, or copies of documents, that must be kept include those setting out all instructions, advices and opinions (including a written summary of those given orally in consultation or in conference or on the telephone) and a list of all documents enclosed with the instructions.

#### **Storage**

41. The records and documents that must be retained must be stored in a manner and in a location that makes them readily accessible. For the time being, all members should retain all records and documents required by this Guideline indefinitely (although not necessarily in their registered office).

#### **Records of conferences etc.**

42. The member must allow a barrister to retain copies of all necessary documents and must make and submit for approval to the barrister a written record of all consultations and conferences and all oral advice given. The member must ensure that arrangements are made with the barrister that enable these requirements to be complied with. In particular, the member should submit to the barrister as soon as is practicable after any conference or telephone conversation a full written summary of the advice given to enable that barrister to check, settle, amend and approve the record and then to retain a copy of it.

**Index of documents**

43. The member must make, and then must keep, a full index of all documents submitted with each set of instructions. That index should be similar in form to the list of enclosures found in well prepared instructions sent by a solicitor. Thus, every document need not be listed. However, the index should be sufficiently detailed to enable it to be ascertained subsequently what were the documents before counsel and what were those used as the basis of any advice or drafts.

**Fee arrangements with barristers**

44. A barrister must be instructed by a member personally and additionally in his capacity as a partner, member, or employee of a firm. A barrister may not accept instructions or a brief from a firm or company. The member must be personally responsible, together with his firm for paying all fees. A barrister may not make an arrangement whereby the member's lay client is responsible for paying the barrister's fees and a barrister is not permitted to receive payment in cheques drawn by the lay client.
45. A member who wishes to retain a barrister through direct professional access should agree the fees of the barrister in advance of issuing instructions with the barrister himself. A definitive fee for the advice sought may not be capable of being established, but the member should be satisfied with the range or hourly rate quoted.
46. a. A brief will only be accepted by a barrister after a fee has been agreed with the instructing member.
- b. In the case of instructions other than a brief, it is a matter for agreement between the instructing member and the barrister whether the fee shall be agreed before the instructions are accepted or at any later date.
47. a. A barrister shall be entitled to require payment of his fee at the time of accepting instructions.
- b. Otherwise, the barrister's fees shall be paid or challenged promptly and in any event within two months of submission of a fee note.
48. a. Unless otherwise agreed a fee note will be submitted at the conclusion of the matter on which the barrister is instructed.
- b. If, however, that matter is protracted, an interim fee note or notes may be submitted at intervals of not less than two months.
49. The member, if he considered the fee note is not consistent with the terms agreed with the barrister, should challenge the fee promptly.
50. In the event that the members' client does not settle the fee it will be the responsibility of the member to settle the barrister's fee initially and take whatever action possible to recover the funds from his client in the normal way as for his own fees.
51. Where a member does not comply with any agreed terms as to payment, a complaint may be referred by the Bar Council to the Registrar of the HKICPA and such conduct is likely to give rise to a disciplinary offence.
52. It is the obligation of the member to notify the barrister of the conclusion of a matter on which he has been instructed, at the time of concluding the matter.



## **Appendix 1**

### **Taxation and insolvency specialisation**

#### **Introduction**

1. There are some barristers who specialise wholly or partly in these areas of the law. Some have particular fields of specialisation within the wider context of taxation and insolvency. For example, one may be particularly strong on the taxation of international commercial or financial transactions; another may concentrate on trusts and estates. But by and large they all profess to be well-versed in the relevant statutes and cases generally. So, of course, do members who specialise in taxation or insolvency. Barristers have legal expertise in drafting documents, and also have a lawyer's general working knowledge of the background legal subjects in the context of which cases often arise - trusts, company and land law, contract and the like - which members may find particularly helpful. (The other side of the coin, naturally enough, is that not all barristers are particularly comfortable in the accounting and computational aspects of taxation and insolvency work, where the member is entirely at home.)
2. The other important attribute of barristers is that they are all experienced or at least trained advocates, and they know about the rules of procedure and evidence which ought to be observed in hearings before the Board of Review.
3. It needs to be remembered that barristers are sole practitioners who only work on a referral basis. They will give their individual attention to each case on which they are instructed, and when they have dealt with the matter that is the end of their involvement unless they are instructed again. Unlike solicitors they are in general not interested in having permanent clients for whom they act on a standing basis. Also unlike solicitors (and members) they do not have elaborate office organisations or support staff of qualified employed assistants. They can do consultancy work on particular points. They can draft documents, and in the case of Queen's Counsel settle documents. They can do advocacy. But they cannot take charge of major transactions involving a lot of administration and office back-up.

#### **Kinds of matters for instructing counsel directly**

##### **Taxation**

4. The next paragraphs contain some comments on instructing counsel directly in the following taxation related areas:
  - general advice on taxation and planning of transactions from a tax point of view;
  - contentious matters and legal arguments before the stage of a hearing;
  - drawing up of written submissions for use at Board of Review hearings;
  - briefing counsel to represent clients at Board of Review hearings.

*Advisory and planning work*

5. Many members, particularly in smaller firms, are accustomed in difficult or substantial matters to consult the specialist department of one of the larger firms, or another member or firm which conducts a specialist tax practice. There may nevertheless be cases where a member, acting as the client's professional adviser, feels that a lawyer's expertise would be useful, and he might consider instructing counsel. Matters involving trusts or complex corporate reorganisations might be good examples. Remember, though, that if a corporate reorganisation is going to involve a lot of administrative work - organising meetings, filing and stamping documents and so on - the barrister does not have the office facilities to do all that himself. He will advise on the principles and on the shape and structure of the transaction, and if required will draft the necessary documents, but it needs someone else - usually the company's solicitors but sometimes its accountant - to attend to the detailed implementation.
6. A lot of planning work for members comes in the most general form: the client telephones and says that he is selling a property for ten million dollars next week. What should he do? He might forget to mention that it is actually his company and not himself which owns the property. The member has to take it from there. Some barristers are happy to tackle general problems presented in that way (see paragraphs 7 and 8 below), but it is probably fair to say that it is not the sort of planning work that most barristers are best at. Most barristers operate best, and prefer to operate, in cases where some of the preliminary work has been done and the matter has been distilled down to one or two points of principle to be considered or a specific proposal to be evaluated. If supplied with the right sort of materials in advance they will prepare thoroughly and can offer the opportunity to the member and the client of an in-depth discussion of the principles or the proposal, viewed from the detached perspective of someone who has not been involved in the client's affairs before and may not be involved in them again.
7. In contrast with the situation described in paragraph 6, there can be cases where best use will be made of a barrister's services if he is instructed to advise on a matter in a general way. For example, some barristers concentrate upon taxes in relation to such matters as trusts, estates and real property. These are areas with which many members are comparatively unfamiliar, particularly if they take on an international aspect and it will probably be best for the member to give the barrister the full background information and to request him to advise generally on the result to be sought and the means to achieve it. In such cases the overall circumstances and affairs - and even the personality - of the client are likely to be of great importance, so that it can be a serious mistake to supply the barrister with too little information and to restrict his instructions to answering one or two fairly precisely defined technical questions. If the member is in any doubt about how much detail or information the barrister needs, a preliminary meeting (usually called by barristers a "preliminary conference") between the two of them alone will frequently be helpful in determining the important areas and the sort of information that either is or is not required.
8. The same sort of approach - that is instructing the barrister to advise generally rather than upon specifically identified and fairly precise questions - may well be found helpful in other contexts where the member wants legal advice in an area of taxation which is outside his normal experience but in which the barrister specialises. Another example is the criminal law aspect of taxation: there are barristers who are criminal law specialists with particular expertise in tax-related cases.
9. If a barrister is to be instructed in a tax planning matter it is usually best, even if a little more expensive, not just to send him papers and ask him to advise in writing but to discuss it with him in a meeting (normally referred to by barristers as a "conference"). (There are more comments on conferences in paragraphs 30 to 32 of the Guideline.) Before instructing counsel in this way members may like to have a brief discussion over the telephone with him to check that the matter is one where he can help and/or to discuss what information and documents he needs. This can prove to be a valuable time-saver.
10. Normally the member prepares his own file note of the conference and the barrister will be happy to read it and sign it to confirm that he agrees with it. Alternatively, after the conference counsel can be asked to write an opinion.

*Contentious matters before the stage of a hearing*

11. Correspondence with the Inland Revenue is normally conducted by the member, and direct professional access does not change that. But there are some cases where members find it useful to involve a barrister. The two most common situations are these:
  - a. Where the member feels he has reached the end of the road in correspondence and would like a second opinion from someone with experience of tax litigation on whether he should advise the client to go to appeal or to give in, or to try and reach a compromise.
  - b. Where the Assessor has written a letter replete with legal arguments and citations from decided cases, the expertise of the barrister will ensure that he will be better prepared than the member to draft the reply.
12. In these sorts of cases (a. and b. in paragraph 11) it is usually best to discuss the matter in a conference with counsel, but can if need be dealt with by written instructions to the barrister to draft a reply. Barristers are not permitted by their Code to take over the correspondence with the Assessor themselves, they should instead be asked to draft a letter for the member to send, or to write an opinion to be sent to the Assessor with a covering letter from the member.

#### *Board of Review hearings*

13. The use of counsel to represent clients before the Board of Review has already been mentioned. It is a natural context for direct professional access, advocacy being central to a barrister's profession but exceptional to an accountant's. There is an extra reason for using counsel if a case looks as if it might go on to the High Court: counsel will be needed there. It will almost always make more sense to bring him in at the first stage. That is the stage when the facts are established, and the handling of a case before the Board of Review can significantly affect its prospects on appeal.
14. It is often useful, in advance of a hearing before the Board of Review to draw together various documents for use at the hearing, including a statement of the facts prepared by the Inland Revenue. If counsel is to present the case at the hearing it is best for him to review the documents for accuracy. He will obviously be better able to do so if he is instructed a reasonable time before the case comes on.
15. One note of caution: if a case which is going before the Board of Review is quite a large one or where there is a dispute as to the statement of facts it will very probably be best to have a firm of solicitors involved. If there are going to be several witnesses and quite a lot of documents there is a lot of administrative and office work to be done in getting it ready for trial. Solicitors are experienced, equipped and staffed to cope with this. Members and barristers in general are not. If a case needs a solicitor as well, the Bar Council's rules require a barrister who has been instructed directly by a member of another profession to say so. It will help all round if members identify these cases in advance themselves but in any case barristers will advise when this is necessary, and may refuse to accept instructions if solicitors are not brought in. Another way of dealing with cases like this might be for the barrister to be instructed by the member, and for the member to bring a solicitor in to be part of the entire professional team working on the case so that overall control will remain with the member.
16. It should also be remembered that if a case goes on from the first instance hearing to the High Court, solicitors will have to be involved at that stage. This is a requirement of the general law which the Bar Council cannot change.

#### **Insolvency**

17. The next paragraphs contain some comments on instructing counsel directly in two types of insolvency matter:
  - general advice on insolvency and its practical implications in cases;
  - contentious matters before the stage of a hearing.

*Advisory and planning work*

18. Examples include advice on insolvency law such as the validity of appointments and securities, priorities of claims, the conduct of investigations, international aspects and the drafting of special documents such as indemnities.

*Contentious matters before the commencement of proceeding of a hearing*

19. Examples include advice on parties who can be sued, the chances of success, the need and availability of orders for documents or examinations prior to suit, and the drafting of correspondence setting out or denying claims.

Matters normally investigated by a liquidator upon which he may need the advice of counsel include:

- Section 182 of the Companies Ordinance: Dispositions of the company's property after the commencement of a winding up by the court.
- Section 266 of the Companies Ordinance: Fraudulent preference.
- Section 267 of the Companies Ordinance: Floating charge created within 12 months of commencement of liquidation.

## Appendix 2

### Recommended Standard Terms of Engagement of a Barrister Undertaking Direct Professional Access Work

#### PREAMBLE

- (i) These Standard Terms of Engagement have been approved by the Bar Council. The Bar Council has further recognised the Hong Kong Institute of Certified Public Accountants as a recognised professional body under and for the purposes of the Direct Professional Access Rules.
- (ii) They are intended to apply in any case where a barrister is instructed by a member of the Hong Kong Institute of Certified Public Accountants in accordance with the Direct Professional Access Rules in Annex 19 of the Bar Code of Conduct.
- (iii) Any member of the Hong Kong Institute of Certified Public Accountants will be deemed to instruct a barrister on these Standard Terms unless and to the extent that they are excluded or varied by agreement between that member and the barrister whom he instructs in any particular matter.

#### DEFINITIONS

In these Standard Terms:

"Bar Code of Conduct" means the Code of Conduct for the Bar of Hong Kong for the time being in force;

"Direct Professional Access Rules" means the Rules in Annex 19 of the Bar Code of Conduct;

"A recognised professional body" means a professional body recognised by the Bar Council under and for the purposes of the Direct Professional Access Rules;

"Instructing member" means a member of a recognised professional body from whom a barrister has accepted instructions in accordance with the Direct Professional Access Rules;

"Instructions" include a brief save where the context otherwise requires.

#### INSTRUCTIONS

1. A barrister has the right in circumstances set out in the Direct Professional Access Rules to refuse to accept instructions and these Standard Terms will apply only where a barrister has accepted instructions.
2.
  - (i) A barrister may only accept instructions from a member of a recognised professional body who is identified at the time of giving instructions and confirms that he or the company, firm or other body of which he is a director, partner, member or employee is insured against claims for professional negligence in respect of the matter giving rise to such instructions.
  - (ii) It shall accordingly be the duty of a member of such a body wishing to instruct a barrister to identify himself as the instructing member at the time of giving instructions and confirms that he or the company, firm or other body of which he is a director, partner, member or employee is insured against claims for professional negligence in respect of the matter giving rise to such instructions.
3.
  - (i) A barrister may only accept instructions from a member of a recognised professional body in a matter of a kind which falls generally within the professional expertise of the members of that professional body.

- (ii) An instructing member warrants that the matter in which he is instructing the barrister is of a kind which falls substantially within the field in which he normally practises.
4.
    - (i) An instructing member should, in addition to instructing a barrister in his personal capacity, instruct the barrister in his capacity as a director, partner, member or employee of a company, firm or other body.
    - (ii) The instructing member warrants that he is authorised by the relevant company, firm or other body, as the case may be, to instruct the barrister.
  5.
    - (i) Unless the instructing member otherwise stipulates and the barrister agrees, the barrister will deal with instructions other than a brief as soon as he reasonably can in the ordinary course of his work.
    - (ii) Where for any reason time is of the essence the instructing member must, when he delivers his instructions, so inform the barrister or his clerk and of the particular reason for urgency in order that the barrister or his clerk may decide whether in those circumstances he can accept the instructions. That information must be communicated to the barrister or his clerk separately from the instructions themselves.
  6. Notwithstanding the instructions have been delivered to a barrister, the barrister shall not be deemed to have accepted those instructions until he has had a reasonable opportunity to peruse them and decide whether they are appropriate for Professional Direct Access.
  7. Without prejudice to any other right which a barrister may have in accordance with the Bar Code of Conduct to return his instructions, a barrister shall be entitled at his complete discretion, which he shall exercise in the interests of the lay client, at any time to require, as a condition of his continuing to act in the matter on which he is instructed, that a solicitor shall take over the instructions or that the services of a solicitor shall otherwise be retained to assist in the future conduct of that matter. In such an event the instructing member shall have the option of withdrawing his instructions to the barrister or of complying with the barrister's request.
  8.
    - (i) Unless otherwise agreed a barrister accepts a brief upon the understanding that he may be unavoidably prevented by a conflicting professional engagement from attending the case.
    - (ii) A barrister shall inform the instructing member immediately there is an appreciable risk that he may not be able to undertake a brief which he has accepted.
    - (iii) In the event that a barrister has to return a brief, he shall so far as practicable do so in sufficient time to enable another barrister to be engaged and to master the brief.

### THE BARRISTER'S FEES

9. It is the obligation of the instructing member, jointly with the company, firm or other body of which he is a director, partner, employee or member, to be responsible for the payment of the barrister's fees.
10.
  - (i) A barrister shall be entitled to require payment of his fee at the time of accepting instructions.
  - (ii) Otherwise the barrister's fees shall be paid promptly upon submission of a fee note.
11.
  - (i) Unless otherwise agreed, a fee note will be submitted at the conclusion of the matter on which the barrister is instructed.
  - (ii) If, however, that matter is protracted, an interim fee note or notes may be submitted at intervals of not less than two months.

12. A brief will only be accepted by a barrister after a fee has been agreed with the instructing member.
13. In the case of instructions other than a brief it is a matter for agreement between the instructing member and the barrister or his clerk whether the fee shall be agreed before the instructions are accepted or at any later date.

COPIES OF INSTRUCTIONS AND RECORDS OF ADVICE

14. A barrister shall be entitled for the purposes of his records to retain his instructions or any papers delivered therewith or, if the instructing professional should require the return of such instructions and papers, to take and retain a copy of such instructions or papers and of any written advice, and if so requested by the barrister it shall be the duty of the instructing member to supply him with and to permit him to retain for those purposes a copy of such instructions, papers or advices.
15. In any case where a barrister gives advice orally it shall be the duty of the instructing member to make a written record of that advice and submit it to the barrister for his approval as soon as is practicable and in any event by such date as the barrister may reasonably require.