

Re: Revised Draft Practice Directions
Relating to the Civil Justice Reform

Submission of the Hong Kong Bar Association

1. The Steering Committee on Civil Justice Reform (“Steering Committee”) seeks the views of the Hong Kong Bar Association (“HKBA”) on the revised draft practice directions relating to Civil Justice Reform (“Revised Draft PDs”).
2. The Revised Draft PDs include all draft practice directions put forward in the earlier consultation exercise as well as newly included Draft PD 5.7 (Long Cases) and Draft PD 16.1 (Settling Draft Orders and Judgments).
3. Where a particular Revised Draft PD is not referred to in this submission, it can be taken that the HKBA has no further comments on its contents.

PD 4.1: Civil Appeals to the Court of Appeal

4. Paragraph 10: The second sentence should read: “Accordingly, ... when serving the documents referred to in paragraphs 8 and 9 above, ...” following the addition of a comma immediately after the word “above”.
5. Paragraph 16: In line with paragraph 33(b) of the PD, it is suggested that the skeleton arguments in question “should not *normally* exceed 5 pages ...”.
6. Paragraph 32: The first sentence should read: “Skeleton arguments ... should be lodged ... no later than 14 days before the relevant appeal or application is listed *to be heard*.”

PD 5.6: Documents for Use at Trial

7. Paragraph 6: The HKBA wishes to clarify whether it is intended that the label be affixed on the inside cover. If so, the paragraph may be amended to: "... should also be labeled on the top *left-hand* corner of the inside cover."

PD 5.7: Long Cases

8. The HKBA suggests that a paragraph be added immediately after paragraph 2 to clarify at the very beginning the relationship between this PD and the PD for Case Management. This paragraph may indicate that in respect of long cases, the PD for Case Management applies subject to the provisions of PD 5.7 therein. This would mean that after the close of pleadings, the parties would still have to comply with the PD for Case Management while the consultation and application for assignment to a trial judge are underway. If this suggestion is accepted, then paragraph 4(i) and (j) could be modified and deleted respectively.
9. Paragraph 3(c): This paragraph can be clarified as it appears that the power of the Listing Judge under it may *only* be exercised in a case where the parties are in disagreement or one or more of the parties is unrepresented. In particular, it is not clear whether a party may apply to have a case assigned to a trial judge by reason of complexity or otherwise notwithstanding that it is not a case that is likely to last 15 days or longer. Otherwise the parties would be obliged to follow the PD for Case Management and await a decision of the master to refer the case to a Judge; see PD for Case Management, paragraph 28.
10. Paragraph 4(a): The last sentence should read: "From then on, any hearing *of a Case Management Summons, ...*".

11. Paragraph 4(b): The HKBA suggests that a more appropriate label be given to the “short Case Management Conference” so that the particular type and nature of the hearing can be identified. “Short” is a rather subjective expression. Rather, “Initial Case Management Conference” could be considered to denote the first Case Management Conference in a long case. If this paragraph is amended, subsequent paragraphs in the PD would require consequential amendments.
12. Paragraph 10: The amended PD should supersede the PD that became effective on “1 March 1998”.

PD 11.3: High Court and District Court Restricted Application and Restricted Proceedings Orders

13. The sub-heading (e)(i) should be amended to read “*Right of appeal against RAOs and RPOs*” by deleting the word “orders”.

PD 14.2: Proceedings before Masters

14. This PD refers to “master” in the lower case, except at paragraph 3, line 2; paragraph 5, line 1 and paragraph 12, line 2. The reference to “master” should be standardized.
15. Paragraph 10: The words “consolidates and” may be deleted.

PD 14.5: Application for Wasted Costs Order under Order 62 Rules 8, 8A, 8B and 8C

16. This PD cites rules of court with the upper case “R”, for example, Order 62 Rule 8A. Other PDs cite rules of court in the long form with the lower case “r”, such as Order 32 rule 11A. It is suggested that the citation used in this PD should follow other PDs.

17. The HKBA notes the revision of paragraph 24 to the effect that the submission at the first stage hearing should be “succinct” as opposed to “short and to the point”. The HKBA believes that the revision would provide room for a legal representative to seek to fully dispose of the application at the first stage by developing fully a case for immediate dismissal without going on to the second stage. On the other hand, it remains the HKBA’s concern that given the court’s discretion to proceed from the first stage to the final stage without an adjournment, the legal representative will have to attend the first stage hearing fully prepared to put the full case.

PD 16.1: Settling Draft Orders and Judgments

18. Paragraph 1 is added to require a draft order to be submitted for approval “as soon as practicable but in any case not later than 7 days after the pronouncement of the order”. The HKBA considers that if delay on the part of solicitors to submit draft orders for approval is a present problem the PD could explicitly refer to the duty of the solicitor to have the judgment or order drawn up. Further, to eliminate one excuse for delay (which may arise out of misleading commentary in *Hong Kong Civil Procedure 2009*, Vol 1, 42/5/4), the PD could refer to RHC O.42 r.5(5) and then identify the party who is required to draw up the order not later than 7 days, namely the party initiating the application.

PD 18.1: The Personal Injuries List

19. The citation of RHC in this PD should be standardized as the rules of court are cited on occasions with and on other occasions without a comma immediately after “RHC”. It is suggested that the rules of court be cited without the comma, namely “RHC O.62, r.8”.
20. The HKBA’s comments on the PD on Mediation applies equally to paragraph 4 of this PD.

21. Paragraphs 2.3 & 2.4: In respect of ADR, references should be made to Paragraphs. 4.1 to 4.21 (where parties are presented).
22. Paragraph 5.6: The last sentence should read: “The Solicitor has a duty to explain ... save for agreements entered into *with* the Legal Aid Department ...”.
23. Paragraph 7.1: At sub-paragraph (ii), in item (d) under the heading of “In Personal Injuries Cases”, a comma should be added immediately after the words “loss of earnings”. Further, there should be a line separating items (f) and (g).
24. Paragraph 8.2: The last line should read "(d) to (g)" instead of "(d) and (f)".
25. Paragraph 15.4: The HKBA suggests that in sub-paragraph (a), the words “or anticipated will not be met” be deleted as it seems these words add little meaning to the sentence. Further, the last sentence in the same sub-paragraph should read: “... without impinging on the trial date or the period in which *the trial* is to take place”.
26. Paragraph 17.3: The last part of the paragraph should read: “including an order under RHC O.62, r.8, 9(4)(b) or 9A to be payable forthwith”.
27. Paragraph 19.2: The second sentence should read: “...by telephone and by writing (preferably by fax) confirming *the* telephone communication ...”. The last sentence should be clarified as to what the solicitor should indicate if that is within his knowledge.
28. Paragraph 22.15: The words “paragraph 21.7 herein” should be substituted with “paragraph 22.7 herein” where they twice appear.

29. Paragraph 22.18: A full stop should be added at the end of the provision.
30. Paragraph 22.20: The HKBA suggests that the “*top left-hand corner*” of the inside cover of the bundle be labeled instead of the “*top right-hand corner*”.
31. Paragraph 23.8: The words “paragraph 22.5 herein” should be substituted with “paragraph 23.5 herein”.
32. Paragraph 23.9: The words “paragraph 22.8 herein” should be substituted with “paragraph 23.8 herein”.
33. Paragraph 24.7: The words “paragraphs 23.6(a) to 23.6(d) herein” should be substituted with “paragraphs 24.6(a) to 24.6(d) herein”.
34. Paragraph 25.1: The words “paragraph 23.6 herein” should be substituted with “paragraph 24.6 herein”.
35. Annex 4, Schedule B (Page 4 of Annex A): The HKBA suggests that a new item be added under “Industrial Accident Cases”, namely “3. Witness statements (see paragraph 8.1(h) of PD 18.1)”. The remaining paragraphs should then be re-numbered.

PD 24.1: Sealing of Writ of Summons, Newspaper Advertisements, Filing of Documents

36. Annex 1: The first paragraph should read: “Upon filing of an originating *process* the plaintiff or his legal representative ...”. Then in Section B, it appears that the item “Enforcement of non-HK judgment” appears twice. The second occurrence of the item between “Financial provision ...” and “Goods sold and delivered” should be deleted.

PD 27: Civil Proceedings in the District Court

37. The heading of paragraph 13 may be amended to “EX PARTE, INTERIM AND INTERLOCUTORY APPLICATIONS FOR *RELIEF (INCLUDING INJUNCTIVE RELIEF)*” for consistency.

PD on Case Management

38. Paragraph 1 should be amended to provide for the additional exception of long cases to which PD 5.7 applies.

PD on Costs

39. Paragraph 8 may be amended to add at the end the words “for the substantive application” so as to clarify that no skeleton argument is required for an application for summary assessment of costs.
40. The HKBA considers that it is desirable that the basis of assessment and methodology of assessment of summary assessment of costs be clarified. Would the usual basis of assessment (subject to an order for a different basis) remain party and party basis of assessment? Would the Court apply the “necessary and proper” test for each item and then consider whether the final figure is proportionate? Would costs that were necessarily and properly incurred be disallowed because the Court determines that the final figure is disproportionate to the sum at stake?
41. Paragraph 17(g): The last sentence should be amended to: “If another firm of solicitors’ costs are claimed in the same bill, there should be another *certificate signed by that solicitor* to the same effect.”
42. Paragraph 20: Where a bill has been served it is important to identify the particular bill or revision thereof and service relied upon. Issues of costs and interest may arise. Thus it is desirable to amend the last

sentence to: “It will be sufficient to make reference to that fact in the NOCT, *identifying the bill by date and the date of service.*”

43. Paragraph 27 should begin with: “*At all times ...*”.
44. Annex B: The headings for Stages 2 to 5 refer to “The day ... to ...”. It is desirable to add the word “inclusive” at the end of each heading so costs incurred on both of those days are included. The heading for Stage 3 should identify the “first Questionnaire” as the “first *Timetabling* Questionnaire”.

PD on Statements of Truth

45. RHC O.41 r.5 provides for the form of a statement of truth. This PD could address the matter of the language of a statement of truth. It should be in the language of the statement maker. If not, there should also be a signed interpretation clause. Cf, for example, the case of a witness statement in *Hong Kong Civil Procedure 2009*, Vol 1, 38/2A/8.

PD on Mediation

46. Paragraph 1: The second sentence should read: “The court has the duty ... by encouraging the parties to use an alternative *dispute* resolution procedure (ADR) ...”.
47. Given that the rules of court refer to ADR generally but this PD is mediation specific, it seems desirable to provide at paragraph 5(b) that there would not be an “*unreasonable failure to engage in mediation*” exposing a party to adverse costs consequences if the party engaged in some other form of ADR. This can be done by adding at the end this sentence: “Engaging some other form of ADR to resolve or settle the dispute may also be a reasonable explanation.”

48. There should be a requirement that if the Mediation Certificate is not in the language of the party signing it, then there should also be on the certificate a signed interpretation clause. This requirement may be added at paragraph 9 or as a footnote to the specimen form in Annex B of this PD.

49. It is suggested that for the avoidance of doubt, it should be stated that: “The Mediation Certificate, the Mediation Notice and Response and the Mediation Minute are admissible materials on the issue of costs.”

Hong Kong Bar Association
23 December 2008