

法官行為指引

Guide to Judicial Conduct

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The Judiciary of the Hong Kong Special Administrative Region
of the People's Republic of China

Guide to Judicial Conduct

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PREFACE

1. Under the Basic Law, the Hong Kong Judiciary is an independent judiciary that upholds the rule of law and administers justice without fear or favour, bias or prejudice. Judges and judicial officers are chosen on the basis of their judicial and professional qualities. We hold positions of trust and responsibility with regard to the cases and other judicial work that we handle. We owe it as much to ourselves as to the public to observe at all times the highest standards of judicial conduct.

2. Recognising the importance of judicial conduct to the maintenance of the independence and integrity of the Judiciary as well as to the public's confidence in the Judiciary and the due administration of justice, the Chief Justice of the Court of Final Appeal, Mr Andrew Li Kwok-nang, initiated the development of the Guide to Judicial Conduct ("the Guide") in September 2002. The relevant Working Party was chaired by the Chief Judge of the High Court, Mr Justice Geoffrey Ma Tao-li (as Chief Justice Ma then was). The Guide was published in 2004, and has been in effect ever since.

3. At the time the Guide to Judicial Conduct was first published, the topic of judicial ethics, or judicial conduct, was still in its early stages. Whilst the Guide was being developed in Hong Kong, the United Nations Office on Drugs and Crime was in the process of developing the Bangalore Principles on Judicial Conduct ("Bangalore Principles"). Similar exercises were also taking place in other jurisdictions. Following the adoption of the Bangalore Principles in 2006, a commentary ("Commentary") was developed in 2007 to provide more detailed guidance on the implementation of the Bangalore Principles. The Commentary drew upon judicial conduct material from many different jurisdictions – in particular, Hong Kong's Guide to Judicial Conduct was specially mentioned.

4. In the years since the Guide was published, the topic of judicial conduct has seen much growth and development. Given the increasingly complex conditions in which judging takes place, and the increased public

interest in the performance of judicial duties, the time has come to review the Guide.

5. The Judiciary is indebted to the Working Party, consisting of the Chief Judge of the High Court, Mr Justice Jeremy Poon Shiu-chor; Justice of Appeal of the Court of Appeal of the High Court, Mr Justice Thomas Au Hing-cheung; Justice of Appeal of the Court of Appeal of the High Court, Mr Justice Godfrey Lam Wan-ho; the Chief District Judge, His Honour Judge Justin Ko King-sau; and the Chief Magistrate, Mr So Wai-tak, for their work in carrying out this review. The members of the Working Party represent not only the different levels of court, but much judicial experience as well. In reviewing the provisions of the Guide, the Working Party drew reference to the Bangalore Principles and Commentary, as well as material from major common law jurisdictions overseas.

6. The resulting revisions to the Guide are very much a product of the times. We continue to be well served by the Guiding Principles laid down in 2004, but new additions to the guidance in this edition are reflective of the information technology era in which we live. The need to respect privacy by avoiding unnecessary publication of personal details is now explicitly provided for, as well as entirely new material on social media and doxxing. The guidance on recusal and apparent bias has also been updated with reference to recent case law in this area.

7. I am confident that this new edition of the Guide will continue to assist judges and judicial officers to maintain the highest standards of judicial conduct, and give the public a better understanding of our judicial work and the uncompromised standards we set for ourselves.

Andrew Cheung
Chief Justice
May 2022

GUIDE TO JUDICIAL CONDUCT

PART A : PURPOSE OF THE GUIDE

1. An independent Judiciary, upholding the rule of law and safeguarding the rights and freedoms of the individual, is a cornerstone of Hong Kong's society. Judges¹ are entrusted by the community with the exercise of independent judicial power; and liberty, property and reputation are at stake in the decisions they make when adjudicating cases between citizens and between citizen and government.
2. In order to maintain public confidence in the Judiciary and the administration of justice, it is of fundamental importance that judges observe the highest standards of conduct. Judges must do their utmost to uphold the independence and impartiality of the Judiciary and to maintain the dignity and standing of the judicial office. The community has a right to have the highest expectations of the Judiciary and judges.
3. These duties are buttressed by the judicial oath taken by judges upon assumption of office in accordance with Article 104 of the Basic Law and section 17 of the Oaths and Declarations Ordinance, Cap. 11 in the following terms:

“I swear that, in the Office of a Judge/a judicial officer of the Judiciary of the Hong Kong Special Administrative Region of the People's Republic of China, I will uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, bear allegiance to the Hong Kong

Notes

¹ The reference to “judges” in this Guide includes judicial officers.

Special Administrative Region of the People's Republic of China, serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit.”

4. In the exercise of judicial power, it is the duty of judges strictly to apply the law and not to be influenced by or to appear to be influenced by any extraneous factors such as political considerations of whatever nature.
5. Public acceptance of and support for the exercise of judicial functions depends upon public confidence in the Judiciary as a whole. An instance of misconduct of one judge may irreparably damage the moral authority of the court generally. A judge must consider it his or her duty not only to observe high standards of conduct but also to play a part in collectively upholding the standing of the Judiciary.
6. Judges are of course part of the community which they serve. Maintaining the highest standards of conduct does not mean that judges should be divorced from society, living a “monastic” life on its fringes. In the modern world, a perception that judges are remote and out of touch with their community would not inspire and may undermine public confidence in the Judiciary and the administration of justice.
7. The purpose of this Guide is to provide practical assistance to judges in dealing with matters relating to judicial conduct. Such matters may arise in many varied situations involving different circumstances requiring judges to decide on the proper course of action. This Guide obviously cannot be comprehensive. Its aim is to provide practical guidance for judges. It does not attempt to define judicial misconduct.
8. In situations of difficulty, different views might quite reasonably be taken as to the appropriate course of action. In such situations, judges may find it helpful to discuss the matter with colleagues. If

in any doubt, it is recommended that judges should consult their Court Leaders and the Chief Justice, as Head of the Judiciary, may be consulted as appropriate. (Reference in this Guide to the Court Leader is to the Court Leader of the court where the judge concerned is sitting.)

9. Ultimately, the responsibility for deciding on the appropriate course of action in each case rests with the judge concerned. In matters concerning judicial conduct, it is important that judges exercise a high degree of alertness. Caution and commonsense are the surest guides. At the end of the day, the decision made must rest comfortably with the judicial conscience.
10. Guides similar to the present are a common feature of a number of common law jurisdictions. Inevitably it may contain propositions as to proper judicial conduct that are self-evident and of course judges are and have been alive to them.
11. It should be noted that this Guide does not extend to matters arising from the conditions of service of a judge (for example, as to when permission for outside work is required) or matters governed by law (for example, the Prevention of Bribery Ordinance, Cap. 201 and the Acceptance of Advantages (Chief Executive's Permission) Notice issued thereunder). This Guide does not affect the obligations of judges under their conditions of service or under the law.
12. This Guide will first discuss the Guiding Principles (Part B). It will then deal with various areas of judicial conduct: Discharge of judicial duties (Part C); Matters concerning disqualification (Part D); Professional activities outside court (Part E); and Non-judicial activities (Part F).
13. It may be appropriate to revise or supplement this Guide from time to time.

PART B : GUIDING PRINCIPLES

14. Three guiding principles are relevant to any consideration of judicial conduct. First, a judge must be independent. Secondly, a judge must be impartial. Thirdly, a judge must display integrity and propriety in all matters of conduct, both in and out of court.

Independence

15. Judicial independence is constitutionally guaranteed by the Basic Law which contains safeguards for its protection. Article 85 provides that the courts of Hong Kong shall exercise judicial power independently, free from any interference, and that judges shall be immune from legal action in the performance of their judicial functions.
16. Judicial independence is of course not conferred as a privilege enjoyed by judges. It imposes a responsibility on judges and is essential to enable them to perform their constitutional duty of adjudicating disputes impartially without fear or favour. Judicial independence is a fundamental guarantee of a fair trial and a fundamental safeguard of the rights and freedoms of Hong Kong residents. It is a prerequisite to the rule of law. Judges must ensure that their conduct, both in and out of court, does not undermine judicial independence or give the appearance of doing so.
17. The Judiciary must be and must be seen to be independent of the executive and legislative branches of government. The relationship between the Judiciary and the executive and legislative arms of government should be one of mutual respect, each recognising and respecting the proper role of the others. The responsibility for dealing with the other branches of government on behalf of the Judiciary rests with the Chief Justice.

18. Judges must be aware that threats to their judicial independence may take the form of subtle attempts to influence how they should approach certain cases or to curry favour with them in some way. Judges must reject any extraneous attempt, direct or indirect, to influence them, by any means. If appropriate, any such attempt should be reported to the Court Leader who can consider any necessary action. In reaching their decisions, judges should be influenced solely by the matters properly before them in the case.
19. Cases will arise that have excited public controversy with extensive media publicity. Sometimes the weight of the publicity may tend considerably towards one desired result. However, in the exercise of the judicial function, the judge must be immune from the effects of such publicity. Judicial independence encompasses independence from all forms of outside influence. Judges should act fearlessly, irrespective of popular acclaim or criticism.
20. Judicial independence involves not only the independence of the Judiciary as an institution from the other branches of government. It also involves judges being independent from each other. A judge may sometimes find it helpful to “pick the brain” of colleagues. But it must be remembered that judicial decision-making is the responsibility of the individual judge, including each judge sitting in a collegiate appellate court.

Impartiality

21. Impartiality is the fundamental quality required of a judge. Judges should conduct themselves in and out of court in a way that maintains confidence in their impartiality and that of the Judiciary.
22. Justice must be done and must be seen to be done. Impartiality must exist both as a matter of fact and as a matter of reasonable perception. If partiality is reasonably perceived, that perception is likely to leave a sense of grievance and of injustice having been done, which is destructive of confidence in judicial decisions.

23. The perception of impartiality is measured by the standard of a reasonable, fair-minded and well-informed person, as discussed more fully in relation to questions of apparent bias.
24. A perception that a judge is not impartial may arise in a number of ways, for instance, by a perceived conflict of interest, bias or adoption of or association with a political cause or view, by the judge's behaviour on the bench, or by the judge's out-of-court associations and activities.

Integrity and Propriety

25. The conduct of judges is subject to public scrutiny. Judges should conduct themselves, both in and out of court, in a way that maintains the standing and dignity of the judicial office.
26. Judges enjoy the rights and freedoms of citizens generally. However, it must be recognised and accepted that there are proper constraints on a judge's activities imposed by the judicial office.
27. A judge must attempt to strike the right balance. The guide is for the judge to consider whether in the eyes of a reasonable, fair-minded and well-informed member of the community, the proposed conduct would be likely to call his or her integrity into question or to diminish respect for him or her as a judge. If so, the proposed course of conduct should be avoided.
28. It goes without saying that judges must have scrupulous respect for the law and its observance. What in others may be seen as a relatively minor transgression may well attract publicity, bringing the judge into disrepute, and raising questions regarding the integrity of the judge and the Judiciary.

PART C : THE DISCHARGE OF JUDICIAL DUTIES

Diligence

29. Judges should be diligent in the performance of their judicial duties. They should endeavour to be punctual and to perform their judicial duties with reasonable promptness.

Behaviour in court

30. Judges should conduct themselves with courtesy to all and require similar courtesy from those who appear before them. Unjustified reprimands of counsel, offensive remarks about litigants or witnesses and intemperate behaviour by a judge may undermine the perception of impartiality.
31. All who appear in court, legal practitioners, litigants and witnesses, are entitled to be dealt with in a way that respects their dignity. Judges must ensure that all who appear in court are protected from any display of prejudice based on racial, cultural, political, gender, religious or other discriminatory grounds.
32. Judges should at the same time be firm in maintaining the proper conduct of the proceedings and preventing unnecessary wastage of court time and resources. A judge may have to intervene but should ensure that impartiality and the perception of impartiality are not adversely affected by the manner of intervention.
33. Judges have the responsibility to regulate court proceedings and manage any unruly behaviour in the court room or premises which may interfere with the administration of justice, bearing in mind the overarching principle of due administration of justice, and other relevant considerations including the seriousness of the behaviour

and the proportionality of the measures to be adopted to deal with such behaviour.

Comments on persons

34. Care should be taken to avoid unnecessary criticism in the exercise of the judicial function. This includes being conscious of the harm that may be done to a person criticised in public judicial remarks, whether orally in court or in written decisions (especially where that person has not had the chance of being heard), and taking care to ensure that any criticism actually made is relevant, necessary, justified and tempered with caution and restraint.
35. Derogatory or discriminatory remarks based on racial, cultural, political, gender, religious or other impermissible grounds must be avoided.
36. The legitimate privacy interests of litigants and third parties should also be borne in mind. Special care should be taken to avoid unnecessary publication of a person's full address, email address, telephone number, ID card number, bank account numbers and similar information.

Confidentiality

37. In the course of performing judicial functions, a judge may acquire information that is not available to the public. The judge must not reveal or use such information for personal gain or for any purpose not related to judicial duties.

Communications concerning a case

38. There should be no communication concerning a case between the judge and any of the parties in the absence of the others unless the consent of those absent has been obtained. The principle of impartiality generally prohibits private communications between the judge and any of the parties, their legal representatives, witnesses or jurors. If the court receives such a private communication, it is important for it to ensure that the other parties concerned are fully and promptly informed.

Correction of oral judgments and jury summations

39. A judge may not alter the substance of reasons for a decision given orally. The correction of slips, poor expression, grammar or syntax and the inclusion of citations omitted at the time of delivery of oral judgments are acceptable.
40. The transcript of a summing up to a jury is, like a transcript of evidence, a true record of what was said in court. The transcript of a summing up should not be altered in any way unless it does not correctly record what the judge actually said.

Reserved judgments

41. Subject to any legal requirements or relevant Practice Directions, a judge should deliver reserved judgments within a reasonable time, taking into account the complexity of the matter and other work commitments. If a judge is in difficulty in completing a reserved judgment within a reasonable time, it is the responsibility of the judge to raise the matter with the Court Leader so that arrangements for making time available to complete the judgment can be considered.

Communication with appellate courts

42. A judge should not communicate privately with an appellate court or appellate judge in respect of any pending appeal from that judge's determination.

Letters of complaint

43. From time to time, after the conclusion of a case, judges may receive letters or other forms of communication from disappointed litigants and others, criticising their decisions or decisions made by their colleagues. A judge should not enter into contentious correspondence with the authors of such communications. If in doubt whether a response is required, or if their receipt becomes oppressive, or if they are of a threatening nature, the matter should be reported to the Court Leader who may take such steps as are appropriate.

Media criticism

44. There may be media criticism of a decision or criticism mounted by interested members of the public. A judge should refrain from answering such criticism, for example, by writing to the press or making incidental comments about such criticism when sitting on the bench. Judges should speak only through their judgments in dealing with the case being decided. It is generally inappropriate for judges to defend their judgments publicly.
45. If there is media misreporting of court proceedings or a judgment and a judge considers that the error should be corrected, the judge should consult the Court Leader and the Judiciary may issue a press release to state the factual position or take steps for an appropriate correction to be made.

PART D : MATTERS CONCERNING DISQUALIFICATION

46. The duty of judges is to hear and determine cases listed before them. However, occasions may arise when the fundamental principle requiring the court to be, and to be seen to be, impartial may operate to disqualify a judge from sitting.
47. Three classes of cases calling for disqualification have been dealt with in the case-law:
- (a) where there is actual bias;
 - (b) where bias is presumed and disqualification is automatic; and
 - (c) where the circumstances give rise to apparent bias.
48. This continues to be a developing area of the law. Accordingly, while this Part seeks to distil the applicable principles, judges should be alert to possible developments.

Actual bias

49. Where a judge is affected by actual bias, disqualification must follow. Cases of actual bias are very rare².

Notes

² *Locabail Ltd v Bayfield Properties (“Locabail”)* [2000] QB 451 at 471G-472B; *Chau Siu Woon & another v Cheung Shek Kong & others* [2010] 3 HKLRD 49 (CA), at [10].

Presumed bias : automatic disqualification

50. The Australian position differs from that in England and Wales in this context. The Australian High Court³ has held that there is no rule of automatic disqualification and subsumes all relevant cases under the general rule concerning apparent bias discussed below. The House of Lords has, on the other hand, not only confirmed the rule's existence, but extended it, as indicated below. Although the Court of Final Appeal has not yet had occasion to rule on the approach to be adopted in Hong Kong, the Court of Appeal has proceeded on the basis that the rule applies in Hong Kong⁴.
51. Bias is presumed and the judge is automatically disqualified where the judge has a pecuniary or proprietary interest in the outcome of the case⁵.
- (a) This may be so, for example, where the judge has a substantial shareholding in one of the parties and the outcome of the case might be such as could realistically affect the judge's interest⁶.
- (b) Where a publicly listed company is a party and the judge holds a relatively small part of its total shareholding, the automatic disqualification rule would usually not apply since the outcome of the case would usually not affect the judge's interest⁷. But it may be different where the litigation involves the viability and survival of the company itself in which case,

Notes

³ *Ebner v Official Trustee ("Ebner")* (2000) 205 CLR 337 at 350, 356, 358.

⁴ *Chong Yu On v Court of Final Appeal* (莊裕安 v 終審法院) [2020] HKCA 970, paras 57-64.

⁵ *Locabail* at 472B-473G; *R v Bow Street Magistrate, Ex parte Pinochet (No.2)* ("*Pinochet No.2*") [2000] 1 AC 119 at 132H.

⁶ *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Cas.759 at 793-4; *Pinochet No.2* at 133B-G; *Locabail* at 472B-473E.

⁷ *Locabail* at 473B.

depending on the circumstances, the outcome may be regarded as realistically affecting the judge's interest.

52. The automatic disqualification rule has been extended by the House of Lords to cover a limited class of non-financial interests, namely, where the judge's decision would lead to the promotion of a cause in which he is involved in promoting together with one of the parties. So a judge was held to be automatically disqualified where he was a director of a company which, although not a party in the case, was controlled by a party and carrying on associated work in promoting the same causes⁸.
53. The automatic disqualification rule is limited in scope. It has been observed that any extension is undesirable unless regarded as plainly required⁹.

Apparent bias

54. In practice, questions of disqualification are most likely to arise in relation to suggestions of apparent bias.

The apparent bias test

55. The apparent bias test may be stated as follows:

A particular judge is disqualified from sitting if the circumstances are such as would lead a reasonable, fair-minded and well-informed observer to conclude that there is a real possibility that the judge would be biased.

Notes

⁸ *Pinochet No.2* at 135B-F.

⁹ *Locabail* at 474H-475B.

56. While this test has sometimes been formulated with slightly different wording so that, for instance, in some of the frequently cited passages in the leading English cases¹⁰, the word “reasonable” has sometimes been left out, it is clear on analysis that the test set out above is the operative test. It is the test for apparent bias adopted in Scotland, Australia, South Africa and in the European Court of Human Rights¹¹. It is also applied in New Zealand¹² and Canada¹³. After the English courts had made what was described as “a modest adjustment of the test”¹⁴ previously adopted¹⁵, it is now also in substance the test applied in England and Wales. It has been applied in Hong Kong by the Court of Final Appeal¹⁶.
57. The fair-minded and informed observer is neither complacent nor unduly sensitive or suspicious. He would have access to such information as may be necessary for an informed member of the public without any particular specialised knowledge or experience to make a dispassionate judgment. He is to be taken to appreciate that a judge has the requisite professional training and experience to differentiate between a litigant and the issues that call for determination in a particular situation, and understand that the judge has sworn an oath to do justice and will generally try to live up to the

Notes

- ¹⁰ *Locabail; Re Medicaments and Related Classes of Goods (No.2)* (“*Medicaments*”) [2001] 1 WLR 700; *Porter v Magill* (“*Porter*”) [2002] 2 AC 357 and *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48.
- ¹¹ See references cited in *Locabail* at 476G, para 17 and in *Porter* at 493, para 100.
- ¹² See the cases cited in *Webb v The Queen* (1994) 181 CLR 41 at 48-49; *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72; and *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* (No 2) [2009] NZSC 122.
- ¹³ See e.g. *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)* [1992] 89 DLR (4th) 289; 1 SCR 623; and *R v Curragh Inc* [1997] 144 DLR (4th) 614; 1 S.C.R. 537.
- ¹⁴ *Medicaments* at 726, para 85 and *Porter* at 494, para 103.
- ¹⁵ In *R v Gough* [1993] AC 646 at 670.
- ¹⁶ *HKSAR v Md Emran Hossain* (2016) 19 HKCFAR 679, para 36, citing *Deacons v White & Case LLP* (2003) 6 HKCFAR 322, para 21; see also *Falcon Private Bank Ltd v Borry Bernard Edouard Charles Ltd & another* (2014) 17 HKCFAR 281.

high standard which it imposes. But he is not an insider in the judicial system and his objectivity should not be compromised by being drawn too deeply into a familiarity with the system as that would make him too ready to overlook an appearance of bias¹⁷.

Applying the test

58. Consideration only needs to be given to the question of disqualification if the circumstances present a real possibility that the apparent bias rule may apply. Judges should not yield to tenuous, trivial or frivolous grounds and should not accede too readily to suggestions of apparent bias. If they do, this would place a burden on a judge's colleagues and may encourage parties to believe that by seeking disqualification, they may be able to have their case transferred from a judge whom for one reason or another they may wish to avoid¹⁸.
59. Where the circumstances do raise a question of apparent bias, a judge may wish to consult colleagues and the Court Leader for their views, and should do so when in doubt. However, it is the ultimate responsibility of the judge to decide for himself or herself whether disqualification is required. That decision is made applying the apparent bias test. The judge must consider the position objectively from the viewpoint of the reasonable, fair-minded and well-informed individual and ask whether such individual would conclude that there is a real possibility that the judge would be biased if he or she were to proceed to hear the case.

Notes

¹⁷ *The Belize Bank Ltd v The Attorney General of Belize* [2011] UKPC 36 at paras 36 to 39; *Gilles v Secretary of State for Work and Pensions (Scotland)* [2006] UKHL 2; *Chong Yu On v Court of Final Appeal (莊裕安 v 終審法院)* [2020] HKCA 970, para 60; *Falcon Private Bank Ltd v Borry Bernard Edouard Charles Ltd & another* [2014] 3 HKLRD 375, para 54; *HKSAR v Md Emran Hossain* (2016) 19 HKCFAR 679, para 42.

¹⁸ *Locabail* at 479A-480A; *Ebner* at 348 (para 20).

Disclosure to the parties prior to commencement of the hearing

60. Three situations may arise:
- (a) Where, having taken into account all known material circumstances and applied the apparent bias test, the judge is satisfied that disqualification is not required, no disclosure to the parties is required. The judge should proceed to hear the case. If, however, someone objects, that objection should obviously be heard and resolved with an open mind.
 - (b) Conversely, where, having applied the apparent bias test, the judge is satisfied that disqualification is necessary, steps should immediately be taken to inform the Court Leader so as to have the case re-assigned to a different judge. Again, no disclosure is required and the case will simply proceed before the replacement judge.
 - (c) Where a judge wishes to have the assistance of submissions from the parties, whether on the facts or the law, before deciding whether disqualification is required, disclosure of the relevant circumstances should be made to the parties, inviting them to make any submissions desired in the light of such circumstances. Having heard such submissions, the judge should decide whether to proceed applying the apparent bias test.
61. Such questions should be dealt with at as early a stage as possible before the hearing to obviate the inconvenience of an adjournment.

Disclosure after commencement of the hearing

62. There are times when a question of apparent bias may arise for the first time after the hearing has begun. For instance, a witness with whom the judge has a potentially relevant relationship may be unexpectedly called; or the judge may discover that someone

relevant owns a company which is a named party to the litigation, and so forth.

63. Where this occurs, the abovementioned approach to pre-hearing apparent bias questions should equally be adopted in the first and third situations discussed: where satisfied that the test does not require disqualification, no disclosure is required; and where assistance of the parties' submissions is desired, disclosure should be made for that purpose.
64. The approach to the second situation discussed is different. If, applying the test, disqualification is considered necessary (a conclusion that should not lightly be reached given its implications in terms of expense and disruption), the judge must inform the parties of his decision, disclosing its basis. In this context, questions of waiver may require consideration, but, as discussed below, care must be taken to avoid any impression of pressurising the parties to consent to the judge hearing the matter.

Some practical illustrations

65. Questions of apparent bias may arise in an infinite variety of situations¹⁹. In each case, the judge must resolve them applying the apparent bias test, taking all material facts into account. Some practical illustrations are considered below.

Notes

¹⁹ *Locabail* at 480 where a number of situations were referred to and commented on.

Relationships

66. Litigant or witness: Applying the test, it would appear inevitable that a judge should disqualify himself or herself where the relationship between the judge and the litigant or a material witness²⁰ is one of: (i) spouse (or domestic partner) or (ii) close relative, which in this context refers to a parent, brother or sister, child or son-in-law or daughter-in-law.
67. Counsel²¹ or solicitor-advocate in the case: Similarly, the test would appear to necessitate disqualification where a judge has one of the abovementioned relationships with counsel or a solicitor appearing as advocate in the case.
68. Apart from the solicitor-advocate, the position in relation to solicitors is less clear-cut. Solicitors may play large or small roles in relation to a piece of litigation, ranging from a small, temporary, behind-the-scenes involvement to a primary role as instructing solicitor, as the main correspondent in letters to the other parties or as the main adviser to the client in the litigation. Applying the test, disqualification may well be necessary where a solicitor having a relevant relationship with the judge, is or has been playing a major role in the proceedings. Conversely, the test may permit a minor, transient or unimportant role in the litigation to be safely ignored.
69. Friendships, including a close friendship or a past professional association with counsel or solicitor in the case, such as former pupils, members of the same chambers or partners in the same firm, usually would not require disqualification.

Notes

²⁰ In this context, a material witness includes both a witness of disputed fact and an expert witness whose evidence is challenged, but not a witness giving formal or undisputed evidence.

²¹ Counsel in the case refers to counsel appearing in the case, whether senior or junior counsel and whether appearing alone or together with other counsel.

70. It is in each case a question of conscientiously applying the test to the particular facts. For example, the fiancée of a judge, may well be regarded as in a position similar to that of a judge's spouse; as may also be the case regarding individuals having an intimate personal relationship of a less formal nature with the judge²². On the other hand, different considerations are likely to apply, for example, to a distant relative.

Financial interests

71. The automatic disqualification rule has already been discussed. It requires disqualification of a judge having a pecuniary or proprietary interest in the outcome of the case or who is involved in a shared cause with one of the parties. Situations may however arise where the automatic disqualification rule is not engaged but where deciding the case heard may nevertheless be seen to have financial implications for the judge in question. In such cases, the apparent bias test must be employed to decide whether the judge should sit.
72. A few examples of this latter situation may assist:
- (a) A judge owns a mortgaged flat and, with falling interest rates, has made an application to the mortgagee bank to refinance the loan at a lower interest rate. If, while the application is pending, the same bank were to come before the judge seeking, say, to recover a loan made to some other customer, there is no question of the automatic disqualification rule applying since the judge is not interested in the outcome of the bank's action against that other customer. Nonetheless, because of the judge's pending application to the plaintiff bank regarding his mortgage interest rate, the apparent bias test would have to be applied.

Notes

²² See *Komal Patel & others v Chris Au & others* [2016] 1 HKLRD 328 for an example where an objection was made (unsuccessfully) based on the personal and professional relationship between the judge's brother and a plaintiff and that plaintiff's brother.

- (b) To vary the above example, the bank's action against the other customer comes before the judge when his son or daughter has just applied for employment by that bank. Again, automatic disqualification is not required but the apparent bias test would have to be applied.
 - (c) A judge has a pending claim against an insurance company arising out of say, theft of the judge's car. If that insurance company is a party in a case listed before the judge, automatic disqualification is similarly not required but the apparent bias test would have to be applied.
73. These examples illustrate the point that the apparent bias test may be applicable in a case with possible financial implications for the judge where the automatic disqualification rule is not engaged. Whether the judge applying the test would rule in favour of disqualification in the examples just given would depend on all the circumstances.
74. One would generally expect the apparent bias rule not to require disqualification where a judge is merely involved as a customer, dealing in the ordinary course of business with a bank, insurance company, credit card company, mutual fund or unit trust, or the like, which happens to be a party in a case, without there being pending any dispute or special transaction involving the judge.
75. In cases involving financial implications which are highly contingent and remote at the time of the decision, one would expect application of the test generally not to result in disqualification.

Other situations

76. Where a judge has, before appointment, acted as a lawyer for or against a person, one would expect that this, by itself, would usually not result in disqualification. Nor will the fact that a judge has, before appointment, publicly expressed views regarding an issue which he or she is now required to determine necessarily a ground

for recusal²³. But everything depends on the particular circumstances.

77. Similarly, where a judge in a previous case has held against a person, whether as a witness or a litigant, this by itself would usually not be expected to result in disqualification. But the circumstances may be such that the question of disqualification has to be considered. For example, this may arise if the credibility of that person is in issue and the judge had in a previous case rejected his or her evidence in such strong terms as to throw doubt on the judge's ability to approach such person's evidence in the current case impartially. Likewise, where a judge has in earlier stages of a case made intemperate remarks or expressed views which may call into question the judge's ability to deal further with the case impartially, the apparent bias test may need to be considered²⁴.
78. Disqualifying bias is not established merely by pointing to tension or even hostility between the judge and the lawyer for a party, but exceptionally it may happen that a judge has so seriously and conclusively criticised an advocate's professional integrity, such as by finding that the advocate had deliberately misled the court, that a fair-minded and informed observer would conclude there was a real possibility that the judge's mind would not be open to persuasion by that advocate²⁵.
79. Where a judge has made a formal complaint concerning the conduct of a party, it may give rise to a ground for recusal, but again it depends on the particular circumstances²⁶.

Notes

²³ See, for example, *ZN v Secretary for Justice & others* [2016] 1 HKLRD 174.

²⁴ *HKSAR v Cheung Chun Yuen Barry* [2019] HKDC 889; *MJN v TMN* [2019] HKFC 283; *S v L* (CACV 205/2007, 12 October 2007); *Incorporated Owners of Finance Building v Bright Hill Management Consultants Co Ltd* [2010] 3 HKLRD 1.

²⁵ *Falcon Private Bank Ltd v Borry Bernard Edouard Charles Ltd & another* [2014] 3 HKLRD 375 and (2014) 17 HKCFAR 281.

²⁶ *HKSAR v Mark Sutherland* [2015] 4 HKLRD 129.

80. Knowledge of the contents of privileged materials such as without prejudice correspondence or a sanctioned payment, or prejudicial materials from extraneous sources, does not automatically disqualify a judge, but may be a ground for recusal if (i) the judge subjectively considers that he or she is disabled from fairly continuing with the case; or (ii) applying the apparent bias test, there is a perception of a real possibility of unfairness. Judges need to bear in mind the considerable delay and costs implications that recusal may entail and should not be too ready to reach this conclusion²⁷.

Waiver in presumed bias and apparent bias situations

81. In a situation where bias is presumed and the automatic disqualification rule applies²⁸ and in a situation where there may be apparent bias²⁹, a party may waive his right to object. Any waiver must be clear and unequivocal and made with full knowledge of all relevant facts. However, although a party may waive his right to object, it would be undesirable for a judge to give any impression of exerting any pressure on the parties to consent to the judge hearing the matter as this would put the parties in an invidious position. Further, even if there is a waiver, it is ultimately for the judge to decide whether to sit.

Necessity

82. The law recognises a doctrine of necessity in this area. In other words, the situation could arise where, notwithstanding the judge's conclusion in favour of disqualification, whether because of

Notes

²⁷ *Tang Yau Keung v Tang Choi Yau (鄧有強 v 鄧才有)* [2014] 2 HKLRD 940; *Lai Yiu Mun Susanna v Tsang Kai Choy Paul & others* [2019] 2 HKLRD 359.

²⁸ *Locabail* at 475C; *Pinochet No.2* at 136H.

²⁹ *Locabail* at 481A-B.

presumed bias and the application of the automatic disqualification rule or because of apparent bias, the judge should nevertheless sit. However, such cases would only rarely arise and the scope of that doctrine is debateable³⁰.

Notes

³⁰ *Ebner* at 359 (para 64) for the majority view on the scope of the doctrine of necessity. Cf. a narrower view at 368 (paras 101-3) per Gaudron J. See *DR. X v Education and Accreditation Committee, Medical Council of Hong Kong* [2013] 1 HKLRD 167; *Chong Yu On v Court of Final Appeal (莊裕安 v 終審法院)* [2020] HKCA 970.

PART E : PROFESSIONAL ACTIVITIES OUTSIDE COURT

83. The contents of this Part do not affect judges' obligations to seek permission for outside work as required by their conditions of service or under the version of the Acceptance of Advantages (Chief Executive's Permission) Notice currently in force, given under section 3 of the Prevention of Bribery Ordinance, Cap. 201.
84. There is no objection to judges contributing to legal and professional education such as by delivering lectures, teaching, participating in conferences and seminars, judging moots and acting as honorary examiners. Nor is there any objection to judges contributing to legal texts as authors, writers of forewords, editors and the like. On the contrary, such professional activities by judges are in the public interest and are to be encouraged. Judges should however be wary and consult the Court Leader where the circumstances may cause concern. For example:
- (a) Judges should be wary of allowing themselves to appear to be associated with others, such as organisers of conferences or authors of books, if such association is likely to be controversial.
 - (b) Judges should avoid expressing views extra-judicially on controversial issues. They should likewise avoid taking part in activities such as conferences which by reason of the identity of the organisers or otherwise have the appearance of promoting certain controversial causes or policies.
 - (c) Where judges are invited to give lectures or seminars to a small exclusive audience or at the request of commercial organisers who seek to profit from the event, they should be wary of any perception of favouritism.
 - (d) Where a judge is invited to write a foreword or contribute to a book, he or she should take care that the publication is not

of such a low quality as to reflect adversely on the judgment of the judge.

Judges should be mindful of the effect of these activities on public confidence in the independence, impartiality and integrity of themselves and of the Judiciary generally.

85. Judges should of course ensure that such professional activities do not interfere with the discharge of their judicial duties. They should ordinarily consult the Court Leader before committing to attend conferences and seminars during working time.
86. A judge should avoid expressing views on controversial legal issues which are likely to come before the courts in a way which may impair the judge's ability to sit.
87. Judges should avoid expressing views to the media, even on an anonymous basis. Media enquiries should be directed to the Court Leader who will generally refer them to the Judiciary's Press and Public Relations Office for follow up action.

PART F : NON-JUDICIAL ACTIVITIES

88. In the area of non-judicial activities, the appropriate guide for judges is to consider whether a reasonable, fair-minded and well-informed member of the community would consider that the conduct in question would be likely to undermine judicial independence or impartiality or to affect the dignity and standing of the judicial office. If so, the conduct should be avoided. The following are some of the more common situations. They are of course not exhaustive.

Political organisations or activities

89. Judges should refrain from membership in or association with or making contributions to political organisations or activities. For example, a judge should refrain from attendance at political gatherings or demonstrations. Judges should also refrain from making public statements or petitions, whether or not jointly with others, on matters of a political or controversial nature. But a judge is of course free to exercise his or her electoral rights.
90. Where a close member of a judge's family is politically active, the judge should bear in mind that in some cases, the question of disqualification may arise for consideration as concerns may exist as to the perception of the judge's impartiality.

Social media

91. Judges' use of social media in their private activities is a matter of personal choice and not objectionable. On the contrary, the lack of a basic knowledge of social media might suggest a judge is out of touch with modern world. But a judge should be aware of the attendant risks with the use of social media, and should act with care in light of these risks. Information posted through social media may

be instantly seen by a very large number of people, can be easily searched, retrieved and disseminated, and may remain on the Internet in perpetuity. Privacy and security settings, whilst worth attending to, are by no means fully reliable. Judges should be guided by the principles on independence, impartiality, integrity and propriety and the need to promote and maintain public confidence in the administration of justice, and be mindful of the public's perception of their words and conduct.

92. In general, a judge should not use social media in any way that would pose risks to the judge or compromise his or her standing and integrity or the dignity of the office or public confidence in the Judiciary generally if the relevant information became public. For example:
- (a) Judges should take reasonable care that their personal or contact details or information about their personal life do not enter the public domain unnecessarily through use of social media by themselves or their close family members and friends.
 - (b) Judges should refrain from commenting on cases, legal issues, litigants, witnesses or lawyers on social media.
 - (c) Judges should be wary of “friending”, “liking”, “following” or other forms of online or social media association with any person, group or entity where such association may undermine the perception of their impartiality in a particular case or could damage public confidence in the Judiciary in general.
 - (d) *Ex parte* communications on social media between a party or its lawyer and the judge are as inappropriate as *ex parte* contact through other means. Where a judge receives such a communication, it is important to ensure that the other parties concerned are fully and promptly informed.
93. Instances of online abuse, doxxing or other disclosure of personal information or details of judges have happened in Hong Kong and

other jurisdictions. Where it occurs, a judge should refrain from responding directly to such vilification but should whenever appropriate consult the Court Leader.

Use of judicial office

94. Judges should not use the judicial office for personal advantage or for the benefit of family and friends or so conduct themselves that their actions might reasonably be so perceived.
95. Judges should not use the fact of holding judicial office in any attempt or what may reasonably be seen to be an attempt to extricate themselves from legal or bureaucratic difficulties. For example, if stopped for an alleged traffic offence, a judge should not volunteer his or her judicial status to the law enforcement officer.
96. However, in private dealings, judges need not conceal the fact of holding judicial office. But a judge should take care to avoid giving any impression that the status of judge is being used in order to obtain some form of preferential treatment.

Benefits and hospitality

97. It is axiomatic that judges must not exploit the status and prestige of judicial office to obtain personal favours or benefits. Apart from the Prevention of Bribery Ordinance, Cap. 201 and the Acceptance of Advantages (Chief Executive's Permission) Notice issued thereunder, judges should be wary about acceptance of any benefit or hospitality that might be interpreted as an attempt to attract judicial goodwill or favour.

Use of judicial stationery and equipment

98. In general, judicial stationery is intended for use when a judge wishes to write in an official capacity. Care should be taken in the use of judicial stationery when writing in a private capacity. For example, it would not be objectionable to send a thank you note after a social occasion using such stationery. On the other hand, it would not be appropriate to use judicial stationery where there may be a reasonable perception that the judge is seeking to draw attention to the fact of his or her being a judge in order to influence the recipient of the letter, for example, generally when writing to complain or regarding, for instance, a disputed claim on an insurance policy.
99. Judges should not use equipment, including IT equipment, provided by the Judiciary for their official use, for other purposes which could bring them or the Judiciary in general into disrepute.

Letters of reference

100. Although there is no objection to a judge providing a letter of reference, caution should be exercised. A person seeking such a letter may do so not because he or she is well known to the judge but solely to benefit from the judge's status. In relation to letters of reference, judicial stationery should generally only be used when the judge's personal knowledge of the individual has arisen in the course of judicial work; for example, when writing for a judicial clerk or a judge's marshal. In other cases, for example, when writing for a domestic helper, a private letterhead should be used.

Giving character evidence

101. A judge should not volunteer to give character evidence in court. If requested, a judge, after consultation with the Court Leader, should

only agree to do so when to refuse would be manifestly unfair to the person seeking that character evidence.

Giving legal advice

102. A judge should not give legal advice. However, in the case of close family members or close friends, he or she may offer personal advice on a friendly, informal basis, without remuneration, even on a matter having legal implications, but making it clear that he or she must not be treated as giving legal advice and that any legal advice needed should be professionally sought.

Participation in organisations

103. Judges are free to participate in community non-profit-making organisations of various types by becoming members of the organisation and their governing bodies. Examples include, charitable organisations, university and school councils, church councils, hospital boards, social clubs, sporting organisations, and organisations promoting cultural or artistic interests.
104. However, in relation to such participation, the following matters should be borne in mind:
- (a) It would not be appropriate for a judge to participate in an organisation if its objects are political or if its activities are likely to expose the judge to public controversy or if the organisation is likely to be regularly or frequently involved in litigation.
 - (b) A judge should ensure that it does not make excessive demands on his or her time.
 - (c) A judge should not serve as legal adviser. This does not prevent a judge from expressing a view, purely as a member

of the body in question, on a matter which may have legal implications; but it should be made clear that such views must not be treated as legal advice. It should be made clear that in so far as legal advice is required by the body in question, this should be professionally sought.

- (d) Organisations such as charitable organisations may appeal to the public for funds. But a judge should not personally become involved in or lend his or her name to any fund raising activities.

Commercial activities

- 105. Judges should not hold directorships in commercial companies; that is, companies whose objects are profit-related. This applies to both public and private companies, whether the directorship is executive or non-executive and whether it is remunerated or not. Accordingly, upon appointment, judges should resign from all such directorships.
- 106. Judges, however, can hold directorships in “family companies”; that is, companies owned and controlled by a judge and his or her family. It is common for matrimonial homes or other family assets such as investment properties to be owned and controlled by family companies. However, the directorship of such a company should not require the judge to devote excessive time to the company’s affairs and its activities should not involve commercial trading or expose the judge to public controversy.

Owners’ Corporations

- 107. Where a judge owns or occupies premises in a building which has an Owners’ Corporation, he or she may serve on its management committee but should not give legal advice. However, this does not prevent a judge from expressing a view, purely as a member of the body in question, on a matter which may have legal implications; but

it should be made clear that such views must not be treated as legal advice. It should be made clear that in so far as legal advice is required by the body in question, this should be professionally sought.

Management of personal investments

108. Judges are entitled to manage their own investments and those of their immediate families, including acting as trustees of family trusts and the like. However, the caution necessary in relation to acting as a director of a family company similarly applies.

Judges acting as executors

109. There is no objection to judges acting as executors, administrators or trustees of the estates of family members or close friends provided they do so without remuneration (whether or not they are beneficiaries of the estate).

Personal litigation

110. Judges have the right to act in the protection of their rights and interests, including by litigating in the courts. However, judges should be circumspect about becoming involved in personal litigation. If contemplating legal action, the judge should consult the Court Leader. A judge, as a litigant, runs the risk of appearing to take advantage of his or her office and, conversely, of having his or her credibility adversely judged by judicial colleagues.

Acceptance of legal services

111. A judge should not accept free legal services and should pay at a proper rate for legal services except for services provided by a spouse or close relative, referring, in this context, to a parent, brother or sister, child or son-in-law or daughter-in-law.

Social contact with the legal profession

112. Social contact between members of the Judiciary and members of the legal profession is a long-standing tradition and is proper. However, as a matter of common sense, judges should exercise caution.
 - (a) Care should be taken to avoid direct social contact with members of the profession who are currently appearing or are in cases due imminently to be heard before them. For example, it would generally not be appropriate for a judge to attend a dinner party for say, 12 persons including counsel then appearing before the judge. However, it would be unobjectionable for a judge to attend a large cocktail party given, for example, by newly appointed Senior Counsel to celebrate their appointment. At such a function, although counsel appearing before the judge are likely to be present, direct social contact can readily be avoided.
 - (b) If such contact does take place, talk of the case should be avoided and the other parties to the hearing should be informed of the contact at the earliest opportunity.
 - (c) Care should be taken in assessing the appropriate degree to which social visits to their old chambers or firm should be made. For example, it would be appropriate for a judge to visit his or her old chambers or firm to attend a function, such as a Christmas party or an anniversary party or a party to celebrate the appointment of a member of chambers as Senior

Counsel or his or her elevation to the Bench. However, excessively frequent visits by a judge to his or her old chambers or firm in order to socialise with former colleagues would not be appropriate.

Using clubs and social facilities for certain organisations

113. Judges should exercise care in relation to using clubs and other social facilities run by or for members of organisations such as the Police, the Independent Commission Against Corruption and Customs and Excise Department, which are, or whose members are, likely to appear frequently before the courts. Thus, while there is no objection to a judge occasionally accepting an invitation say, to dine at a police mess, it would be undesirable for him or her to frequent or become a member of such clubs or to be a regular user of such facilities.

Visiting bars, karaoke lounges and the like

114. There is no prohibition against judges visiting pubs, bars, karaoke lounges or similar venues. But discretion should be exercised. Judges should consider how such visits are likely to be perceived by reasonable, fair-minded and well-informed members of the community in the light, for example, of the reputation of the place visited, the persons likely to frequent it and any concern that may exist as to the place not being operated in accordance with law.

Membership of syndicates

115. Whether it is appropriate for judges to join a syndicate engaged in a leisure activity such as owning a racehorse or a leisure boat depends on the circumstances. These include considerations such as the syndicate's object, the nature of a member's involvement, the extent

of dealings (particularly financial dealings) between members, the identity of the other members, whether they are likely to appear regularly before the judge so that questions of apparent bias might often arise.

Gambling

116. There is no prohibition against judges engaging in occasional gambling as a leisure activity. But discretion should be exercised, bearing in mind the perception of a reasonable, fair-minded and well-informed member of the community. It is one thing to have a flutter at the horse races or at soccer betting or to pay an occasional visit to a casino outside Hong Kong for fun during a holiday or to play cards or mahjong with friends and family. It is quite another for a judge to be extensively involved in gambling activities or to play for high stakes or to attend establishments which have a questionable reputation.

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