HONG KONG BAR ASSOCIATION'S COMMENTS ON THE DRAFT REVISED PRACTICE DIRECTION 2.1

1. Revision of this Practice Direction is long overdue. It is badly out of date as it primarily deals with appeal to the Court of Final Appeal ("**CFA**") as of right under the old s.22(1)(a) of the HKCAFO Cap.484, which had already been abolished in 2014.

2. Para 2(d) of the current PD2.1 provides:

> "*In all other cases, applications for conditional leave will be heard in open court by three judges.*"

There is no further direction as to the procedure to be followed. Today, the Court of Appeal ("**CA**") deal with most of these applications on paper only.

3. As to the contents of the Notice of Motion, Para 2 of the Draft PD2.1 directs:

> "*The Notice of Motion seeking leave to appeal should set out the grounds of appeal concisely and succinctly. It should not include argument or factual allegations. It should clearly identify the properly formulated question(s) in respect of which leave is sought to have the same to be determined by the Court of Final Appeal.*"

4. This Notice of Motion is the document filed with the CA to initiate the application for leave to appeal to the CFA pursuant to s.24(2) of the HKCFAO. PD2.1 does not affect the Application for leave to appeal to be filed with the CFA under s.24(3) and (4) of the HKCFAO, if leave is refused by the CA. Form B in Schedule 1 of the HKCFA Rules expressly states the Applicant should in that Application:

> *"set out in numbered paragraphs such facts and matters as may be necessary to enable the Appeal Committee to consider whether leave should be granted, but deal with the merits of the case only so far as is necessary to explain the grounds upon which leave to appeal is sought."*

5. I agree that the Notice of Motion should not include arguments and factual allegations going into the merits of the appeal. It is unnecessary as the CA who recently dismissed the appeal would be familiar with them. Further, there is significant duplication in contents between such Notice of Motion and the Applicant's Skeleton Submission to be filed shortly (resulting in unnecessary wastage of costs).

6. It would however be useful to clarify what is permissible in the "concise and succinct statement of the grounds of appeal" in the Notice of Motion. The grounds for invoking the CFA's appellate jurisdiction under s.22(1)(b) of the HKCFAO are the "great general or public importance" limb, and the "or otherwise" limb.

7. Great general or public importance of the questions involved in the appeal is usually apparent upon seeing the formulation of the questions, but not invariably. If the Applicant seeks to rely on matters other than the mere formulation of the questions itself to justify "the great general or public importance" limb, it would seem some leeway should be given provided it is done succinctly in the Notice of Motion.

8. Further, if the "or otherwise" limb is relied on, it is important that the exact basis should be clearly stated in the Notice of Motion. Although the usual practice is for the CA to leave to the CFA to decide whether leave should be granted on the "or otherwise" limb (see *Richly Bright International Ltd v De Monsa Investments Ltd*, CACV 247/2012, 9 May 2014, §21, per Kwan JA), insofar as this limb is relied on, I believe it should still be set out clearly in the Notice of Motion.

9. As Bokhary PJ said in *Dr Leung Shu Piu v. Medical Council of Hong Kong* [2014] 3 HKLRD 328 at §14,

> *"care should be taken to state with clarity why it is suggested that the matters in question may support leave to appeal under the "or otherwise" limb even they fail to do so under the "question of great and general importance" limb. That should be addressed in the written Application itself. Such Applications are studied with care by the Appeal Committee before leave hearings, and they should be prepared with care in the interests of justice to both sides."*

10. This would give the Respondent more notice and ensure there is sufficient time to meet the argument if the leave application is

opposed. If nothing other than the formulation of the questions is said in the Notice, the first time when the Respondent receives notice of the detailed grounds would be upon receipt of the Applicant's Skeleton, and under para 3(b) of Draft PD2.1, the Respondent has only 14 days to respond by way of Skeleton Submission.

11. As mentioned, application for leave to appeal to the CFA before the CA is often dealt with by way of exchange of written submissions only unless the CA directs otherwise. Provided the Court has the discretion to hear oral submission from the parties (para 3(g)), I believe the proposal at para 3 is unobjectionable.

12. The timetable for filing Skeleton Submissions (para 3(a) to 3(c)) is tight, especially when Counsel conducting the trial below might not be readily available. However, the suggestion is unobjectionable in principle and parties can seek extension of time upon encountering difficulties. The directions as to contents and length of the Skeleton Submissions (para 3(e) and (f)) are unobjectionable.

13. As to the directions for filing of Statement of Costs, para. 3(d) provides:

> "*Legally represented parties shall submit to the Registry at the same time when they lodge their skeleton submissions a statement of costs ….*"

As the Applicant have two rounds of Skeleton Submissions to file (para 3(a) and para 3(c)), it seems he should only be required to lodge the statement of costs when lodging the reply submission, as opposed to putting in two sets of statement of costs (with the last one inevitably superseding the first). This should be clarified. Otherwise, these directions (including the Supplementary Statement if oral hearing is directed, under para.3(g)) are in line with the practice under the CJR and unobjectionable.

14. The word "non-compliance" in the last line of paragraph 2 of the Draft Practice Direction 2.1 should probably be "non-compliant".

Hong Kong Bar Association

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