

Themis Competition 2018

Semi-Final D

Judicial ethics and professional conduct

**Dealing with non-legal knowledge: perspective from
Judicial Ethics**

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Introduction

In 1975, R. Dworkin first introduced his image of an ideal judge – Hercules. R. Dworkin’s model of an ideal judge – Hercules – is a superhuman, omniscient with infinite competence, intelligence and resources¹. This concept is confirmed by the analysis of modern judicial ethics and in particular the collection of main principles of judicial ethics in European countries: independence; impartiality; integrity; justice; autonomy; constitutionality and legality; fairness; correctness; accountability; expertise; responsibility; prudence; discretion; propriety; equality; humanity; respect for humans; the ability to listen to others; respect and loyalty to the state; respect for the public interest; wisdom; confidentiality; transparency; publicity; honesty; selflessness; incorruptibility; decency; decorum; exemplarity; courtesy; tolerance; dutifulness; solidarity; competence; diligence; courage; caution; open-mindedness; improvement of qualification; personal unselfishness; other generally recognized ethical standards.²

Ethical dilemmas arise when judges, aiming to justify the public confidence, have to find answers not only to legal questions but also to other scientific or technical questions (for instance, in medicine, physics, engineering, etc.), and it becomes obvious that solely legal knowledge is not enough to reach a just decision. In such cases a judge faces the limitations of his knowledge invoking an ethical (or philosophical) dilemma: should a judge know everything and (or) seem as such for the society? How ethical standards of care, diligence and responsibility are applied in such cases?

¹R. Dworkin, *Hard cases*, *Harvard Law review* 88 (1975), 1057- 1083

²Šimonis M. 2017. The role of judicial ethics in court administration: from setting the objectives to practical implementation. *Baltic Journal of Law & Politics* 10:1 (2017): 90–122.

The object of this paper work are the standards and dilemmas of judicial conduct, arising in cases of professional liability, and the duty of awareness and due assessment regarding issues in non-legal, but rather scientific and technical areas. This paper work relies on documents establishing the virtues of judicial conduct: the Bangalore Principles of Judicial Conduct and its commentary³; Opinion Nr. 3 by Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, Strasbourg (November 19, 2002)⁴, European Network of Councils for the Judiciary Report for the judiciary Judicial Ethics Report 2009–2010⁵ (hereafter – the ENCJ Report), the Code of Ethics of Judges of the Republic of Lithuania⁶.

This paper work is structured to represent the course of proceedings and ethical dilemmas arising throughout it: firstly, it discloses if ethical standards have influence on judge's attempts to have and/or obtain special knowledge (perceived as non-legal knowledge herein); secondly, it analyses how principles of professional conduct affect judicial communication and cooperation with experts; and finally it highlights the coherence and synergies between ethical standards and subjective personal experience and values of a judge. The aim of this paper work is to find the answers to the questions arising in the course of proceedings: what is the extent of the duty to deepen and obtain special knowledge? What is the connection between the principles of judicial conduct and the right to a fair trial? What should be the nature of cooperation with experts in cases of professional liability in perspective of ethical standards? How ethical principles influence the impact of personal experience and values of a judge?

Limits of Non-Legal Knowledge: the Right to a Fair Trial

A judge shall analyse the essence of the pending cases, avoid hurrying and superficiality, but without delaying the court proceedings⁷. Does it mean a judge must possess non-legal knowledge of special areas accessible to human beings in special matters – such as medical treatment, academic activity, finances and accounting, engineering, etc.? What are the limits and requirements for obtaining and possession of such knowledge?

³Commentary on the Bangalore Principles of Judicial Conduct. United Nations Office on Drugs and Crime, 2007.

⁴Opinion Nr. 3 by Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality.

⁵Judicial ethics report 2009-2010. European Network of Councils for the Judiciary.

⁶www.teismai.lt/data/public/uploads/2014/12/code-of-ethics-of-judges.doc&cd=1&hl=lt&ct=clnk&gl=lt

⁷Code of Ethics of Judges of the Republic of Lithuania, Art. 15 p. 4.

The main legal pillar of a just society is the rule of law, which demands granting of access to independent judicial body in all disputes regarding individual rights. This falls under the concept of the right to a fair trial, which is one of the most important prerequisites for making individual rights a reality. This means that even disputes related to all kinds of professional activities requiring high skill – be it on matters of medical treatment, scientific activities, various professional standards, physics, engineering – fall under the competence of an independent judicial body. Despite involving even the most complicated issues of science or practice in certain high-skill professions, disputes are expected to be solved at the courtroom. Does judicial deliberation in these cases go beyond the reach of legal practice? Has the profession of a lawyer through the course of its development raised sufficient skills of collecting and comparing evidence from different areas of human activity – be it medicine, physics, finances (including taxation) or architecture, etc., or maybe the position of a judge is exceptional compared to other legal professionals (barristers, for example) in the sense that position of a judge additionally requires a wide range of knowledge? Disputes on matters of professional conduct is one of the examples that portrays how interdisciplinary is a requirement of knowledge that a judge must possess.

Let's start from scratch. When a judge is assigned a case on matters of professional liability of a doctor for a failed medical treatment, what guides does he have on how deep his knowledge in medicine has to be to solve the dispute? Do the virtues of judicial ethics constitute requirements for non-legal knowledge of a judge?

Competence and diligence are prerequisites to the due performance of judicial office. Competence in the performance of judicial duties requires legal knowledge, skill, thoroughness and preparation⁸. This means that, first of all, judicial ethics require a judge to possess outstanding professional knowledge. It is quite clear that this requirement refers to legal knowledge. But is it enough? It is a well-known truth that being a lawyer (especially a judge) is not just knowing statutes, jurisprudence, procedural techniques, but also understanding how it works in reality, how it affects the real life of people (to use an analogy of medicine: for a doctor, it is not just a medical case – it is a patient)⁹. This implicitly requires a judge to have some degree of knowledge of non-legal matters. However, none of the documents regarding judicial conduct (the Bangalore Principles of Judicial Conduct and its commentary¹⁰, Opinion No 3 by

⁸Commentary on the Bangalore Principles of Judicial Conduct (par. 192). United Nations Office on Drugs and Crime, 2007, p. 129.

⁹A. Rzeplinski, To be a judge, speech 2016 in ECHR.

¹⁰Commentary on the Bangalore Principles of Judicial Conduct. United Nations Office on Drugs and Crime, 2007.

Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behavior and impartiality, Strasbourg 2002)¹¹, ECJN Judicial Ethics Report 2009-2010¹², or national code of judicial ethics) prescribe or provide guidance on how much knowledge is enough. According to the commentary of the Bangalore Principles of Judicial Conduct, a judge shall take reasonable steps to maintain and enhance his knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges¹³. The obligation for a judge to enhance his knowledge, first of all, refers to professional knowledge. In the Commentary of the Bangalore Principles of Judicial Conduct, it is observed that training should not consist only of instruction in the techniques involved in the handling of cases by judges but should also take into consideration the need for social awareness and an extensive understanding of different subjects reflecting the complexity of life in society¹⁴. The idea of this expression is so that a judge shall understand real consequences of legal decisions. When interpreting this requirement strictly (in the narrow sense), it does not directly cover knowledge of non-legal areas (special knowledge areas). It might be deliberated that there is no need and it would not be reasonable to require a judge to obtain extensive knowledge of particular areas to reach the level of professional. Nevertheless, judicial ethics set the requirement to win public confidence by performing judicial role with wisdom, hard work and prudence¹⁵. Virtues of prudence and seriousness require a prudent judge to combine his knowledge of the law and of the particular circumstances of the case in a reasoned way while maintaining his practical common sense (seriousness and prudence)¹⁶. Despite implicit requirements for special knowledge mentioned before, it is quite obvious that any judge will never be a better doctor or engineer than those professionals whose activities the judge must assess in each individual case. In these situations, we come to a kind of a paradox – how ethical is it for a judge to assess the conduct of professional activities of persons who obviously possess higher degree of knowledge and experience in their professional areas? It is

¹¹Opinion Nr. 3 by Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, Strasbourg (November 19, 2002).

¹²Judicial ethics report 2009-2010. European Network of Councils for the Judiciary.

¹³Commentary on the Bangalore Principles of Judicial Conduct. United Nations Office on Drugs and Crime, 2007, p. 134 (6.3) (the Bangalore virtues competence and diligence).

¹⁴Commentary on the Bangalore Principles of Judicial Conduct. United Nations Office on Drugs and Crime, 2007, p. 202.

¹⁵Judicial ethics report 2009-2010. European Network of Councils for the Judiciary, virtue wisdom p. 11.

¹⁶Judicial ethics report 2009-2010. European Network of Councils for the Judiciary, virtues seriousness and prudence, p. 13.

worth mentioning that, usually, areas of high-skill professional activity (such as academic research, medical treatment, etc.) are governed by ethical principles of their own. This means a judge has to assess conduct from the perspective of professional ethics of relevant profession and possible misdemeanors.

Do legal procedural requirements provide for any guidance on the extent a judge must make effort to obtain special knowledge? A judge has a diligence obligation to make reasoned and grounded decision evidencing that his decision complies with the rule of law. In this respect, evidence assessment principles come to relevance. Concept of so called “free assessment of evidence” means that a judge establishes certain facts by his internal belief, which is based on well-rounded and objective evaluation of all circumstances which were subject of proof in the case according to law¹⁷. The Supreme Court of Lithuania in its extensive jurisprudence stated that court assesses evidence according to evidence assessment rules, prescribed in Articles 176–182 of Republic of Lithuania Code of Civil Procedure, it is obliged to adhere to rules of eligibility and connectivity of evidence (Art. 177–181). However, evidence assessment based on internal belief might be conducted only on the condition that internal belief is based on objective and relevant assessment of evidence. As we can see, this is not only an ethical requirement, as failing to conduct evidence assessment in line with procedural laws is the basis for decision to be dismissed by appeal instance. To reach the point of internal belief, the judge must be sure that all relevant evidence and circumstances were examined. Can a judge reach that point without understanding the network (map) of evidence (relations between evidence), if it is without a clear sight of “the big picture”? Probably not. For example, if a floor of a flat was flushed with water, some level of humidity persist for a period of time and the fact of flushing could be evidenced by humidity level on interior installations of the floor. It is up to parties of the case, to provide evidence or not, but a judge possessing this kind of “map” of possible circumstances and evidence has a much greater chance to assess evidence and to conclude on facts than a judge relying only on fragmented information provided by parties. It would be disproportional and unrealistic to require from a judge to acquire all the possible information on the matter of a dispute or information at the level of a professional of that specific area (for example, including all recent technological developments). It would be even more disproportional to require from a judge to have considerable degree of qualification in all possible fields of all possible disputes,

¹⁷Article 182 of the Code of Civil Procedure (V. Laužikas E., Mikelėnas V., Nekrošius V. *Civilinio proceso teisė*. T.1. – Vilnius: Justitia, 2003, Ž. Terebeiza, *Laisvas įrodymų vertinimas civiliniame procese: teoriniai ir praktiniai aspektai*).

i.e. to collect knowledge *ex ante*. That means non-legal knowledge and skills are to be developed on a case by case basis. A judge must put all the best effort to construct the map of possible circumstances and evidence in a particular case. Let's look at the example of a case on academic dishonesty. An academic institution (university) repealed a PhD title on the grounds of academic dishonesty. The plaintiff claimed with action to revoke this decision. The core relevant issues of the dispute were: has the plaintiff committed an act of academic dishonesty, and was this dishonesty so strong as to constitute proportional grounds for revocation of a PhD degree? Possibly, the court could ask for an expert opinion on all of these questions. Nevertheless, the court took a more investigative and systemic approach and took into consideration the mosaic (or a map) of facts: what exact parts (in this particular case – pictures and blueprints) of the thesis were originally created not by the author himself, who and in which circumstances created blueprints and pictures in question, when and how it was published, how the fact that the blueprints and pictures were not a result of the author's own efforts were disclosed in the thesis, how it was disclosed during the defending procedure, what was the position and knowledge of defending committee towards these circumstances, what was the scientific value of the non-original parts, what would be the scientific value of the thesis without the non-genuine parts of it, etc.¹⁸. Such activity is similar to connecting dots – for a judge, it has to be clear what connections are missing. In an ideal case, all the dots have to be connected. Evidence in line with a relevant expert opinion must combine sound and integral “blockchains”.

What sources of relevant information might we expect the judge to examine? First of all, examples of such widely accessible sources would be guides of best practice, standards (for example, standards of medical treatment, construction), user manuals or technical instructions. There is no limit to a judge's curiosity to explore knowledge of the matter. Even a simple “ask google” method might come in handy, as well as “how to” videos on Youtube channel might be useful to create a basis for understanding relevant connectivity of circumstances. Of course, a certain level of skepticism and critical stance shall be maintained in the process of assessing this freely circulating information on the web.

The obligation vested with a judge and taken by an oath to deliver justice requires not only formal assessment of adduced evidence, but to act aiming for material justice. In combination with virtues and qualities of a judge such as work, wisdom, seriousness and prudence¹⁹, this is an impulse of a judge for an activist behavior. However, it mustn't be understood, that the judge has

¹⁸Decision in case Nr. 2-2558-773/2014 by Kaunas District court.

¹⁹Judicial ethics report 2009-2010. European Network of Councils for the Judiciary, virtue wisdom p. 11, virtue work p. 13.

to fill the gaps of evidence by himself. By stating this, we realize that we reach the limits set up by the virtues of impartiality and equality and have come to the realm of ethical dilemma where judicial activism faces virtues of impartiality and equality.

Impartiality is the fundamental quality required of a judge and the core attribute of the judiciary. According to jurisprudence of ECHR, impartiality has its two dimensions – objective and subjective. Subjective impartiality means that a judge must not have any bias or prejudice. Secondly, the judge must also be impartial from an objective viewpoint, i.e. he must offer sufficient guarantees to exclude any legitimate doubt in this respect²⁰. A judge shall ensure that his conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary²¹. It is not only an ethical requirement: impartiality is a strict legal imperative and a compulsory prerequisite to ensure the right to a fair trial. The concept of a fair trial comprises the fundamental right to adversarial proceedings. This is closely linked to the principle of equality of arms.

Equality of arms implies that each party must be afforded a reasonable opportunity to present their case – including evidence – under conditions that do not place them at a substantial disadvantage vis-à-vis the other party²².

In adversarial proceedings, we find the following values and principles of judicial ethics most relevant: impartiality, respect and the ability to listen, equal treatment, listening and communicating²³. From the perspective of the right to a fair trial, the requirement to afford opportunity to present their case is more formal than the content of judicial ethical virtues and qualities of a judge. The former refers to a mere opportunity itself and the latter refers to how diligently this opportunity is to be conveyed. So, it is possible to formally comply with ECHR provisions, but at the same time fail to uphold ethical duties. A judge shall not to fill all the gaps of arguments and evidence. Always, it must be borne in mind that excessive activism may result in detour from the ideal of equal treatment and adversarial proceedings. Nevertheless, in a situation where an argument was presented and expressed and there is an expectation of a party that it is enough evidence to prove it, and if it is quite obvious for a judge that it is not so, it would not be considered a detour from principles of equality and impartiality to make a party

²⁰Gregory v United Kingdom, European Court of Human Rights, (1997) 25 EHRR 577 from Guide on Article 6 of the European Convention on Human Right. Right to a fair trial (civil limb). European Court of Human Rights, 2017.

²¹The Bangalore principles of judicial conduct. The Hague, November 25-26, 2002, p. 3-4.

²²Guide on Article 6 of the European Convention on Human Right. Right to a fair trial (civil limb). European Court of Human Rights, 2017.

²³Judicial ethics report 2009-2010. European Network of Councils for the Judiciary, p. 7, 8 (Equality of treatment, respect and the ability to listen).

aware about this. So, both interests – to have the matter of the case be examined in deep (avoiding superficiality) and adversarial nature and equal treatment shall be balanced.

There is no ceiling for non-legal (special) knowledge – a judge must know as much as possible to understand the matter of the case. There are no universal rules on how deep the knowledge of special professional areas must be. It depends on circumstances of a particular case, there is not a presumable or ex ante known amount of necessary knowledge of special areas. A judge uses legal techniques (evidence assessment rules) to ensure objective weighing of evidence. In doing so, a judge shall make the best effort to construct the map (a mosaic) of circumstances and counterfactual relations between them. The importance of lawyers has always been a consequence not merely of their technical ability, but of their prudence and practical wisdom, their ability to gather evidence from diverse and at times contradictory sources, and to use that evidence, together with lawyers’ procedural and problem-solving skills, to forge creative solutions to real-world problems²⁴. The very nature of legal profession is underpinned with deliberation of objective, measurable criteria to distinguish one phenomena from another.

In trying to construct the map, a judge must bear in mind the limits of his understanding of the matter. For this reason, a judge is able to ask for a special knowledge in the form of expert opinion. The map (mosaic) must be able to formulate the correct questions/assignments for experts and give guidance on interpretation of their opinion. Ethical virtues and values of wisdom, hard work, prudence, seriousness, impartiality, respect and the ability to listen, equal treatment, listening and communicating go beyond formal legal requirements in respect of the right to a fair trial. Ethical values and virtues are purported to respond to expectations of society from judiciary and has paramount influence on quality of justice.

Professional Conduct in Cooperation with Forensic Experts

A judge who thinks he knows everything and his opinion is always correct and suitable, cannot properly perform his functions. Judges are trained to be impartial arbiters of fact, relying on presentations in court for their education about facts to be proven. Judges, first of all, use legal knowledge, which may not be categorized under “special knowledge” in the legal procedure, because judges are assumed to know the law. The procedural imperative to establish the material legally relevant circumstances in certain cases raises an ethical dilemma – to order preparation of an expert report or not – especially since, in this case, the right of a party to submit evidence

²⁴ Anthony T. Kronman, *The lost lawyer: failing ideals of the legal profession* 354-64 (1993), quoted from Livingston, M. A. *Reinventing Tax Scholarship: Lawyers, Economists and the Role of the Legal Academy*. *Cornell Law Review*. 1998, 83:365-436.

competes with the process efficiency and economy. The principle of judicial ethics states: competence and diligence are prerequisites to the due performance of judicial office. In accordance to this principle, we may say that the main strength of us judges is the awareness of the limits of our knowledge²⁵. In cases where understanding of circumstances of the case requires special knowledge of sciences, arts, professions, business or any other specific activity, an expert opinion shall be ordered – without revealing the essence of the case, due process shall not be deemed carried out. A court expert report guarantees the right to a fair trial, which means that hearing of a case in court in compliance with the principle of justice implies the duty to go deep into the matter of the case and avoid being superficial and hasty. In the international context, the system and status of rights and duties of an expert are established in the Guidelines on the role of court-appointed experts in judicial proceedings of Council of Europe’s Member States No CEPEJ (2014)²⁶ 14 (the CEPEJ Guidelines or the Guidelines) and the 2015 Guide to Good Practice in Civil Judicial Expertise in the European Union prepared by the European Expertise and Expert Institute together with the Directorate General for Justice and Consumers of the European Commission²⁷ (the EEEI Guidelines). EEEI Guidelines establish that an expert’s opinion is required during a trial when the judge determines that certain evidence gathered in the case are dubious, thereby getting in the way of adopting a detailed decision, or determines that an expert’s opinion is required on certain financial, scientific, medical, artistic or other issues. The Guidelines note that the question of appointing the expert may only be considered when there are means of proof are impossible to obtain by simply and more expedient methods, in order to resolve the dispute (Clauses 2.1, 2.3 of the EEEI Guidelines). Article 6 of the Convention does not include an obligation of national courts to order an expert opinion to be given or any other investigative measure to be taken solely because a party had sought it; the national court must decide whether the requested measure would serve any important and material purpose, or if there is sufficient other data in the case to adopt a decision (H. v. France, judgment of 24 October 1989, Series A no. 162-A, p. 23, par. 60-61, *Vozhigov v. Russia*, no. 5953/02, judgment of 26 April 2007, par. 37)²⁸. Adoption of such decision by the judge is enabled by the following ethical principle: a judge shall perform all judicial duties, including the

²⁵ The Bangalore principles of judicial conduct. The Hague, November 25-26, 2002.

²⁶ Guidelines on the role of court-appointed experts in judicial proceedings of Council of Europe’s Member States: Document adopted by CEPEJ at its 24th Plenary meeting. Strasbourg, 11 – 12 December 2014.

²⁷ Guide to Good practice in Civil Judicial Expertise in the European Union. EGLE. European Guide for Legal Expertise, 2015.

²⁸ Guide on Article 6 of the European Convention on Human Right. Right to a fair trial (civil limb). European Court of Human Rights, 2017.

delivery of reserved decisions, efficiently, fairly and with reasonable promptness²⁹. This means that the judge must first adhere to the fundamental purpose of the proceedings – to reach a just and fair decision in the case.

When deciding on which expert to appoint, a judge may face an ethical dilemma. One of the Bangalore principles of judicial conduct states: ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office³⁰. The judge's impartiality is of material importance when resolving the issue of assessment. Judicial ethics demand: impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made³¹. Impartiality is essential to any court proceedings. Impartiality stands for objectivity at the same time. Public confidence is a prerequisite for performance of the functions of a judge. It means that the society trusts the morality of a judge, believes that judges have no personal interests in the judicial proceedings, they do not aim to strengthen their roles, and they protect democracy by seeking justice. In this case, impartiality implies that the judge shall treat the parties to the dispute equally and provides them with equal opportunity to make their case. It means that the judge must treat an expert proposed by a party without prejudice, to value them based on their competence, and to hear the opinion of the other parties regarding the candidate. The parties to the proceedings must always have the right to challenge the appointment of an expert on the grounds of lack of independence, lack of impartiality or any other admissible legal grounds provided for by the law of the country in which the procedure is taking place, including lack of competence in the field of knowledge (Clauses 3.22–3.55 of the EEEI Guidelines). Impartiality of an expert is also emphasized in the CEPEJ Guidelines, which establish that the expert has to remain independent during the examination and must be impartial concerning the relationship with both parties, i.e. the expert should not be allowed to have been appointed by one party to prepare a private expert opinion during the pre-procedural stage, it should also be prohibited for the expert to stand in a close personal relationship with one party, the expert also has to guarantee that the opinion is given objectively and not according to potential personal interests (Clauses 35, 36 of the CEPEJ Guidelines). Impartiality and independence of an expert are also highlighted in the EEEI Guidelines. The problem seems to be solved on a theoretical level: the expert takes responsibility for choosing of methods of examination, he is aware that false testimony may result in criminal liability. As for the expert, before accepting the assignment, he must disclose any information

²⁹ The Bangalore principles of judicial conduct. The Hague, November 25-26, 2002.

³⁰ The Bangalore principles of judicial conduct. The Hague, November 25-26, 2002.

³¹ The Bangalore principles of judicial conduct. The Hague, November 25-26, 2002.

that could preclude a conflict of interest must reassure the court regarding his independence and disclose his relationship to any of the parties to the proceedings, if any, which may influence his impartiality. If certain circumstances having influence over independence and impartiality of an expert change during the proceedings (or during performance of the expertise), the expert must inform the appointing judge or party. Also, both parties and the court must have an opportunity to ascertain the absence of a conflict of interest as well as adequate competence of the expert before appointing him. Therefore, impartiality of the judge does not equal his passiveness. On the contrary, a demanding, vigilant and examining judge ensures the consistent quality of the work results of other participants in the proceedings or, in this case, an expert. An impartial judge considers the expert's opinion in the context of all circumstances. Expert reports are evidence and should be assessed in accordance with the same rules as other evidence – by inner belief of a judge based on an extensive and impartial examination of all circumstances of the case, pursuant to law. Expert opinions are not binding on the court or the parties. The court evaluates it freely. The judge has the possibility to diverge from the expert's presented position and understanding if he has reasonable grounds to do so. The principle of impartiality obliges the judge to assess the expert's report without prejudice. It means that, on one hand, legal acts regulating the proving process during trial do not bestow greater weight of evidence to an expert's report in comparison to other evidence of the case and does not mean that an expert's report is more credible by its nature. On the other hand, an expert's opinion as a source for evidence is subject to specific assessment which is determined by the fact that circumstances relevant to the case are being determined by a person having special knowledge. Taking into account the circumstances and nature of obtaining the data for the expert report, such reports are considered to be more objective in the case law. The principle of independence of a judge is particularly important in consideration of private experts, since their services are remunerated by a party to the proceedings. Therefore, independence of the court via assessment of expert opinions shall be carried out during trial.

When considering the impartiality and independence of a judge, or an issue of a judge's conduct, an expert may be requested to answer whether special norms, rules and instructions regulating special (professional) activities have been complied with. On one hand, taking into account that they are normative provisions, and legal questions fall under exclusive competence of a court, violations of special rules should be established by the court itself. On the other hand, would it be considered interference with application of law enforced by the court? For example, when hearing a case for compensation of damages, the court must establish if the defendant complied with the equipment operation rules; in a case regarding environment pollution, the court should analyse whether a company adhered to the special provisions regulating the permitted pollutant

concentration in the atmosphere. Reference made only to technical descriptions is not sufficient grounds for a court decision. However, legal nature of an expert's report does not allow for comparing it with similar descriptions which may be admitted as evidence but cannot replace an expert's opinion, because the court itself cannot determine the level of application thereof in a particular situation, because special knowledge is required for that. On the other hand, even though special scientific and technical rules are normative in their nature and have legal meaning, their origin does not change, and only an expert is adequately competent to determine questions of compliance with technical and other special rules. Therefore, when hearing a case for compensation of damages caused during performance of professional activities by utilizing modern technical means (or technologies), if a question arises as to whether special rules regulating that particular activity exist (and what, if any), the court may ask a specialist to submit relevant information. If the court has doubts as to whether damage was caused by violation of special rules in particular, it may order an expertise to establish, what exact special requirements were breached and what the cause of that was. Expert examination is necessary to the extent that it is needed to analyse and professionally evaluate the quality of the performed activity (activity that requires special preparation). The task of the expert is not to establish the fact of violation of a special rule, but to determine objective causes of the disorganization of the professional activity. Pursuant to the expert's report, only the court may rule, to what extent the actions of the person who caused damage were legal and illegal, and to what extent the person is guilty. Thus, an expert, adhering to ethics, does not have the right to evaluate the aspect of will in relation to the behavior of the subject in breach. If such evaluation is expressed, an impartial judge shall distance himself therefrom, because evaluation of the aspect of will falls under the exclusive competence of the court. One may say that an expert acts in the proceedings exclusively as a source of special knowledge, and may not express opinions the wording of which expressis verbis matches the legal norm. In such situation, the expert's report or a part thereof may be rejected, but the decision not to admit the expertise report should be motivated and the court may order submission of another or additional expert's report. However, when adopting such decisions, a judge should have not only legal, but sufficient special knowledge. A principle of judicial conduct states that judge shall take reasonable steps to maintain and enhance his knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges³². It means that the judge shall be able to have an

³² The Bangalore principles of judicial conduct. The Hague, November 25-26, 2002.

outside view of his ability and analyse, criticise and control himself. Judges shall perform the duties of their office diligently. In order to maintain a high level of competence, they shall continue to develop their professional skills³³. A judge is an impartial evaluator of factual circumstances. Most facts uncovered during hearing of a case may be analysed by the court simply by seeing the evidence. How much scientific knowledge is needed by the judicial office? Scientific knowledge is needed at the very least to help the court decide, in certain cases, if an expertise is needed or not. An important ethical dilemma arises when a judge evaluates a scientific report about a factual circumstance, but it is much more difficult, when the factual circumstance itself is scientific proof in a case where a dispute has arisen regarding scientific controversies. And is the information presented explained by the expert in court enough? The fact is, the judge has to have sufficient knowledge in order to implement the “gatekeeper” function. But how much is enough? Here we can see a dual aspect: one is required when assessing the expert’s report on factual circumstances, and the other – when a judge deals with factual circumstances which are scientific facts at the same time. If a dispute arises regarding novelty of scientific discoveries, it is important for the judge to be able to recognize if scientific grounds for proof were refuted in a hearing, whether the scientific issue being established is contradicting or admissible, maybe scientific facts introduced during trial are controversial and require rethinking the science itself? In such cases it is essential for the judge to realize that he is not only a “gatekeeper” to the scientific evidence in the courtroom, but also the gatekeeper for his own impartiality.

Subjective Objectivity

As was mentioned in before herein, compliance with standards/principles of judicial ethics when determining cases of professional liability helps to “overcome” the limitations of a judge’s knowledge in areas related to other professions and to adopt a lawful and just decision. Requirements for a judge to be and remain objective and impartial are provided for in both procedural regulations and standards of judicial ethics. The Bangalore principles describe impartiality as essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made. A judge shall perform his or her judicial duties without favour, bias or prejudice. The description of this principle may make an impression that a judge is absolutely objective when hearing the case, however, it is evidently

³³ Resolution on Judicial Ethics. Council of Europe, Plenary Court on 23 June 2008.

impossible to completely dissociate oneself from personal experience in other areas unrelated to law, therefore, a dilemma arises regarding limits to the judge's subjectivity.

In the cases dealing with professional liability, the individual experience of the judge may have a dual effect. First of all, if the judge is familiar with the subject matter because of the experience in his private life, he would seem to be more confident, would be able to ask the experts well-formulated questions and that would make him look more professional. So, on one hand, it could be said that a judge with more "real" life experience is a more knowledgeable and professional judge. On the other hand, previous experience (bad or good) of a judge could lead to prejudice and fast conclusions even without asking and answering the necessary questions. In this case, an "inexperienced" judge who is willing to learn and who is not afraid to show the limits of his knowledge, could, at the end of the day, produce a decision with a better reasoning.

Let's take a look at practical example, illustrating this duality.

In one of the cases³⁴, the Supreme Court of Lithuania had to answer the question if a family doctor could be held responsible for a death of a teenager because of meningitis. The claimants (parents of a teenager) had taken the position that the doctor was reckless as he had not suspected meningitis at its very early stage. The hospital (the defendant) argued that beginning of meningitis does not have specific symptoms and looks like regular influenza, so the doctor was acting according to medical standards when prescribing antipyretics and scheduling a blood test on the next day. Unfortunately, the patient died after 12 hours from the doctor's visit.

Which judge could handle this case more professionally: the one with his own rich experience (successful or not) concerning hospitals and illnesses, or the one who starts the case without a proper knowledge what antipyretics are for? Will not a judge, who has children, be a priori more strictly positioned regarding professional liability of doctors, that the one whose spouse practices in medicine? However, as we can see, in such case a judge faces two absolutely non-legal questions which are crucial to adopt a judgment: 1) did the doctor have a duty to suspect meningitis at the stage when none of the specific symptoms were shown yet; i. e. is it rational and obligatory (acting in the best interests of a patient) to do all the possible medically relevant tests having just a theoretical guess (as fever, nausea, headache could be a symptom of a number of illnesses); 2) would it have still been possible to save the teenager's life if best available treatment was applied few hours earlier (given that it was meningococemia – a rapidly progressing form with very high mortality rates), i. e. is there a causal link between negligence

³⁴ Ruling of the Supreme Court of Lithuania Civil Cases Division in case No 3K-3-299-611/2015 of 20 May 2015.

(if we admit such existed) of a doctor and negative consequences. It is worth mentioning that forensic medical expertise and reports of medicine professors did not bring an unambiguous conclusion and the final outcome of the case lied down solely on internal belief of the judge. Therefore, when legal norms and reports of the experts do not offer a sufficient background for making of a decision, judicial ethics starts playing a rather important role. First of all, when upholding the principle of professionalism and dutifulness, a judge feels the inner motivation to get deep enough into a field of another profession or subject matter to reach the very core of the issue, restricting himself from prejudices and keeping himself an impartial “investigator”, gathering all the arguments for and against.

Secondly, the true aspiration to get acquainted with non-legal issues or processes also works as a safeguard for independence of the judge as he becomes more resistant to public and media pressure. Majority of the cases concerning doctor’s professional liability, or where the damage is caused to health/life include strong emotional aspects and parties tend (consciously or unconsciously) to use emotional rather than legal arguments. Moreover, even legal representatives often are succumbing to the temptation to give an emotional speech in the courtroom, which sounds fascinating to the party he or she represents but lacks sufficient legal grounds.

In such cases, it is very important that judge pays enough attention not only to the proper proceedings and observation of the rules on the apportionment of the burden of proof but also gives a chance for the party to speak out its arguments, even the ones which are not very relevant to the case. Procedural law entitles a judge to cut off a speaker if his or her arguments do not relate to the substance of the case, but guiding the procedure in a more flexible way could serve as reassurance of people’s faith in the integrity of the judiciary and would assist the justice not only being merely done but also to be seen to be done. A judge, listening to statements of parties and other participants of the proceedings, unknowingly “filters” them by deciding if stated arguments are legally relevant and may serve for the reasoning of the judgment. However, for the parties and other participants of the proceedings to feel being heard in emotionally sensitive cases, the judge unavoidably has a duty to allow presentation of less relevant (or irrelevant) arguments which may subjectively appear important to the speaker.

In such cases (moments) compliance with norms of judicial ethics such as propriety (which, by its content, is partially similar to the norms of social ethics) is extremely important as a judge may permit litigants to present their not legal or not relevant arguments, but listen to them with not much of interest (for example, ticking with a pen or tracking a hand-watch while “listening”, or yawning). Formally, such behavior does not directly influence the adoption of a lawful decision, because a judge takes in mind and attentively listens to the statements regarding legally

relevant circumstances and presentation of legal arguments. However, a party without legal education cannot always distinguish which arguments are legally relevant, and which are not and to consider judge's behavior as impolite, at least. That is why it is very important for all arguments which are considered by the party to be relevant to be heard with due respect and thoughtfulness. This leads to a conclusion that principles of judicial ethics sometimes prevail against legal norms because to reach the aims for judiciary to be seen and considered a trustful source/manager of justice, knowledge of legal norms is far from being enough. Exercising judicial ethics is an additional tool to gain the trust of society as principles of the judicial ethics allows not only becoming a more professional judge but also making it visible as professional for a society. In other words, ethical norms are the guidelines helping to form an impartial and independent inner conviction of the judge, which later transforms not only into a lawful decision, but also a decision which is as just as possible, or is perceived as just by the parties.

It should also be noted that some cases of professional liability are closely related not only to "the grey area" – specifics of another profession unknown to a judge – but also to personal human values and convictions of a judge. Individual views of the judge may significantly deviate from the ones presented in the case. For example, when a judge who is against euthanasia as such has to decide if there were preconditions for euthanasia, or when a judge who thinks aesthetic surgery is an unnecessary as such has to decide if the result for becoming more beautiful was achieved. Or, in cases where a judge deems sex change as a breach of moral or religious norms which he believes in, but has to hear a case regarding professional liability of a doctor who incorrectly performed such surgery.

Principle of equality³⁵ requires a judge to be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds"). Therefore, even though there are no legal norms restricting a judge to have personal views, but exercising principles of judicial ethics brings understanding that such views could lead to being partial and encourages a judge to continue willful efforts for understanding and accepting the diversity of the society and its needs. The principle of equality, as the principle of ethics, does not motivate the judge to change his views or adapt them to the beliefs of the parties of the case, but allows for the judge to

³⁵ The Bangalore principles of judicial conduct. The Hague, November 25-26, 2002.

acknowledge that certain matters or interests, even if not acceptable to him or her personally, are lawful and a party may reasonably expect judicial protection thereof.

Conclusions

1. Legal norms form the basic (minimal) requirements for a fair trial. Ethical principles come into the highest relevance in the legally unregulated area and serve as guidelines for legitimate and well-founded judgment making paramount influence on quality of justice.
2. There are no universal rules on how deep the knowledge of the judge in special professional areas shall be, there is not a presumable or *ex ante* known amount of necessary knowledge of special areas – it depends on circumstances of a particular case. For adjudication, the judge employs his legal skills – objective weighing of evidence. In doing so, he shall make the best efforts to construct a map (a mosaic) of circumstances and counterfactual relations between them.
3. In order to ensure implementation of the right to a fair trial, principles of judicial ethics such as competence and diligence mean the duty to go deep into the matter of cases under examination, avoid being hasty and superficial, which may be ensured by cooperation with experts.
4. To keep the faith of society a judge has to be impartial, which, in cooperation with experts, means ensuring equality of parties when proposing the expert and assessing the expert's report in the context of all evidence.
5. Norms of judicial ethics require for the judge to constantly improve his qualifications and obtain sufficient knowledge to perform the evidence “gatekeeper” function in the courtroom, and not forget that he is also the gatekeeper for his own impartiality – all that may be achieved by adhering to judicial ethical norms.
6. A judge cannot completely dissociate himself from his own experiences and convictions, however, by adhering to the principles of judicial ethics and acknowledging and accepting the differences and variety of the society, he can refrain from bias and prejudice.
7. Knowledge of legal norms and their proper application is not sufficient to reach the aims for judiciary to be seen and considered as trustful source of a justice, therefore, adherence to the principles of judicial ethics is a key to ensuring judges are just and competent, and perceived as such by the society.

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