BAR COUNCIL 2000 ETHICS LECTURE PROGRAMME
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ADVOCACY AND DECORUM IN COURT, PROFESSIONAL CONDUCT OF COUNSEL IN AND OUT OF COURT, DUTIES OF COUSEL

by
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When Tuan Haji Kuthubul Zaman and Encik Effendy came to see me to invite me to give this talk, I asked them: "Mengapa pilih saya?" They replied: "Hendak mengubah selera. Kami sudah banyak kali menjemput hakim-hakim dari Kuala Lumpur. Sekarang kami hendak jemput hakim yang datang dari Pulau Pinang pula". I don't know whether they, Tuan Haji Kuthubul Zaman in particular, had "nasi kandar" in mind. I would not be surprised. Let us see what you will get and whether it is to your taste.

I am not going to take you through the law, the rules, the case law and the opinions of learned jurists or academicians. You can find them and read them yourselves. What I will do is to share with you my experience in the thirty-one years that I have been with the court or in court-related jobs.

I am not giving a lecture, only a talk. What I am going to say is not meant for your bar examination. It is only to expose you to actual practice. For the purpose of your examination, please go and read the rules. You are not going to get any mark by quoting me in your examination.

Let me begin by placing you firmly and securely on the ground. A few years ago, when I gave a talk to law students at a private college in Penang I said, and pardon me for repeating: The law course takes about four years to complete. But, please do not think that when you pass the first year examination you know one quarter of the law; when you pass the second year examination you know half the law and when you pass the final year examination you know all the law. Wait till your first client walks into your office, then you will know how much you don't know.

That happens to everybody. When I first joined the service, I was posted to Kangar, Perlis without any training. I was the only legal/judicial officer in the State at that time. I must admit that I learned quite a bit from my office boy and a lot from my interpreters. In fact, during the first week that I sat as a Magistrate I felt as if I was in a boat that was drifting at sea. Of course, it did not take long before I became the Captain. Today, after thirty-one years, almost everyday, I still come across things that I don't know. The moral of the story is, don't be shy to learn from anybody, no matter how low his position may be and, in law practice, there is no end to learning.

Also, when you start practicing, you will come face to face with the reality of life, good and bad. You will come across things that you did not imagine before, especially when you enrolled yourselves in the law schools. Perhaps I should illustrate with one story. I don't know whether it true or not. This is how the story goes: There was a lawyer in India. He had a son who had just been called to the bar. One morning he was not feeling well. So, he handed a file to his son and asked his son to go to court regarding an application. The son went and came back quite early and very happy. He straightaway went to his father's room and said. "Dad. You know that old case. I have managed to settle it." He expected his father to congratulate him. But, instead, the father thundered. "What? You settled it? Do you know that that was the case that had seen you though school and the university?"

I prefer the son than the father.

There is this lawyer. On the day he was called to the bar, he said: "I'll be a millionaire in two years". I do not know whether he did become a millionaire in two years. But, I know that in or about two years he was suspended from practice for six months.

Let me say it very frankly. The legal profession is not the right place for people whose sole ambition is to make as much money as fast as possible. It is such people who bring disgrace to the profession. If that is your ambition, please go into business.

Also, please do not think that when you become a lawyer you are above the law, that you no longer have any moral and social obligation and that you can get away with murder. I have seen people, after becoming lawyers, who refuse to pay housing and study loans that they had taken and challenge the validity of the agreements. These are ungrateful people. And, let me tell you from my observation of such people: they don't go far, whether in their carrier or in life.

Advocacy

Again, I am not pretending to teach you advocacy. Indeed, I do not think it is something that can be taught. A lot depends on individual skill, style, character and mannerism. If a person is a "kiasu" you can see from the way he handles his case. If the person is the quarrelsome type, you can see it too when he cross-examines a witness or argues his case.

What I will do is to make some observations from the point of view of a judge who has to listen to you.

Have you heard the story of a lawyer (again, in India, sorry) who received a letter from the Chief Justice offering him judgeship? He replied to the Chief Justice thanking him for the offer but declining it. He gave his reason as follows: "I don't

mind talking nonsense a few hours a day. But I mind listening to nonsense the whole day and every day". Of course, that is an exaggeration.

Remember, when you appear in court your duty is to present your case. You are not fighting a holy war or a corporate war. You are not fighting the other lawyer. More so, you are not fighting the Judge. Indeed, you are an officer of the court. What it means is that you have a duty to present your facts accurately, fully and honestly. It means that it is your duty to draw the attention of the judge to the relevant law, whether or not it is against you. It means that at no time you should mislead the court.

Being "an officer of the court" does not mean that you are entitled to free parking lots at the court's car park. You will be surprised that such an argument had been put forward!

As I have said, your duty is to present your case. It is unfortunate that the word **"argue"** is often used. The Malay word **"berhujah"** is a better word. In the Malay Language we have the words **"berhujah", "berbalah", "bertengkar", "berkelahi", "bertumbuk", "bergaduh"** and **"berperang**", each denoting a different level of "disagreement". In English we have the words **"to argue", "to quarrel", "to fight".** But, we cannot say **"to war"** as the word "war" cannot be used as a verb. It is perfectly correct to say in English: "The counsel is **arguing** his case" or "The taxi driver and the passenger are **arguing** about the fare." On the other hand, it would not be correct to say in Malay: "Peguam itu sedang **bertengkar** kesnya (some do, of course!) or "Pemandu teksi dan penumpang itu sedang **berhujah** mengenai tambang." The word **"berhujah"** is of a different i.e. higher, status that it is not suitable to be used in the second example. It is used in legal and academic arguments by lawyers, judges and scholars.

I have come across in a written submission in which words like **"idiotic submission"** and **"schizophrenic submission"** were used when referring to the written submission of the other counsel. I have heard counsel in his oral submission before me saying, "I don't know where Mr. so-and-so learned his advocacy". And the other counsel replied "I come from a better law school than you do**". No comment.**

There was an occasion when two lawyers, who apparently had a grudge against each other, who kept making personal derogatory personal remarks against each other. I cautioned them. After some time they were back at it again. I reminded them again. Later the same thing happened again. This time I could not tolerate it anymore and I said: "Look. If you are going to quarrel like children, I am going to adjourn this case until you both grow up." The specialist doctor who was in the witness box smiled!

<u>Clarity</u>

The most important thing in advocacy is to make the judge understand you. If you cannot make the judge understand you, it is more likely that you may not win the case. Of course, cases may be won **in spite of you**. There were times when, as a judge, I felt like telling the defense counsel, **"Please don't make it difficult for me to acquit your client".** But, of course I did not say it.

It goes without saying that before you can make the judge understand your case, you must understand it first. This is more so regarding facts in complicated commercial cases.

I was lucky enough to have the opportunity to work directly under Tun Suffian for seven years. I still remember and practice what he told me. He said: "Why do we write? Because we want to convey a certain idea, message or information to somebody. No matter how long or how well we write, if that person cannot understand us, it does not serve the purpose. So, be clear. Between a short sentence and a long sentence, choose a short sentence. Between a bombastic word and simple word, chose the simple word. If you have any doubt whether you should say something, delete."

Remember the English judge (sorry, I can't remember his name) who said something like this: "When I am right I want to be clearly right so that I can be followed. When I wrong, I want to be clearly wrong so that I can be corrected".

These are very useful tips.

<u>Know your case well</u>

Whereas the same law may be involved in many different cases, each case is different from the other on facts. Most likely the Judge had come across similar applications and had heard the same authorities cited to him many times. He is not in the mood, indeed he has no time, to listen to a lecture, say on amendment of pleadings. On the other hand, he hears many cases a day. He certainly cannot digest all the facts of all the cases for the day before he goes up on the bench. Indeed it is not possible for him the read all the affidavits and the exhibits (a big portion of them are either not material or repetitive, anyway). Or, he may have the facts of one case confused with that of another case.

So, (I am talking about civil applications), you should state the facts briefly and in chronological order before you proceed to make your submission so that the judge can follow your submission. And, you should be able to answer any question regarding the facts of the case, when the judge asks you.

Unless you have a fantastic memory, it is a good practice to make a summery of:
(1) the chronology of the proceeding;
(2) the chronology of facts.

By the chronology of proceeding, I mean, the dates and the enclosure numbers of the various documents and applications, the dates hey are served, heard and orders made. If you are going to court for the hearing of one application, don't just read that application. Make a point to know what had happened previously. The judge may want to know.

I tell you one incident that had happened to me. There was a very old case. There were hundreds of enclosures. There was an application before me. Both counsels submitted for one whole day. I reserved judgment and went through the whole file. To my horror I found that there was a similar application some ten years earlier and an order had been made. I called both counsels. They came. When I showed then the earlier application and order, of course both of them said that they were not aware. Imagine what would have happened had I not discovered it. Whichever way I decided, it would be wrong.

Authorities

There is a tendency among new lawyers to place too much emphasis on case law rather than the facts of their case. They start off by citing authorities. The judge is a practical person. He has to be. Otherwise he would not be able to hear all the cases fixed before him for the day. He is not writing an essay or a thesis. All that he wants to know are the facts of the case, what prayers you are asking for (and of course the relevant law if that is something new to him) and why he should give the order that you ask for.

For the same reason, (I am speaking for myself), the judge is more interested to know decisions of higher courts because they are binding on him. Again, speaking for myself, I am more interested in local authorities than authorities from other countries. Indeed, I only refer to foreign authorities if there are no local authorities and only if necessary.

But, I must warn you. Other judges may be different. When I was a Federal Counsel appearing in court, I was told that when I appear before a certain judge, I must be prepared with authorities because, even if I happen to cough he may ask for authorities! It is a good thing to know the idiosyncrasies of the judge you will be appearing before. Lawyers are good at that.

When you prepare your bundle of authorities, please have it paginated. It is easier and faster for the judge and the opposite counsel to find the pages that you will be referring to. This also applies to the exhibits attached to the affidavits, especially when they are voluminous. And if you do highlight certain passages (it is are a good practice, as far as I am concerned) don't just highlight your own copy and the judge's copy. Highlight the copy that you are giving to the opposite counsel as well. This may sound very petty. But, let me tell you, some lawyers do such thing. I do not know what the motive is. The only inference I can draw is that he wants to make it difficult to the other counsel.

Introduction

Before you begin your submission, make a point to introduce yourself and the opposite counsel. Don't assume that judges can remember the names of all of you. And do not try to show off to your client at the back that you know the judge very well and vice versa. It is good manners, anyway, to introduce yourself and the opposite counsel first before you begin your submission. But, the introduction is only required when the case is called up, i.e. at the beginning of the trial or hearing.

Language.

In the lower courts, Bahasa Malaysia is almost exclusively used, apart from the giving of evidence by witnesses. In the superior courts both Bahasa Malaysia and English are used. But, please begin in Bahasa Malaysia when introducing yourselves. If you think that the submission is going to be very technical and you wish to continue in English, ask permission to continue your submission in English.

In the examination of witnesses, I take a practical approach. If the witness speaks Bahasa Malaysia, I ask counsel to question the witness in Bahasa Malaysia and I record straight away in Bahasa Malaysia. If the witness speaks English I ask counsel to question the witness in English and I record in English. It is faster.

Young lawyers have no difficulty conducting cases in Bahasa Malaysia. Indeed, generally speaking, the pleadings and the submissions, especially written submissions, in Bahasa Malaysia are of very high standard. Of course mistakes are made, sometimes. For example, in one affidavit, the deponent says: "Saya **bernafsu** untuk menjual tanah itu." ("I am **desirous** of selling the land"). The correct word is **"berhasrat".** In another affidavit we have this: "Peguam kedua belah pihak telah **bergaduh** dalam kamar. Selepas itu peguam Defendan telah memohon untuk **bergaduh selanjutnya** di mahkamah terbuka. Kedua-dua belah pihak telah pun **bergaduh** di mahkamah terbuka." We see straight away that the word **"bergaduh"** was wrongly chosen when translating the word **"argue".** As I have said earlier, the correct word in Bahasa Malaysia in **"berhujah".** Never mind about such mistakes. Even when we speak English we make grammatical mistakes, even more.

Don't quarrel with witnesses

Some lawyers are in the habit of quarrelling (I mean "quarrel") with witnesses, especially witnesses of the opposite side during cross-examinations. Just put your questions to them. Don't expect them to agree with you in everything. Otherwise, they should rightly be your client's witnesses and the not witnesses

for the other side. What is important is that you put your questions to them. Later you can call your witnesses to contradict them. Further, when you descend to the witnesses' level (they come from all walks of life), you are losing your self-respect.

Look at the Judge's hand

One small tip. Glance at the judge's hand. If he is still writing, don't ask the next question or continue with your submission. Judges take longer time to record the evidence of witnesses during cross-examination and re-examination compared with examination-in-chief. This is because the questions are always related to what the witnesses had said earlier. The judge has to incorporate the relevant part of the witnesses' earlier evidence in the answers, otherwise they would make no sense when they are read later.

Decorum in Court

Some of what I have said earlier are also relevant under the heading of decorum. There is nothing special or peculiar about it. It is just good behavior and good manners, the kind of thing that we are taught or ought to be taught at home from small. We are taught (or ought to have been taught) that we should be properly dressed for the occasion, that we should not interrupt another person when he is speaking, and, even if we have to, we should do it with respect, in court with permission of the judge. Please do not think that the person who says the most, who has the last say and who is the loudest is the person who will always convince the judge. We are taught not to raise our voice unnecessarily and to listen when someone is speaking to us and so on. I don't have to list all of them. It is just a question of proper behavior and good manners.

Professional Conduct

Generally speaking, it is just an extension of good conduct. For the purpose of your examination and to avoid disciplinary actions, read the rules and follow them. Most of the time, breaches of professional conduct are committed not because of ignorance, but in spite of knowing that they are wrong. I do not think that any lawyer can claim that he does not know the nature and consequences of his act in committing the breach. If he does make such a claim, he should qualify to plead insanity under the Penal Code.

Be early

Always be early. Don't make the court wait for you. One judge used to say, "In this world, lawyers wait for judges. Judges wait for the aeroplane." If and when you are late, apologize to the court when you stand up to address the court and after introducing yourselves.

I don't strike out cases because the counsel has not arrived when his case is called, provided I have other cases to hear. I stand down the case, first. But when I have dealt with all other cases for the day, I will have the case called again and if I am satisfied that he has notice of the date and he has not contacted the court to tell why he is late, I will strike it out. But, let me warn you that some judges do strike out cases if the counsel is not present when the case is called.

There is this lawyer, quite senior in age and practice. He was supposed to defend a client charged with a criminal offence in a Magistrate's Court. He arrived late. In fact the trial had proceeded and completed and **his client had been acquitted and discharged,** before he arrived**.** However the Magistrate was still sitting, hearing another case. The Magistrate told the lawyer that his case was over and his client had been acquitted and discharged. And, the lawyer stood up and said, **"I object, Your Honour**". I don't know whether he was objecting to the trial or the acquittal or both, in his absence.

<u>You are the lawyer</u>

Always remember that **you** are the lawyer, not your client. You must act professionally. Your client comes to see you with a problem. He may want you to do something. You should be the one to tell him what the law is and how to go about it. If he insists that you do something or in a certain way, and you know that it is against the law or it is not the correct way to do it and he refuses to listen to you, you should be brave enough to decline the brief. Remember that many lawyers get into trouble, some are even murdered, because they get involved with the wrong kind of clients. My advice is that you keep away from them if you cannot get them to agree that you will only represent them on you terms.

One young lawyer appeared before me in an ex-parte application. Since it was heard in Chamber and there was nobody else except my interpreter, I asked her. "Tell me very honestly and frankly, do you think I should make the order that you are asking me to make?" She thought for a moment and said, "No, My Lord, but my client insists." I asked her "Who is the lawyer, you or your client?" Remember that in an ex-parte application, there is no opposing party and the judge relies a lot on you. Therefore, you owe a duty to court to honestly and frankly disclose all the relevant facts and law, for and against you. Don't hide anything. You may get away with it, once. But that, too, will not be for long, because when the other side applies to set aside the order, the truth will come out.

<u>Duties of Counsel</u>

All I want to say is, present your case as best you can, honestly and according to the rules. Don't unnecessarily make things difficult for the other party and, more so, the court. Never mislead the Court. It doesn't pay. Remember that you will be appearing before the same judge again and again, unless you only want

to be a one-case lawyer. Once the judge finds that he cannot trust you, it is not going to be easy for you to win his confidence again. He will be extra careful to accept what you say from the bar.

When the Court gives its decision, accept it gracefully. If you are not happy with it, appeal. That is the system.

Concluding remarks

In any profession, indeed, in life, at the end of the day, it is the person who is honest, humble, reasonable, considerate, hard working, not greedy and not mean who is successful, in his carrier or in life. I have lived long enough and I have seen quite a lot that I dare say this from my observation.

Please be honest to your clients. (Of course you should also beware of dishonest clients.) There was one case before me. It was an application for an order that the fees charged by a lawyer on his client be assessed by the Senior Assistant Registrar. The client engaged the lawyer as his solicitor in a land deal. The client paid RM1.6 million to his solicitor. That is the purchase price to be held by the solicitor and to be paid to the solicitor for the vendor when the transfer is duly effected. Somehow, the deal did not go through. The client asked for the money to be returned to him, of course less the solicitor's fees. The solicitor sent a bill of RM1.3 million to the client and said he was prepared to return the balance RM300,000.00. Amongst the items was a fee of RM900,000.00 for removing the caveat on the land. **And that caveat was removed by consent.** Luckily, that client was quite educated. At least he knew what to do under the circumstances. He went to another lawyer who filed that application. I not only granted the order. I even congratulated the second lawyer, in open court. A few months later I read in the newspaper that the first lawyer was arrested on some allegation of fraud.

Please have a heart for the less fortunate. At the very least, don't swindle them. I have seen poor and uneducated kampong folks being swindled of their only inherited lands by unscrupulous businessmen, through what is called "joint venture". The landowner is paid a few thousand Ringgit, the land is transferred to the "developer", the "developer" takes a loan from the bank, charges the land to the bank and disappears. Later the bank auctions the land.

I think you should not get involved in such transactions and, if you do, you should be protecting the uneducated landowners rather than assisting the unscrupulous businessmen. That is the way to champion the cause of the poor. And don't charge exorbitant fees that will keep the poor away from justice. The court should not be turned into a five-star hotel.

You talk about fairness, justice, transparency and so on, of other people. Please don't forget to practice them yourselves.

Lastly, after you have practiced for a few years, it is good to specialize. But, please do not specialize in one thing: delaying tactics. You ask for postponements. You make all kinds of interlocutory applications. You appeal against every order. As a result the disposal of the case is delayed. Who get the blame? Judges. And, judges are only expected to give everybody who appears before them, the right to be heard. They themselves are not entitled to the same right: they are not supposed to make public statements, they are not supposed to reply to what is said in the press about them.

Remember the dialog in the film “Dr. Zhibago”? (Most of you were not born yet when that film was first screened.) Anyway, when the owner of the bungalow that had been occupied by “the people” was told by the “Peoples Committee” that it was the Committee that had power over the house, he (the owner) said: **“I am the people too.”**

Well, ladies and gentlemen,

That is what you get. I don’t know whether it is to your taste. Thank you.