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ONE MAN'S EXPERIENCE

By Joseph Grimberg SC

No brilliance is needed in the law. Nothing but common sense, and relatively clean fingernails.[1]

The creator of *Rumpole* was, of course, jesting. Competence in the law requires more than a decent manicure. The ability to marshal facts, and knowledge of the law to be applied to them, is of the essence in a fused profession. Whereas in England a barrister may well not see his client or his witnesses until he is at the door of the court, most of the preliminary work having been done by the solicitor, here the work of an advocate and solicitor can be said to begin from the moment the client walks through the practitioner's door. If the client is, or is to be, involved in litigation, that is effectively the moment when preparation for the case begins. It is from that moment that the foundations are laid, the moment when you size up the client and the moment the client begins the process of investing his confidence in you.

This is a primer intended for advocates who have already acquired some forensic experience. They will have started to formulate the steps to be taken in preparing for and conducting a case through its various stages. I developed in my mind certain rules, in the course of some 50 years' practice at the Singapore Bar. To some of you, they will seem elementary, and in any event, their subject matter will be dealt with in more detail elsewhere in this volume. Nonetheless, here for what they are worth, are my "rules".

A. Rule 1: You Are Not A Business Person

Lawyers who spend part of their time dabbling in business are prone to distraction and, sometimes, to grief. When I was a very young man, the then senior partner of my firm, who had invested heavily in, and took an active part in the business of, a company which made metal window frames, absconded when the company failed, having helped himself liberally to clients' moneys in an attempt to save his doomed investment. Ironically, he had been a god-like figure at the Bar.

Total commitment to the profession will be recognised. You will earn the respect of those whom you respect – your family, your clients, your friends, your colleagues, your opponents and the judges before whom you appear. Do not make it difficult for yourself by taking your eye off the ball.

B. Rule 2: Dress For The Job

While clients might not be concerned if your office is a mess – see rule 3 below – they tend to expect you to look the part. Neat and formal office attire is, therefore, advised. Some firms have introduced the concept of "dressing down" on Fridays, in anticipation of a relaxed weekend. This practice is not universally applauded.

> 'Dressing down' I should explain is another recent transatlantic lifestyle change. In city solicitors' offices, on Fridays, and, for true believers, during the whole week, leisure wear, as long as satisfying the demands of decency, is substituted for the suit. The purpose, as I understand it, is to humanise the individual providing the service; but it seems that the experiment may be short-lived since clients actually prefer to be advised by someone who conforms to their vision of a lawyer rather than of a golfer.[2]

Smart, clean and well-pressed attire is the order of the day for appearances in court. When I was young, we had at the Singapore Bar, a small, tubby and very scruffy, but highly popular lawyer called Muthusamy. We used wing collars and bands in those days, and Muthu's bands and wing collars invariably seemed to have been dipped in muddy water and dried out. One motion day he appeared before Buttrose J, who stated, "I cannot see you, Mr Muthusamy." Muthu responded, "I am here, my Lord." The judge repeated, "I am unable to see you, Mr Muthusamy." The diminutive Muthu shrieked in protest, "My Lord, I am here", at which point Muthu's neighbour tugged at his gown, and whispered in his ear. Muthu withdrew and reappeared a few minutes later in borrowed crisp wing collar and bands, whereupon Buttrose J beamed, "Ah! Now, Mr Muthusamy, I can see you!"

Quite apart from being appropriately dressed for the client and the court, proper attire will give you a sense of confidence and professionalism.

C. Rule 3: The Client – First Encounter

It does not much matter what your desk looks like. You may be orderly by nature; on the other hand your desk may look as though it has been hit by a cyclone. Clients do not mind. It is you they are interested in. Like a physician listening to an anxious patient's recital of his symptoms, you must exude an air of quiet confidence, and a competence in the branch of law on which you are asked to advise. It is always helpful to have some inkling of the client's problem before he walks in. If you have made the appointment yourself on the telephone, that is a good time to try and discover what it is all about. You may not succeed – some clients are cagey, such as in matrimonial problems. If you are to be consulted in a matter involving a branch of the law which is not your strong suit, try and do a little reading up before meeting the client. In that way, when the client begins to talk about a claim on a bill of lading, or liability under a guarantee, or subsidence to his house caused by the neighbour's excavations, or seeks remedies following expulsion from his club, you will be in a better position to advise.

Remember that no matter how unlikely a tale you are told, your duty is to act on the instructions you are given. You may, of course, advise the client that his story is not likely to be believed by the court, but the strange thing is that by the time the case reaches trial, you are likely to have come to believe implicitly in your client's case, no matter that your credulity was stretched to breaking point on your first encounter with him.

An advocate's job has been described as "… the professional presentation of another's point of view, which may or may not coincide with the advocate's personal convictions".[3]

That is fine, so long as the client does not admit to you that his case is a fabrication. For example, if you are instructed in a criminal matter, and the client admits to you that he has committed the offence, you are entitled to put the prosecution to proof on his behalf, but you are precluded from acting for him if he insists on giving evidence and/or calling witnesses in support of a fabricated defence. Once, many years ago, I was instructed in a British naval Court Martial. The potential client, a young sailor, was charged with having murdered a comrade on board an aircraft carrier on a very hot night in the Red Sea. I went to see the fellow, call him Smith, in the lock-up. I asked him what had led to the charge. "Nothing to say, sir, I done it," he announced. I informed Smith that, in that case, if I were to act for him, I would be entitled to test the prosecution's case, but that if his defence was called it would be incumbent upon him to plead guilty, and I would do my best for him in mitigation. I warned him that if he were not prepared to follow this procedure, he would have to see another lawyer. Smith chose the latter course, and I gave him the name and telephone number of a friend, Murphy, in another firm. I subsequently learned from Murphy that Smith had been acquitted, Murphy having been left in no doubt by him as to his innocence.

Moral: your duty to the client is superseded by your duty as an officer of the court. You must not propound a case to the judge which your client has admitted to you to be a fabrication.

D. Rule 4: Do Not Let Getting Up Get You Down

Preparation for a case, especially a heavy one, can be hard labour but, win or lose, the effort is worth it. Most cases turn on fact and law, some on fact alone. So in the first place, get your facts straight. This means seeing the witnesses, and recording their statements.

In Singapore you are in a better position to get a grasp of the facts than your counterpart in England. There, as I have said, barristers seldom see their witnesses until they meet in court, and the job of taking statements and settling affidavits falls to the instructing solicitor. With our

fused profession, we have the distinct advantage of seeing our own witnesses, taking statements from them, and deciding which witnesses should be called and which dispensed with.

If your evidence concerns a chain of events, make sure that every link of the chain is in place. I remember well a defamation case in which I appeared for a very important person. On the night before the trial, it occurred to me that my evidence did not cover a small, but crucial, link in the chain. With much trepidation, I telephoned the client and asked if he thought there was a witness who might fill the gap. To the astonishment of my security guard, the client turned up late at night with an excellent and entirely credible witness whose evidence was crucial. We won.

Affidavits should be short but comprehensive. Judges do not like poring over pages of irrelevant material, but if the background to the case is unusual, while remembering that judges are worldly people like the rest of us, and no longer "trained and reared in the straitjacket of the law" as they once were, your evidence should put the judge into the factual picture.

If your case involves law, as it generally will to a greater or lesser extent, be sure to cover the ground thoroughly. If the point is obscure you may have to go beyond the local cases, and explore English authorities and decided cases of other common law jurisdictions. Remember that you are obliged to draw the court's attention to cases which are, or appear to be against you, in which case you must try and distinguish them from yours. Take great care not to refer or rely on authorities that have been reversed on appeal, although you may of course submit, respectfully, that the court below was correct, and the appellate tribunal wrong. Do not burden the judge with a heap of authorities for pre-trial reading when you only expect to refer to a few of them, or to none of them at all. You must bend over backwards to make your judge's task easier, not more difficult.

In short, be thoroughly prepared, and try to peak at the door of the court. Do not be concerned if you are nervous before a trial. A laid back approach seldom produces a top-notch performance in court. If you have prepared thoroughly you have nothing to fear. A tingling of the palms and a certain weakness of the knees, tinged with excitement and a sense of expectation, are good signs.

> I am a confirmed believer in the contribution of adrenalin to advocacy. Those moments when the judge is about to appear in court, and, in the traditional deference to the Queen's justice, one rises to one's feet, remain for me, moments of unrefined anxiety – akin to those experienced by the sportsman about to enter the arena. When I cease to endure that feeling, I know it will be time to retire. The controversial English politician, Enoch Powell, once said that the best political speeches are made with a full bladder; I do not recommend the need artificially to create tension in this way. But I understand what he meant.[4]

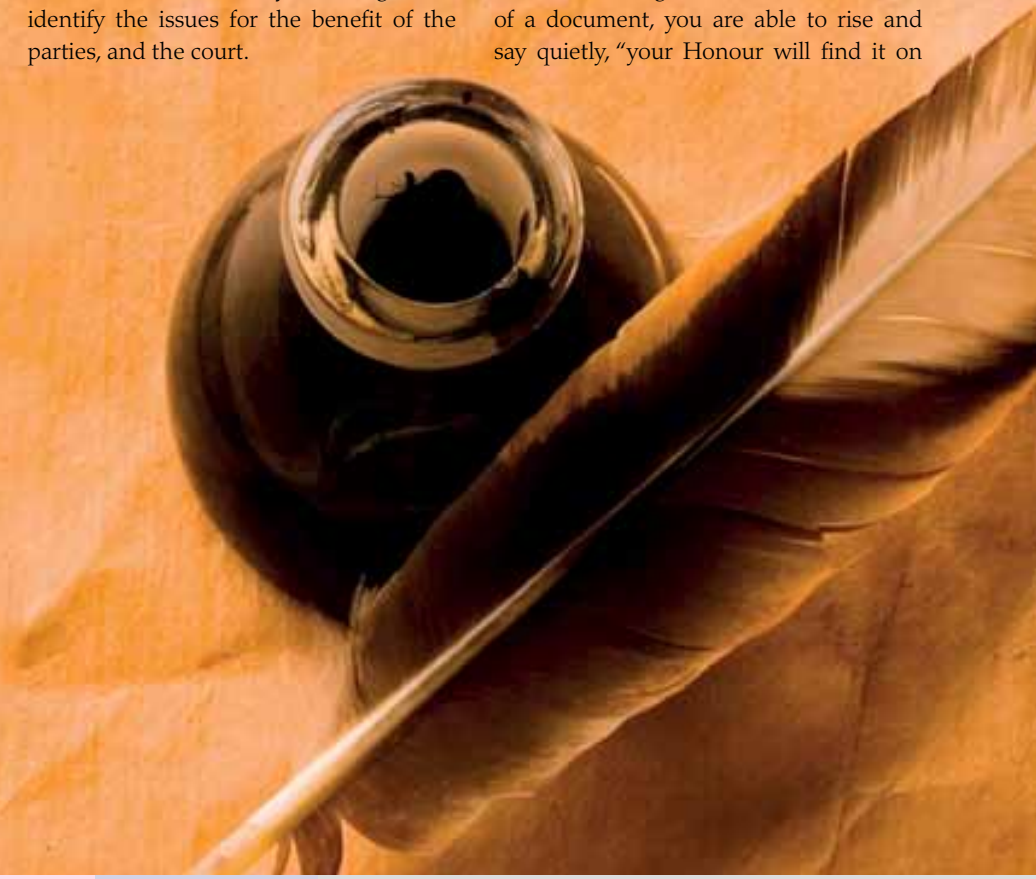
E. Rule 5: Pleader First, Then Advocate

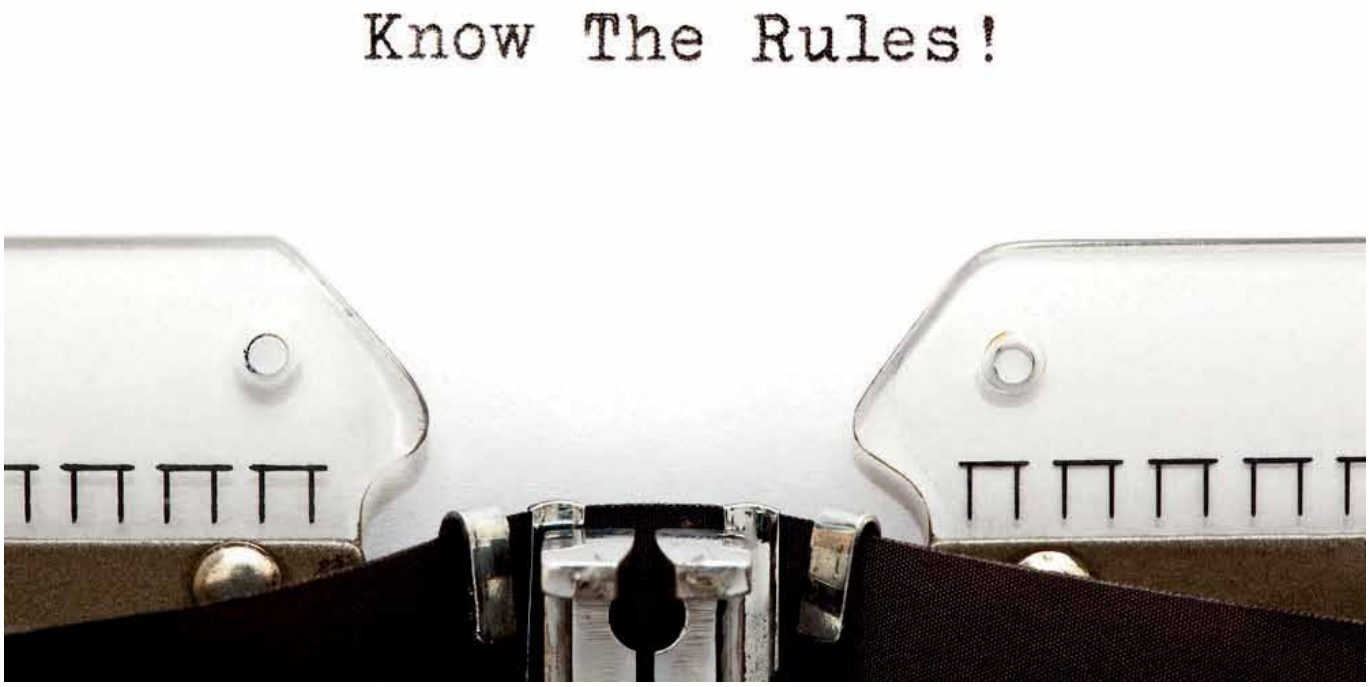
Litigation is warfare, played to elaborate rules, the real ones. They are designed to identify the issues for the benefit of the parties, and the court.

Know the rules, and make use of them. When settling a pleading, be as literate as you can, have recourse to the precedents, avoid archaic language, and if you are the plaintiff, identify your cause or causes of action, and ensure that your prayers refer comprehensively to the relief that your client seeks.

Discovery is an important step in most actions. Make the most of your opportunity to inspect and, if necessary, seek copies of your opponent's documents. Privilege from disclosure is becoming increasingly restrictive so you may wish to apply for further discovery if you have grounds for believing that a document, or class of documents, which should have been discovered have been omitted from your opponent's list. Make use of interrogatories if candid answers to them will tend to shorten the case.

Know your way around bundles of documents. Diligence in this respect makes presentation easier, and invests you with an aura of assurance. Nothing irritates a judge more than a fumbling advocate who does not know his way around the papers. Nothing will impress the judge more than, when your opponent is head down bumbling over the whereabouts of a document, you are able to rise and say quietly, "your Honour will find it on





pages" such and such. The judge will be impressed, and you will have made a point over your learned, but hapless, friend.

F. Rule 6: Battle Clean, Battle Fair

There was a time when cases were presented to the court exclusively by means of oral argument. "[Oral argument occupies] the central place … in our common law adversarial system. This I think is important, because oral argument is … the most powerful force there is, in our legal process, to promote a change of mind by a judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it."[5]

I have often seen a hostile judge turned by skilful advocacy. Unfortunately, the scope for oral advocacy has steadily diminished since the introduction of skeleton arguments (often far from skeletal) and written opening and closing submissions.

Still, there is room for advocacy, though often in written form. Submissions must be concise and compelling. "Torrents of words … are oppressive … which the judge must examine in an attempt to eliminate everything which is not relevant, helpful and persuasive", and elsewhere, indulging "in over-elaboration (causes) difficulties to judges at all levels in the achievement of a just result".[6]

And again:[7]

> It is the duty of Counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner. There has been a tendency in some cases for legal advisers impressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination.

Advocacy, whether oral or written, requires total integrity on the part of an advocate. Your reputation with the Bench as a whole, and your client's particular case, depends on it:[8]

> … judges rely heavily upon the advocate appearing before them for a fair presentation of the facts and adequate instruction in the law. They trust the lawyers who appear before them; the lawyers trust each other to behave according to the rules, and that trust is seldom misplaced.

G. Rule 7: Cross

The objects of cross-examination are twofold. Firstly, to weaken your opponent's case and, secondly, to establish the facts to support your own case. All of us, as our careers progress, develop our own method of cross-examination. My methods were pain-staking. The basis for my cross-examination were the statements that I recorded from my witnesses. I knew roughly what the opposition was going to say, because their pleadings would tell me that. I could not allow for surprise witnesses, but I could at least anticipate

what the principal witnesses on the other side would say. I would write my questions out one by one. They were usually simple questions and I put them down in the sequence in which I considered they would have the best effect. Of course, question number 2 would depend to an extent on the answer to question number 1. Often, I had to consider two alternative questions to take into account alternative possible answers to question number 1. So you can see it is very painstaking when you are dealing with a long witness, and cross-examination can take hours and hours to prepare. I am not saying that you should be absolutely bound by your preparation. If you know your case, you will want to throw in spontaneous questions, but the basic outline of your cross-examination must be very carefully thought out indeed. You may think that this is tedious, but in my experience it is effective. You may also think that it robs the cross-examination of a lot of its spontaneity, but I found that it did not. Very often, a carefully thought out sequence of questions has a very telling effect indeed.

I found it best to keep questions simple. It helps the witness. It helps the judge. Do not expect the witness to answer "yes" or "no". It is often not possible to answer the simplest questions in this way. Do not bully or harangue the witness. Persuade and coax him instead. If he is evasive, or he lies, let the judge berate him, and you will have made your point. There is no necessity to be discourteous or unfair to the witness. Do not take advantage of age or sex or lack of education, because it will only militate against you in the mind of the judge.

> It is with these aims, duties, and dangers in mind that the advocate rises to his feet to begin his cross-examination. It is the moment for him to remember the advantages he possesses over the witness. He, and not the witness, chooses the parts of his evidence on which to ask the questions. He may not choose to cross-examine about his evidence at all. He may choose to attack in an entirely different quarter. He, and not the witness, chooses the words with which to do it. He, and not the witness, knows the rules which bind them both. He, and not the witness, knows the foibles of the Judge who is to referee the contest. He, and not the witness, is familiar with and at home in the court in which they both stand, and he is dressed in a medieval armour sufficient to intimidate most well-brought-up children and quite a few adults. He, and not the witness, knows where to start and when to stop. Above all, no witness knows how much the advocate knows.
>
> Despite all these advantages he can still make a fool of himself, to the great joy of all those who have to suffer at his hands …[9]

Due to the frequent need for interpreters, cross-examination in our jurisdiction is robbed of some of its effect. However, a witness can still be trapped in a lie or made to betray his untruthfulness by systematic and intelligent questioning. It does not matter whether you carry questions in your head like a lot of people do, or whether you write them out as I did. There is no best way, but in either case, good results can only be achieved by thoughtful, careful planning.

Although advocacy provides the drama, it is by skilful argument in matters of law that most of us earn our bread and butter. In this respect, skill with words and powers of oratory are really no substitute for knowledge and understanding of the law. That knowledge and understanding can only be derived by looking up the cases, reading them, and re-reading them. Always aim for an orderly presentation of the authorities, and if there is a long line of cases, tell the judge which ones are no longer of undoubted authority. Draw his attention always to cases which on their face go against you, but which you seek to distinguish.

The ability to lay your hands on relevant cases and statutes within a short time is a very important one. If at the end of the day's hearing or at the lunch adjournment, a judge has asked for a particular authority on a particular point and you are able to come back after the adjournment with the law, thus establishing your ability to find it and to explain it, you will gain your judge's respect and attention. That cannot be bad.

Whilst you will find the law in the cases, the textbooks and in the statutes, the skill of applying it will largely come from experience and that experience will be bred out of industry and motivation. Successful legal practice is never cushy. Sometimes, it can be nerve-wracking. The more successful you are, the worse it is. But there are also times of extreme gratification, when you know that you have done a sound job, win or lose.

H. Rule 8: Goodfellows

Philip Jeyaretnam SC, in a recent speech, referred to "camaraderie" within the Bar, and stressed its importance. There is a great deal to be said for institutional fellowship among practising advocates, both in court and out of it.

You do nothing for yourself or for your client by being acrimonious, and this applies in correspondence as well as in court. Letters written in anger often look silly when read in cold print months or even years later in court. Let your opponent be unpleasant if he wishes, but do avoid being dragged down to his level. You will score off him that way far more effectively than if you employ his tactics. Be courteous to your opponent in court, no matter how unpleasant he may become. By all means be in control, and remember that you are both doing a job and that the judge will try to do his or hers. Neither you nor your opponent will assist the Bench by being grumpy, or rude to each other.

I. Conclusion

I can do no better than to conclude with the words of my friend Michael Beloff QC,[10] upon whom I have drawn so heavily for this chapter, and to whom I am indebted:

> The advocate – is he actor or analyst? The truth lies, as so often, in between. Many qualities transcend the boundaries between the trial and the appellate advocate. Fluency is one; a sense of rhythm is another, the slow to mix with the quick, the light to soften the dark, humour to mitigate passion; a fidelity to reason, the marshalling of fact, the dissection of law; a feeling for structure, the architecture of the submission – are yet others too.

But I would myself place two qualities above all others. The first main quality is sensitivity to relevance – the capacity to identify what is central to a case, to focus on it and in consequence to discard what is peripheral. The temptation is always to say everything, the risk that, in so doing, one ends up by saying nothing. It is often said by great advocates that there is only one point in any case; that is, of course, an exaggeration – what good advocate does not exaggerate – but it is certainly true that not all points are of equal weight, and that selection is as vital as presentation.

The second main quality is adaptability to one's tribunal. Advocates seduced, it may be by the sound of their own voices, may be tempted to put the performance above the result; but in the end, like it or not, advocacy is ineffective if, however dramatic, however powerful, however erudite, it fails to persuade the decision maker.

1 John Mortimer, *A Voyage Round My Father* (1982).

2 Michael J Beloff QC, "Advocacy – A Craft under Threat?" *First Hans Espeland Lecture* (Oslo 2002).

3 A Boon & J Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Oxford, England: Hart Publishing, 1999).

4 Michael J Beloff QC, "Advocacy – A Craft under Threat?" *First Hans Espeland Lecture* (Oslo 2002).

5 *S Sengupta v C N Holmes* [2002] EWCA Civ 1104 at [38], *per* Laws LJ.

6 *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1991] 2 AC 249 at 280, *per* Lord Templeman.

7 *Ashmore v Corp of Lloyd's* [1992] 1 WLR 446 at 453, *per* Lord Templeman.

8 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 692, *per* Lord Hoffman.

9 Richard du Cann, *The Art of the Advocate* (England: Penguin Books Ltd, 1993) at pp 129–130.

10 Michael J Beloff QC, "Advocacy – A Craft under Threat?" *First Hans Espeland Lecture* (Oslo 2002).