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ABANDONING THE FETISHISATION OF THE COURTROOM ADVOCATE

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I. The fetishisation of the courtroom advocate

1 In the inaugural article of the *SAL Practitioner*,[1] Mr Nicholas Poon sought to prove the "common perception" of the decline in opportunities for adversarial oral advocacy amongst young lawyers by head-counting "lead counsel" appearances in reported judgments of the Singapore courts across two generations of lawyers.[2] He suggested that reversing the trend is paramount to ensuring the growth of future "exceptional advocates" for sustaining Singapore's global brand as a leading seat of dispute resolution, and made predictions about the consequences that may follow if the phenomenon he identified is not immediately arrested.[3] Junior dispute resolution lawyers can easily empathise with the sentiments expressed in Mr Poon's article, itself a commendable and impressive project. Yet, one cannot but wonder if those sentiments are truly pertinent, or whether they are borne out of a fetishised view of the courtroom advocate.

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1 Nicholas Poon, "The Decline of Oral Advocacy Opportunities: Concerns and Implications" [2018] SAL Prac 1, reported in the mainstream media at K C Vijayan, "Lawyers taking longer time to gain top court experience" *The Straits Times* (18 September 2018).

2 Nicholas Poon, "The Decline of Oral Advocacy Opportunities: Concerns and Implications" [2018] SAL Prac 1 at paras 12–26. See also, for a fuller data analysis, How Khang, "Singapore's Legal Profession: Data Analysis of Lead Counsel Appearance Numbers" *Medium* (6 December 2018), archived at <https://perma.cc/3PU6-B6XU>.

3 Nicholas Poon, "The Decline of Oral Advocacy Opportunities: Concerns and Implications" [2018] SAL Prac 1 at paras 35–39.

2 Many a young person, doubtless, has been inspired to law school and to a career as a litigator by the courtroom speeches of Harper Lee's "Atticus Finch",[4] and many a young law student, surely, has read and been enthralled enough by Richard du Cann QC's account and reification in *The Art of the Advocate* of the forensic oral skills of the best of the English Bar,[5] to believe in the primacy of oral advocacy in the skill set of a disputes lawyer. The archetypal public image of the lawyer also tends to be that of the courtroom advocate, on his feet pleading before the court, fed no doubt by portrayals in popular media, from the eponymous *Perry Mason* to Horace Rumpole in *Rumpole of the Bailey* to Denny Crane and Alan Shore in *Boston Legal*.

3 Indeed, in making his argument, Mr Poon refers to the "legends" of the Singapore litigation Bar, referring to the early generation of Senior Counsel (who for the most part are, by definition, courtroom advocates) as constituting a "remarkable epoch" of a "golden age of advocacy".[6] It is good to have role models, and it is not unwise, for a young fledgling professional, to have exemplars who have "made it" in the profession to strive towards. But it is a mistake to assume that what worked for them two to three decades ago to become the successful lawyers they are will continue to work and to apply today and tomorrow. Much has changed in the dispute resolution landscape of Singapore in the last decade or two. It is overly simplistic to lament longingly for the same "oral advocacy opportunities" that were available to those senior advocates to cut their teeth on and which, it is claimed, moulded them into the reputable and well-regarded advocates they are today, thinking that such opportunities will be the same important ingredient that makes the next generation of effective dispute resolution lawyers of Singapore.

4 This article surveys some of the foundational changes in the dispute resolution landscape of Singapore that undermine

4 Harper Lee, *To Kill a Mockingbird* (J B Lippincott & Co, 1960).

5 Richard du Cann, *The Art of the Advocate* (Penguin Books, Rev Ed, 1993).

6 Nicholas Poon, "The Decline of Oral Advocacy Opportunities: Concerns and Implications" [2018] SAL Prac 1 at paras 7–8.

the crude assumption that the "oral advocacy opportunities" of today, and tomorrow, will make effective and successful dispute resolution lawyers. It makes the case for eschewing the fetishisation of the courtroom advocate in favour of embracing the model of a modern dispute resolution lawyer whose most important skills are neither exclusively nor necessarily those used or honed in the spectacle of what Mr Poon describes as "the charged atmosphere of courtrooms and arbitration chambers".[7] This article does this with reference to three main themes: first, the increased use of written advocacy in substitution for oral advocacy;[8] second, the amplified importance of documentary evidence over oral evidence in the legal forensic process;[9] and third, the growing recognition of more conciliatory alternative dispute resolution modes in Singapore.[10]

II. The increased use of written advocacy in substitution for oral advocacy

5 The common law adversarial system and the procedures of its courts and rules of pleading that Singapore inherited from the British were historically predominated by orality. The centrality of the jury – often comprised of the illiterate citizenry – in the fact-finding process required that evidence be taken and arguments be made in person and orally in the courtroom. With the decline in the use of the jury in both civil and criminal trials, it followed that much of the procedure no longer needed to be physically performed in the courtroom in a courthouse. While the process is not taken entirely away from the spectacle of an actual physical hearing, many procedural innovations of the recent decades have sought to minimise the extent to which the process actually occurs physically and orally before the tribunal. Oral examination-in-chief of witnesses in open court has been replaced by written affidavits of evidence-in-chief filed before

7 Nicholas Poon, "The Decline of Oral Advocacy Opportunities: Concerns and Implications" [2018] SAL Prac 1 at para 1.

8 See paras 5–8 below.

9 See paras 9–12 below.

10 See paras 13–16 below.

the trial;[11] instead of opening speeches made to the judge, advocates in Singapore file written opening statements before the hearing;[12] and, today, it is the exception rather than the norm for advocates to make closing speeches at the close of the evidence at a trial – instead, they file written closing submissions.

6 By contrast, the appellate process, being a procedure shorn of the jury and heard by judges, never, by its nature, demanded orality. Yet, it too traditionally was largely conducted orally. One explanation may be that this was a spillover from the trial process; another may be the belief in the power and efficacy of the "Socratic" dialogue between the tribunal and the advocate – which can only be conducted orally – in producing better-reasoned decisions. Regardless, in Singapore, we have gone much further than, perhaps, has been the case in England and Wales or in many other common law jurisdictions, in curtailing the emphasis on orality in appellate hearings. In the 1990s, Chief Justice Yong Pung How's Court of Appeal instituted time limits for oral submissions before the court, and, today, in stark contrast to the practice in the UK Supreme Court where hearings for individual cases can run to several days, it is rare to have hearings before the Singapore Court of Appeal extend beyond half a day. This, correspondingly, places greater emphasis on the written appellate briefs and written skeletal submissions required to be filed with the court.[13] In the appellate context, this shift from oral to written advocacy has not gone unobserved by the Judiciary. In *Re Lord Goldsmith Peter Henry PC QC*,[14] in rejecting an application for *ad hoc* admission of Queen's Counsel to argue a constitutional challenge before the Court of Appeal, V K Rajah JA, sitting in the High Court, cited, as a reason against admitting

11 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 38 r 2.

12 Supreme Court Practice Directions Part VIII, para 71(14).

13 See, *eg*, Paul Tan, "Writing a Persuasive Appellate Brief" (2007) 19 SAcLJ 337 for an excellent exposition of the importance of the appellate brief in the Singapore appellate process ("... particularly in appeals it is the written submission that exercises a disproportionate effect on the outcome ...").

14 [2013] 4 SLR 921.

silk, for his oral advocacy skills to make arguments before the court, the diminished importance of oral advocacy in the Singapore appellate process, observing that "the Singapore Court of Appeal has evolved to be more *writing-centred* than that in many other common law court systems", and that "[*t*]*he written medium occupies a central role in the appellate process here*" [emphasis in original].[15] His Honour noted that oral arguments function only as a "useful concluding supplement" to the written appellate briefs, which are the primary medium by which detailed arguments are made.[16] Further, the oral exchange between bench and bar is of reduced significance because instead of a full-blown and spontaneous "Socratic" dialogue at the oral hearing where all the issues are necessarily sought to be fully exposited, the Court of Appeal has adopted a practice of calling for further *written* submissions when critical queries or issues remain outstanding after the earlier submissions or, indeed, the short hearing itself.[17]

7 In short, a large part of the court processes in Singapore, both trial and appellate, has shifted from oral to written. To be sure, this is not to say that orality plays no significant role in the court process today. Admittedly, one particular aspect of the trial, cross-examination, remains a wholly oral process that takes place, necessarily, in the courtroom. The extent to which the importance of this one aspect to the argument may be tempered is tackled in the following section.[18] Suffice it to say that when one actually looks at the constituent parts of the Singapore litigation process in more real terms, it is apparent that oral advocacy does not play as outsized a role as one might have thought. The trend towards a greater emphasis on written advocacy suggests that the skills required of an effective advocate of today and tomorrow may not necessarily be perfectly similar to those that made the senior lawyers of yesteryear.

15 *Re Lord Goldsmith Peter Henry PC QC* [2013] 4 SLR 921 at [29].
16 *Re Lord Goldsmith Peter Henry PC QC* [2013] 4 SLR 921 at [31].
17 *Re Lord Goldsmith Peter Henry PC QC* [2013] 4 SLR 921 at [33].
18 See paras 9–12 below.

8 More esteemed and learned writers have written and spoken on the skills that need to be honed and practised for effective written advocacy,[19] and it is not the object of this article to canvass them. That said, if we are concerned with training opportunities for young advocates, it is germane to note that unlike courtroom oral advocacy where typically only one lawyer can have a go at it, the drafting of written work products often includes iterative processes capable of involving more than one lawyer, from the most senior to the most junior in the team. In this way, the junior lawyer can get as much "hands-on" experience in the process as would the senior lawyer working on it. All this is not to say that, at present, junior lawyers do not work on the written work submitted to the court. Quite the contrary, one can imagine that junior lawyers are more often than not intimately involved in the drafting of written work, which is often viewed as significantly heavier lifting that more senior lawyers may not have the time to commit to doing by themselves. The effect of the fetishisation of courtroom oral advocacy, though, may tend to distract from the importance of such written work to the process, and thus diminish or obscure the junior lawyer's perception of such drafting work as an important opportunity to develop a crucial and necessary skill.[20]

III. The modern trial: more documentary, less oral

9 The great American jurist John Henry Wigmore viewed cross-examination as one of the cornerstones of the adversarial

19 See, *eg*, in the Singapore context: The Honourable Justice Choo Han Teck, "Legal Writing" [2019] SAL Prac 3; Paul Tan, "Writing a Persuasive Appellate Brief" (2007) 19 SAcLJ 337.

20 Of course, there is a need to distinguish between the different types of work that go into drafting a written work product: the analytical substantive work and the so-called "menial" work like the compilation of papers and word processing. It is inevitable that involvement in the former may entail some of the latter. Professors David B Wilkins and G Mitu Gulati distinguish between such work as "training work" and "paperwork": see David B Wilkins & G Mitu Gulati, "Reconceiving the Tournament of Lawyers: Tracking, Seeding and Information Control in the Internal Labor Markets of Elite Law Firms" (1998) 84 *Virginia Law Review* 1581.

system and called it "the greatest legal engine ever invented for the discovery of the truth".[21] In Singapore, Chief Justice Sundaresh Menon has declared it "a truism that cross-examination plays a fundamental role in the common law's adversarial process for getting to the truth".[22] Likely, for now at least, it is hard to imagine otherwise than cross-examination continuing to be a foundational feature of trial procedure in Singapore. So far as cross-examination "requires skills and experience that are not readily transplantable from one advocate to another",[23] it could fairly be maintained that this is an area where young lawyers do need "oral advocacy opportunities" to develop their skills.

10 But even this is liable to be slightly overblown. Granted, in a pure contest of the conflicting oral recollections of witnesses, oral examination conducted with the advocates on their feet face-to-face with the witness, requiring quick wit and reaction to the *ex tempore* testimony of the witness, is inevitable. However, in much of both business and everyday life today, public and private actors generate an enormous number of documents, both electronic and physical. Not infrequently, therefore, the veracity of a witness's testimony is not undermined as a result of the verbal forensic probing by the advocate on his feet, but, instead by contemporaneous documents generated during the fact. In *Sandz Solutions (Singapore) Pte Ltd v Strategic Worldwide Assets Ltd*,[24] Rajah JA, sitting in the Court of Appeal, warned against trial judges placing too great a weight on the witness's demeanour on the witness stand in assessing the veracity of his evidence;[25] instead, His Honour advised that what was required to be assessed was

21 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Little, Brown and Co, 1905) at para 1367.

22 *Teo Wai Cheong v Crédit Industriel et Commercial* [2013] 3 SLR 573 at [25].

23 *Re Lord Goldsmith Peter Henry PC QC* [2013] 4 SLR 921 at [25].

24 [2014] 3 SLR 562.

25 *Sandz Solutions (Singapore) Pte Ltd v Strategic Worldwide Assets Ltd* [2014] 3 SLR 562 at [42]–[56].

the "totality of the evidence" and, in particular, as tested against the "contemporaneous objective documentary evidence".[26]

11 It is true that relying on documentation in the presentation of a case to a court, often in the course of the cross-examination itself, is a skill and experience that can be refined only through the actual "doing" of it. But this downplays significantly the amount of substantive background work, done outside the courtroom, which goes into preparing for that final delivery before the court. While oral delivery is one important aspect, an equally important skill is the ability to review and evaluate the available documentary evidence, to construct a picture of the events in question, and, ultimately, to organise them to be accessible and ready for use in court to challenge the testimony of the adversary's witnesses. This is no trivial task. It requires the lawyer to formulate an understanding of the machineries of the client's and the adversary's industry or circumstances, and also to apply sensitivity to the human workings of the subjects in question in the generation of these relevant documents. As the world we live in grows more and more complex, the ability of a disputes lawyer to do all of this effectively becomes all the more invaluable.

12 Again, it is not unlikely that junior lawyers, when assisting senior lawyers in the preparation for trial, are already closely involved in this process. With the growing importance of this aspect of work to the disputes lawyer's effectiveness, there is a need to recognise the significance of such skills, both on the part of the senior lawyer in teaching and educating the young lawyer, and the young lawyer in appreciating such tasks as meaningful learning opportunities.

26 *Sandz Solutions (Singapore) Pte Ltd v Strategic Worldwide Assets Ltd* [2014] 3 SLR 562 at [56] and [46], citing Patrick Devlin, *The Judge* (Oxford University Press, 1979) at p 63.

IV. The alternative dispute resolution movement in Singapore

13 Of course, perhaps having been drawn to the profession by the popular image of the courtroom advocate on his feet pleading before the court, the young disputes lawyer might understandably have the court process, with the oral hearing as its highlight, as the focus of his professional worldview. But while this could have been so two decades or more ago, it is arguably hardly the case anymore today.

14 The alternative dispute resolution ("ADR") movement has grown rapidly over the last few decades, both globally and in Singapore. Adversarial litigation is no longer seen as the sole, or even primary, mode of dispute resolution. There is a growing acceptance that ADR is oftentimes better for the clients' interests than a traditional adversarial contest. The Singapore Government has heavily backed the institutional infrastructure for ADR, for instance, supporting the founding of the Singapore Mediation Centre in 1997 and the Singapore International Mediation Centre in 2014.[27] Even the Judiciary, the seat of adversarial litigation, has come to be extremely supportive and encouraging of ADR. The Rules of Court make relevant to the issue of costs the parties' conduct *vis-à-vis* attempting resolution by mediation or other alternative means;[28] the State Courts provide ADR services;[29] and the Supreme Court Practice Directions require that lawyers advise their clients about ADR,[30] going so far as to formalise the process of ADR offers and responses.[31] The volume of disputes

27 Consider also the recent passage of the Mediation Act 2017 (Act 1 of 2017) and the successful bid to have the United Nations Convention on International Settlement Agreements Resulting from Mediation named after Singapore.

28 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 59 r 5(*c*).

29 State Courts Practice Directions Part VI, para 35.

30 Supreme Court Practice Directions Part IIIA, para 35B.

31 Supreme Court Practice Directions Part IIIA, para 35C.

settled at the Singapore Mediation Centre has also seen remarkable growth in recent times.[32]

15 Disputes lawyers have also come to discover new ways of practising, aside from the old adversarial mode. Models first conceived in other jurisdictions, like Collaborative Law[33] or Cooperative Law, or indeed, simply the building of a more conciliatory practice,[34] have taken root in Singapore. Suffice it to say, ADR in Singapore today is, perhaps, better described as no longer quite so "alternative" but really, quite "mainstream".[35] All in all, in today's landscape in Singapore, a disputes lawyer content with being a litigation hammer looking for adversarial trial nails probably cannot in good conscience consider himself an effective lawyer.

16 The ADR movement calls for a new (and additional) skill set quite different from those required of the courtroom gladiator. Again, it is beyond the scope of this article to fully canvass and detail what those may specifically be, but some come immediately to mind: an understanding of negotiation theory, emotional skills like empathy, interpersonal communicative skills, and, more generally, an ability to shift one's mindset from adversarialism to collaboration, co-operation and

32 Tan Tam Mei, "Singapore Mediation Centre saw record number of cases and disputed sums in 2017" *The Straits Times* (16 January 2018).

33 See, *eg*, International Academy of Collaborative Professionals, *Standards and Ethics* (2018), archived at <https://perma.cc/E74Q-XYGL>. For a short and easily accessible introduction to this in the Singapore context, see, *eg*, Michelle Woodworth Cordeiro & Jasmine Foong, "Conversation with Catherine Gale of Conflict Resolve, Lawyers and Mediators: Collaborative Law – The New Alternative to Litigation?" *Law Gazette* (January 2013) 34, archived at <https://perma.cc/3JWK-AXLR>; and Rajan Chettiar & Peter Loke, "Collaborative Practice – A New Alternate Dispute Resolution Method" *SMA News* (November 2013), archived at <https://perma.cc/K7SG-TLFV>. See also the Singapore Mediation Centre's Collaborative Family Practice service, archived at <https://perma.cc/TT5D-EDF6>.

34 For example, Singapore readers may be familiar with some of the prevailing themes in Mr Rajan Chettiar's long-running column, "Alter Ego", in the Law Society of Singapore's monthly periodical *Law Gazette*.

35 Some have suggested renaming "alternative dispute resolution" to "appropriate dispute resolution".

conciliation. Do these skills get developed as the young lawyer gets more opportunities to actually conduct negotiations and mediations as – for lack of a better phrase – "first chair"? Of course, and so perhaps, it might be suggested that a lack of opportunities also hinders development like in the case of courtroom skills. Nevertheless, these are skills and proficiencies which young lawyers can pick up through specialised training, self-education and improving their self-awareness. The danger, it is submitted, is if the fetishised view of the courtroom advocate somehow plays some significant part in standing in the way of full recognition and acceptance of these skills as equally important as a lawyer's oral court craft.

V. Concluding remarks

17 Following Mr Poon's article,[36] in October 2018, the Young Members Chapter of the Singapore Academy of Law's Professional Affairs Committee obtained pledges from 21 law firms to provide their young lawyers with more advocacy opportunities in court.[37] This is an admirable and worthwhile undertaking. As the Deputy Attorney-General has suggested in this journal, senior lawyers owe an obligation to educate and train the next generation of young lawyers, and this includes both mentoring and providing fair opportunities for development.[38] Yet, one cannot but wonder whether the outsized

36 Nicholas Poon, "The Decline of Oral Advocacy Opportunities: Concerns and Implications" [2018] SAL Prac 1. Though it must be said that it is unclear to the author whether this and the issues mentioned in n 37 below are related merely correlatively or causatively.

37 Melody Zaccheus, "21 law firms vow to create more chances for young lawyers" *The Straits Times* (16 October 2018).

38 Deputy Attorney-General Hri Kumar Nair SC, "In Search of Purpose and Mentorship" [2018] SAL Prac 15 at para 14. The gist of this sentiment is also one which has recently gained recognition and expression in the leading legal profession literature; see, *eg*, David B Wilkins & Eli Wald, "The Fourth Responsibility" (2017), reprinted in Andrew L Kaufman *et al*, *Problems in Professional Responsibility for a Changing Profession* (Carolina Academic Press, 6th Ed, 2017) at p 588. Professors Wilkins and Wald argue that, *inter alia*, firms owe a responsibility to invest in their lawyers' human capital, *eg*, by providing training and mentoring to their lawyers.

emphasis on courtroom advocacy is warranted or whether it is a product of a skewed view of its importance.

18 This article makes no argument for diminishing the importance of oral advocacy skills in an adversarial setting to a disputes lawyer. It remains one central part of the adversarial court process. Instead, it advances a quite different and much more modest proposition. The modern disputes lawyer's skill set comprises more than just courtroom oral advocacy skills, as much more of his work that is equally important, whether within or without the adversarial litigation context, happens outside the courtroom. If there is indeed a "decline of oral advocacy opportunities"[39] for young lawyers in Singapore, it is more than fair to point this out. But it is necessary to be sure that in doing so, we are not fetishising courtroom advocacy and believing it to be more important than it really and practically is. To do so unfairly minimises and obscures the many other necessary and important skills of a modern disputes lawyer which young lawyers should recognise and also seek opportunities to develop.

39 Nicholas Poon, "The Decline of Oral Advocacy Opportunities: Concerns and Implications" [2018] SAL Prac 1.