ADVOCACY IN COURT: MUSINGS AND OBSERVATIONS

It is understood that advocacy skills are essential for litigation lawyers and that experience is crucial to improving said skills; however, it is acknowledged that opportunities for practice may not be readily available. In this article, the author shares his observations from the Bench on practices adopted by members of the Bar. It is hoped that these pointers – spanning trial and applications advocacy – will provide guidance to readers, especially younger members of the Bar.

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I. Introduction

1 Mention "lawyer" and the first image that comes to mind among non-lawyers is that of the litigation lawyer. This is an unfair reflection on lawyers, including corporate counsel (also known as in-house lawyers), who handle legal work other than dispute resolution. For convenience, in this article, I refer to these lawyers as corporate lawyers. Of course, both litigation lawyers and corporate lawyers are equally important in our legal system; they just perform different roles.

2 The corporate lawyer seeks to ensure that his client's intent is implemented, the transaction does not transgress laws and legal risks are addressed. The negotiation that a corporate lawyer handles in a transaction is a battle that is (usually) less confrontational. And if the corporate lawyer has done his work well, the risks of disputes arising and going to court are reduced. In that sense, a corporate lawyer may not see the quality of his work tested in the same way that a litigation lawyer would. The results of a litigation lawyer's work are seen, and felt, in the courtroom.

3 For the litigation lawyer, confrontation is the name of the game in our common law adversarial system. Unlike the corporate lawyer who tries to minimise the risk of disputes arising, the litigation lawyer

1 I am grateful to Ms Kristy Tan JC for her insightful comments and very helpful suggestions. I would also like to thank Ms Sarah Banton for her assistance with the research for this article. The views expressed in this article are my personal views and any errors are mine alone. The examples used in this article are from actual cases but adapted and modified for the purposes of this article.

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deals with disputes that have arisen. His role is to obtain a resolution of the dispute in his client's favour and, failing a settlement being reached, the courtroom is where the battle takes place. The litigation lawyer is the gladiator championing his client's cause. But there is an important difference. It is not a fight to the death although it might threaten to become one in some (fortunately, rare) cases. And there is an independent third party – the judge, who is both a referee and the decision-maker. The battle is not about inflicting pain on the opponent or, for that matter, the judge. Instead, the battle is to persuade the judge that the justice of the case lies in his client's favour.

4 Advocacy skills, both written and oral, are essential to a litigation lawyer. They are the means by which the litigation lawyer seeks to persuade the judge. Advocacy in this context goes beyond oral advocacy; it embodies everything that is done to present the client's case to the judge in a manner that is most persuasive.

5 In terms of learning and improving on one's advocacy skills, there is no substitute for experience. Practical workshops in which trainers review the participants' performances with the aid of video recordings provide perhaps the next best form of training, followed by watching litigation lawyers in action (with the caveat that one must apply some good sense and intuit what to pick up and what not to, and also not blindly adopt a style that is personally unsuited to one). However, experience may not be easy to come by, and attending workshops and watching litigation lawyers require time. It helps to have a mentor who can provide guidance and explain what should be done or not done.

6 The objective of this article is therefore a more modest one: to share some of my own observations from the Bench in the hope that these observations may provide some guidance, especially to the younger members of the Bar. Many of the observations relate to matters or practices that may seem obvious. Nevertheless, they are mentioned here because despite being obvious, such practices have arisen more often than they should.

7 This article deals with five areas in which my observations apply generally to both trial and applications advocacy, and another three areas touching on advocacy in trial proceedings (with a greater focus on cross-examination).

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II. General matters

A. Counsel's duty to court

8 A counsel's duty to his client is clear. He must "use all legal means to advance the client's interests, to the extent that [he] may reasonably be expected to do so".[2] However, it is equally clear that this duty does not extend to achieving victory for his client at all costs. Counsel has a "paramount duty to the court, which takes precedence over [his] duty to [his] client".[3]

9 The following observations by the Court of Appeal in *BOI v BOJ*[4] regarding the role of counsel are particularly apt:

> 3 First, counsel are not the mere 'mouthpieces' of their clients. They are no mere automatons, executing every instruction of the client, especially where the client wants each and every point to be taken in order to inflict maximum 'damage' on the other party, and where the taking of such points is – in a word – pointless and would not only engender a wastage of the other party's, but also the court's, time and resources. … We operate within an adversarial system. However, as the learned Lord Chief Justice Cockburn observed in an extra-judicial address (see George P Costigan Jr, 'The Full Remarks on Advocacy of Lord Brougham and Lord Chief Justice Cockburn at the Dinner to M Berryer on November 8, 1864' (1931) 19 Cal L Rev 521 at 523), which our courts have endorsed and recapitulated on several occasions (most recently by this court in *Goh Seng Heng v Liberty Sky Investments Ltd* [2017] 2 SLR 1113 at [62]):
>
>> My noble and learned friend, Lord Brougham … said that an advocate should be fearless in carrying out the interests of his client; but I couple that with this qualification and this restriction—that *the arms which he wields are to be the arms of the warrior and not of the assassin*. It is his duty to strive to accomplish the interests of his clients *per fas*, but not *per nefas*; it is his duty, to the utmost of his power, to seek to reconcile the interests he is bound to maintain, and the duty it is incumbent upon him to discharge, with the eternal and immutable interests of truth and justice. [emphasis added]
>
> 4 In order to wield the 'correct' set of arms, the lawyer, whilst owing a duty to his or her client, obviously cannot be the mere conduit pipe of that client. He also owes a duty – and indeed a paramount one – to the court. A lawyer has to tread a *fine line* when adhering to these occasionally inconsistent duties in practice, but that is the *very essence* of being a legal professional.

2 Legal Profession (Professional Conduct) Rules 2015 r 5(2)(*j*).
3 Legal Profession (Professional Conduct) Rules 2015 r 4, Principles (*a*) and (*b*).
4 [2018] 2 SLR 1156 at [3]–[4].

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10 A counsel's duty to the court is multi-dimensional and I will touch on three practical dimensions that have a bearing on advocacy.

11 First, counsel have a general duty to the court to "assist in the administration of justice" and to "act honourably in the interests of the administration of justice".[5] More specifically, when conducting any proceedings before a court, counsel must not "knowingly mislead or attempt to mislead [the court] *in any way*"[6] [emphasis added]. The scope of this duty is broad, as it should be.

12 Where statements in counsel's written submissions make references to cases or documents (including references by way of footnotes) in support of the statements, counsel must make sure that the cases or documents referred to do in fact support those statements.

13 Similarly, where statements in affidavits drafted by counsel make references to documents, counsel must make sure that the documents referred to do in fact support those statements. Counsel cannot hide behind the fact that the client or the client's witnesses approved the affidavits. In addition, it should be noted that counsel has a duty not to "knowingly assist or permit his client to mislead the court".[7]

14 For example, a statement in an affidavit of evidence-in-chief ("AEIC") alleges that the defendant spoke to the claimant over the phone and asked the claimant for a loan. A footnote to the statement refers to an exhibit containing certain WhatsApp messages. Counsel must not allow the AEIC to be filed without making sure that the WhatsApp messages do support the statement. If all that the WhatsApp messages contain is a record of a missed call, the reference in the AEIC to the WhatsApp messages would be misleading as the WhatsApp messages contain nothing that supports the assertion in the AEIC.

15 Second, another important aspect of the duty is that, when conducting any proceedings before a court, counsel must not "knowingly or recklessly cite the law out of context, interpret the law in a manner calculated to mislead the court … or otherwise advance any submission, opinion or proposition which [he] knows or ought reasonably to know is contrary to the law".[8] In addition, he "must inform the court … of every relevant decision, and every relevant legislative provision, of which [he]

5 Legal Profession (Professional Conduct) Rules 2015 r 9, Principle (*a*).
6 Legal Profession (Professional Conduct) Rules 2015 r 9(2)(*a*).
7 Legal Profession (Professional Conduct) Rules 2015 r 10(6)(*a*).
8 Legal Profession (Professional Conduct) Rules 2015 r 9(2)(*f*).

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is aware, whether that decision or provision supports or rebuts [his] contentions before the court".[9]

16 It goes without saying that counsel should not rely on any decision that he knows has been overruled on appeal. Obviously, if the case report indicates that an appeal has been filed, counsel must check the status or result of the appeal. If the appeal has been decided, counsel must inform the court of the decision even if the decision is against his client's case.

17 Counsel should also exercise care in *how* they represent case law in their submissions. Providing a pinpoint citation for a proposition is acceptable (and even helpful) where that citation clearly bears out that proposition. However, if counsel is relying on his own particular interpretation of or extrapolation from the reasoning or holding in a case, that should be made clear. In such situations, it may give a misleading impression if counsel merely provides a bare case citation in support of his legal argument, without more.

18 Third, a counsel's duty to the court includes not knowingly making submissions that deviate from his client's pleaded case without informing the court of this fact. Having informed the court, he may then explain why he is entitled to make the submissions nonetheless. It is wrong for counsel to keep quiet about it in the hope that the court and his opponent may not realise that he has strayed from his client's pleaded case.

19 Abiding by these duties ensures that counsel protects his reputation as an officer of the court who can be trusted. This is vital as, otherwise, his ability to persuade the judge will be adversely affected.

B. Be concise

20 The importance of being concise in both written and oral advocacy cannot be over-emphasised. "Concise" means "brief but comprehensive". Quantity does not mean quality. Less is often more. Use shorter sentences and simple text. A concise argument is achieved only with much effort and thought. As has been said: "If I had more time, I would have written a shorter letter."[10]

9 Legal Profession (Professional Conduct) Rules 2015 r 9(3)(*a*).

10 This quote is often attributed to Mark Twain but it has been traced to a French mathematician and philosopher, Blaise Pascal.

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21 Persuading the judge starts with conveying the arguments clearly to the judge. A concise argument helps the judge to understand the argument faster and more clearly. This allows him to think about the argument instead of wondering what the argument is. Long, rambling submissions do not help. Simply putting everything into the submissions and leaving it to the judge to sort things out is anything but persuasive.

22 Concise submissions are powerful and persuasive. Be concise!

C. Documents filed in court

23 Often, both hard copies and electronic copies of bundles of documents are used in court. The pagination for the hard copies needs to start with the very first cover page so that the page numbers match those on the electronic copies.

24 Many cases today involve voluminous documents. Care has to be taken to ensure that the copies of documents that are filed are clear and legible. Spreadsheets and tables are a common feature in many commercial disputes. Often, when printed on A4-size paper, the contents of spreadsheets and tables are too small to be read. In such cases, it is necessary and helpful to prepare enlarged copies of the spreadsheets and tables for use during the hearing or trial. All too often, this is overlooked or ignored. It is difficult to be at your persuasive best if the judge cannot read the documents that are being relied on.

D. Be attentive to judge

25 Since advocacy is about persuading the judge, common sense tells us that counsel must be attentive to the judge's presence in the proceedings and how the judge is following the proceedings. Yet, it is common to find that counsel have seemingly forgotten about the judge.

26 The most usual manifestation of this is where counsel refers to a document or a case and launches immediately into the questions to the witness or the submissions, oblivious to the fact that the judge is still looking for the document or case. When conducting cross-examination, there is no point referring to a specific bundle and page and firing a barrage of questions if the judge has not located the bundle and page. In such a situation, the judge will likely stop the counsel, who then has to start his questions all over again. This wastes time. More importantly, it may also affect the effectiveness of his questions as the witness now has a second chance at answering the questions. Counsel need to make sure that the judge is at the relevant document or case before continuing with their questions or submissions on that document or case.

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27 I have observed that counsel tend to be less aware of the judge during virtual hearings. In virtual hearings, one does not have the same awareness of the other participants that one experiences in a physical hearing. Counsel need to be aware of this and to make the effort to be more mindful of the other participants, including the judge. The problem is exacerbated when counsel get too focused on reading from their prepared notes on a separate monitor. Ideally, use a larger monitor for the virtual hearing and have the notes on the same screen. Otherwise, position the monitor that the notes are on as close as possible to the virtual hearing monitor.

28 On another note, a Zoom hearing is *not* a Zoom *meeting*. The formalities of a hearing must still be observed. This includes counsel from opposing sides not addressing each other without doing so through, and after obtaining permission from, the judge, in the same manner they would at a physical hearing.

29 During physical hearings, counsel tend to become less mindful of the judge when cross-examining witnesses. This happens when counsel become too engrossed in the exchanges with the witness, especially when counsel stands facing the witness all the time when asking questions. When counsel stands facing the witness, his field of vision narrows and there is a greater tendency to forget to engage the judge. Engaging the judge is important since he is the one that counsel needs to persuade. When preparing witnesses for trial, it is common for litigation lawyers to tell the witnesses that answers given in cross-examination should be directed to, and given facing, the judge. Taking a leaf from this, counsel should themselves stand facing the judge, turning to face the witness only when necessary.

30 Before the advent of technology, judges had to record the evidence of witnesses verbatim. Then, litigation lawyers were taught to "watch the judge's pen". That also meant that they were more attentive to how the judge was following the proceedings. Technology has made court proceedings much faster and more efficient. Unfortunately, it also made the physical cue of watching the judge's pen obsolete. Counsel have to train themselves to be attentive to the judge. Facing the judge is a good start.

E. Responding to questions from judge

31 Just as counsel remind witnesses to answer questions directly, so too should counsel remind themselves to answer the judge's questions directly. Counsel must *not* avoid answering the judge's questions. One reason for doing so may be that counsel perceives the direct answer to be

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unfavourable to his client's case. However, counsel must remember that they owe a duty to assist the court. Besides, not answering the question directly is hardly persuasive and more likely to annoy or irritate the judge.

32 If counsel is not sure of the answer, be it on the law or the facts, counsel should say so and not shoot from the hip.

33 If the judge asks a question relating to a submission made by counsel, it is not helpful at all to answer the question by simply repeating the submission. The fact that the judge has a question regarding the submission means that there is something that is not clear to him or that he has issues with or concerns about the submission. In asking questions, the judge is seeking counsel's clarification. Repeating the same submission over and over is not good advocacy. It does not make the submission any clearer or more persuasive. Counsel needs to understand what is bothering the judge and try to address the judge's concerns.

III. Proceedings headed for and at trial

A. Pleadings

34 The pleadings set out the respective parties' cases. Pleadings should be drafted to inform the court of the following:

(a) What is the cause of action or defence?

(b) What are the material facts relied on to satisfy each of the elements that constitute the cause of action or defence?

35 Naturally, the judge has to understand what the parties' pleaded cases are. The pleadings are the first port of call. It is therefore important to draft pleadings clearly and concisely.

36 Unfortunately, pleadings are often too prolix. Instead of being concise, they are drafted to include all manner of allegations regardless of relevance to the cause of action or defence or their constituent elements. In addition, pleadings sometimes include evidence and submissions as well. Tediously lengthy pleadings are made worse when the storytelling is not structured. A common approach that is taken is to set out a whole litany of facts and then state: "By reason of the above, the defendant is liable to the claimant …". This leaves the judge to try to make out what the pleaded case is. Such an approach is clearly not good advocacy. The judge should be guided, not left wandering, and wondering what the pleaded case is.

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37 I shall not deal with the drafting of AEICs as that is the subject of a separate article in this publication.

B. Prepare closing submissions before trial begins

38 By the start of trial, counsel must be very clear as to:

(a) what the cause of action or defence, and the elements thereof, are;

(b) what the case theory is and how that maps onto satisfying the elements of the cause of action or defence;

(c) which facts will establish each element of the cause of action or defence and each aspect of the case theory;

(d) what evidence there is that already proves those facts;

(e) what further evidence is required to prove or bolster those facts; and

(f) whom the further evidence is to be elicited from.

39 This means that counsel can, and should, prepare an outline of his closing submissions before the trial begins. The reason for doing so is simple – closing submissions clarify what the endgame is. Preparing an outline of closing submissions can therefore guide counsel in at least two respects.

40 First, the outline of closing submissions will give counsel a clearer picture of what his client is fighting for. This can guide counsel on his strategy with respect to how the trial should proceed, if at all.

41 To illustrate this point, take the case in which the claimant and the defendant had invested in a project in China, which did not proceed. The claimant agreed to fund part of the costs of taking legal action in China against a third party to recover moneys that had been paid for the project. The agreement was that if the claim in China succeeded, the defendant would pay the claimant an agreed percentage of the net proceeds of the judgment debt (the "Net Proceeds") upon the defendant receiving payment of the Net Proceeds. The defendant commenced action against the third party in China and obtained judgment. However, the defendant had not received payment of the judgment debt and interest on the principal sum continued to accrue.

42 Meanwhile, a dispute arose between the claimant and defendant as to what the claimant's share of the net proceeds was. The claimant sued the defendant in Singapore. His primary claim was that his share of the

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Net Proceeds had to be fixed as at a certain date (the "Fixed Amount"). He sought a declaration that his share of the Net Proceeds was the Fixed Amount. The defendant disputed the claimant's case; his case was that the claimant was entitled to *x*% of the judgment debt (which would include the accrued interest).

43 Neither the claimant nor the defendant had computed the amount of interest that had accrued on the principal sum by the time the trial started. However, it appeared that the accrued interest was substantial and the actual difference (in dollar terms) between the claimant's and the defendant's cases would likely be minimal. It appeared that the parties had missed the forest for the trees.

44 Had the parties prepared outlines of their closing submissions before the trial started, the outlines would likely have alerted them to the fact that the quantum of the claimant's share, based on the defendant's case, had not been computed. Once they computed the quantum, it seemed likely that they could have realised that proceeding with the trial would not make economic sense.

45 Second, closing submissions will set out the arguments that counsel will be making after the evidential phase of the trial to persuade the judge that, based on the law and the evidence adduced at trial, the judge should decide the case in his client's favour. An outline of closing submissions can guide counsel as to the questions that he should or should not ask in cross-examination.

46 In today's context, preparing an outline of closing submissions is relatively easier compared to the days before the rules provided for AEICs. With the AEICs, by the time the case gets to trial, counsel has the evidence-in-chief of the other parties' witnesses. It is true that sometimes witnesses refuse to co-operate by signing an AEIC and these witnesses' testimonies will be adduced orally in court. Such cases are the exception, and even then, in practice, parties who are calling such witnesses are usually required to state the areas or issues to be canvassed with the witnesses.

C. Cross-examination

(1) Every question must serve a purpose

47 Two fundamental points need to be made at the outset. The first is that as stated above, counsel should be guided by his outline of closing submissions in deciding on the questions to ask in cross-examination. In

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other words, the question must be relevant for the purpose of the closing submissions that will be made eventually.

48 The second is that the purpose of cross-examination is to:

(a) adduce evidence that supports the cross-examiner's client's case;

(b) adduce evidence that destroys or weakens the opponent's case; and/or

(c) attack the witness's credibility.

49 The two points are obviously interlinked. Every question that is asked in cross-examination must serve one or more of the above purposes as well as be relevant to the closing submissions. Otherwise, quite simply, the question should not be asked. Cross-examination is *not* for the purpose of satisfying one's curiosity, no matter how much counsel's curiosity may have been piqued.

50 Obviously, one should not conduct cross-examination by going through every paragraph in the pleadings or AEICs and asking questions. Such an exercise is wholly unproductive as it would result in many questions being asked but which serve no real purpose.

51 Asking unnecessary questions is inconsistent with the Ideals of expeditious proceedings, cost-effective work and efficient use of court resources found in O 3 r 1 of the Rules of Court 2021. In addition, counsel needs to take heed of the idiom "curiosity killed the cat". We have all heard of the dangers of asking the one question too many.

(2) Just ask the question

52 I make four observations. First, some counsel like to refer to specific statements in the witness's AEIC (or worse, read them out) and ask the witness to confirm that these are his statements or his evidence. There is no need to ask the witness to confirm his statements in his AEIC. The witness has already signed the AEIC on affirmation or oath. Counsel should just ask his questions, if any, about what the witness has stated.

53 The following is an example of what not to do:

Q I refer to paragraph 8 of your AEIC. It states:

[Counsel read the whole paragraph].

You confirm that this is your evidence?

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Q So, you say that:

[Counsel read a sentence in the paragraph].

Correct?

A Yes.

These questions served no purpose and were completely unnecessary. Worse, having asked the witness to confirm the paragraph in his AEIC, counsel then asked the witness to confirm a sentence within the same paragraph.

54 Second, some counsel like to read chunks of the pleadings, AEICs or other documents to the witness before asking a question. Worse, sometimes, counsel would even ask the witness to read certain paragraphs in the documents to himself, after which counsel would himself read out the same paragraphs before asking his question! For example:

Q Please read paragraph 8 of your AEIC to yourself and let me know when you are done.

[Witness reads paragraph 8 to himself.]

A I am done.

Q Good. Now, in paragraph 8, you say:

[Counsel reads out paragraph 8.]

55 If counsel is going to question the witness specifically about something the witness has said in his AEIC or some other document, counsel should just ask the witness to read the sentence(s) or paragraph(s) to himself. Once the witness indicates that he is done, counsel should just ask his question.

56 Most of the time, counsel should be able to ask his questions without even asking the witness to read relevant portions of his AEIC or some other documents. This is especially so when the questions relate to key events. Granted, it may be necessary sometimes to give the witness some context. In such cases, it is usually sufficient for counsel to preface his questions with something along the lines of: "I am going to ask you questions about [event / transaction / person]."

57 Third, there is no need to take the witness through parts of his affidavit or a document that are unnecessary for the question that counsel wishes to ask. The following example concerns a claim for wrongful dismissal. Under the terms of his employment contract, the claimant was entitled to a substantial bonus on completion of two years of employment. Subsequently, the defendant went on a cost-cutting exercise and the

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claimant was terminated for cause shortly before the second anniversary of his employment. Had he been terminated on notice, the notice period would have expired after the second anniversary of his employment and he would have been entitled to his bonus. The claimant denied the defendant's allegations of misconduct and argued that the defendant terminated him for cause in order to avoid paying him his bonus.

58 The defendant's head of human resources had sent an e-mail to the defendant's chairman in which he set out (among other things) the amount of bonus payable under the claimant's employment contract at the end of the year, which was also the second anniversary of the claimant's employment. The e-mail also stated "as a reminder" that the bonus would not be payable if the claimant was "considered terminated for cause". The words "terminated for cause" were highlighted in bold in the e-mail. The e-mail did not set out any grounds for termination for cause.

59 The defendant's chairman was cross-examined about the contents of the e-mail:

> Q We were looking at [the e-mail from the head of human resources]. The first paragraph concerns housing and education allowance concerning the claimant. The second paragraph is a reference to revenue and profit share arrangement. It is the third paragraph that I am interested in. Let me read it out to you:
>
> [Counsel starts reading the third paragraph, then pauses].
>
> And 'terminated for cause' is in bold.
>
> [Counsel continues reading the third paragraph].
>
> Now a table appears below that. Now, if you look at the column concerning the claimant, the first three rows are figures, and it says 'Profit Share', 'Revenue Share', 'PTB Share', and then the next line says '2 Year Guaranteed Total Compensation'. Then at the bottom, the last row, it says '2022 outstanding obligation: x million'.
>
> These are all figures in US dollars. Can you tell me why [the head of human resources] wrote this e-mail to you, specifically highlighting executive compensation due to the claimant by the end of that year?
>
> A We were going through multiple exercises essentially trying to lower the costs of the company. We had gone through the salaries and expected bonuses of a large number of employees but we had not yet done so at the executive level. The head of human resources was just making sure that he was giving us all of the information.

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60 It was not necessary to go through so much of the contents of the e-mail or even to read out the third paragraph before asking why the e-mail was sent to the witness. Counsel could have asked his question in the following manner:

> Q We were looking at [the e-mail from the head of human resources]. Why did [the head of human resources] send this e-mail to you and the other directors, specifically highlighting the executive compensation due to the claimant by the end of that year?

61 In a similar vein, unnecessary statements – *eg*, "I have an additional question, Your Honour, but I think I have already asked it" – do not need to be verbalised.

62 Fourth, do not beat around the bush. Just ask the question. A simple example illustrates this point. The witness testified that a certain company was no longer his company as he had sold it. Counsel wanted to establish the fact that the witness was still the shareholder of the company. The questions were as follows:

> Q Can you turn to page 148 of the defendant's bundle of documents? This is an ACRA search report on the company. Now, you see in the middle of that page, the company name is 'G Pte Ltd'.
>
> A Mm.
>
> Q Can you see your name in this report?
>
> A Yes, I see my name.
>
> Q You are named as the sole shareholder of the company. Do you see that?
>
> A Yes, I see it.
>
> Q Now I ask you again, is this still your company today? The search was done last week.
>
> A Yes.

63 All that counsel needed to do was to ask:

> Q Please look at page 146 of defendant's bundle of documents. This ACRA search report was done last week and shows that you are still the sole shareholder. It is still your company, is it not?

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(3) Ask leading questions

64 Section 143 of the Evidence Act 1893[11] ("Evidence Act") defines "leading questions" as follows:

> **Leading questions**
>
> **143.** Any question suggesting the answer which the person putting it wishes or expects to receive or suggesting disputed facts as to which the witness is to testify, is called a leading question.

65 Sections 144 and 145 of the Evidence Act state:

> **When they must not be asked**
>
> **144.**—(1) Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief or in a re-examination, except with the permission of the court.
>
> (2) The court shall permit leading questions as to matters which are introductory or undisputed, or which have in its opinion been already sufficiently proved.
>
> **When they may be asked**
>
> **145.**—(1) Leading questions may be asked in cross-examination, subject to the following qualifications:
>
> > (*a*) the question must not put into the mouth of the witness the very words which he or she is to echo back again; and
> >
> > (*b*) the question must not assume that facts have been proved which have not been proved, or that particular answers have been given contrary to the fact.
>
> (2) The court, in its discretion, may prohibit leading questions from being put to a witness who shows a strong interest or bias in favour of the cross-examining party.

66 Since leading questions are permitted in cross-examination, every question in cross-examination should be a leading question unless there is some specific reason not to ask a leading question. Sometimes, counsel may deliberately ask an open-ended question in cross-examination because he has reason to believe that given full rein, the witness will incriminate himself. However, that deals with a higher level of advocacy skills, which is outside the scope of this article.

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67 It is easy to ask leading questions by using words such as "did", "was" or "were". For example:

> Q Did you have a face-to-face meeting with the defendant on that day?
>
> Q Were you driving a red car on that day?

68 However, leading questions can take many forms; they just need to suggest the answer or the facts. The following are all examples of leading questions:

> Q And the previous shipment was also for delivery at the same port?
>
> Q The claimant's intention was that the cargo would be discharged from the vessel into the bonded warehouse at the port, correct?
>
> Q Both versions of the policy are relevant because your conduct straddles the time periods covered by both versions. Agree?
>
> Q So, you could have paid the penalties or fines yourself, right?

69 It seems to have become fashionable for counsel to preface a question in cross-examination with "You will agree with me that …". It is one way to start a leading question. However, I am not a fan of this particular formulation when it is used indiscriminately. In my view, it should be used only if the statement that follows is uncontroversial.

70 I have observed on many occasions that counsel ask open-ended questions (instead of leading questions) in cross-examination and leading questions (instead of open-ended questions) in re-examination. The reason may be that it is easier to ask a leading question when one is clear as to the answer that one is looking for. Conversely, when one has no clear idea as to what answer one is looking for, the question tends to take the form of an open-ended question. Thus, if counsel has not prepared an outline of closing submissions before the trial, he may end up asking too may open-ended questions in cross-examination.

71 The following is an example of counsel asking an open-ended question in cross-examination when he should have asked a leading question. The point that the claimant's counsel wanted to make in closing submissions was that the defendant had been treating the claimant as an easy source of funds. The defendant was asked in cross-examination:

> Q You had to pay a penalty of $5,000 for late payment for goods that you ordered. Your bank statement shows you have $17,000. You had enough to pay the penalty without asking the claimant for funds. Why didn't you?

72 Instead of asking the open-ended question – "Why didn't you?" – counsel should have asked a leading question instead, *eg*: "You did not

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want to use your own moneys to pay the penalties because you found the claimant to be an easy source of funds, isn't that right?"

73 It can also be seen that in the example discussed in paras 57–60 above, the question that was asked – why was the e-mail sent – was an open-ended question. It allowed the witness to answer the way that he did. It was not disputed that the defendant was on a cost-cutting exercise at the relevant time. The claimant's case was that the defendant decided to terminate the claimant for cause to avoid paying him his bonus. Instead of the open-ended question, counsel should have asked leading questions, *eg*:

> Q We were looking at [the e-mail from the head of human resources], which shows the amount payable to the claimant at the end of that year. This was the amount that the defendant had to pay the claimant if the defendant decided to terminate the claimant on notice at that time?
>
> A Yes.
>
> Q The e-mail highlighted the fact that the amount would not be payable if the claimant was 'considered terminated for cause.' However, the e-mail did not contain any ground for termination for cause – agree?
>
> A Yes.
>
> Q What the e-mail did was to present the two options available to you – agree?
>
> A Disagree.
>
> Q You then chose to terminate the claimant for cause so as to avoid paying the claimant his bonus.
>
> A Disagree.
>
> Q Towards that end, you concocted the grounds that you now rely on as cause for terminating the claimant's employment.
>
> A Disagree.

74 It did not matter that the witness would likely have disagreed with the last three questions, or that the witness may have wanted to explain further. The claimant's case was sufficiently put to the witness. The claimant could argue in closing submissions that: (a) the e-mail suggested termination for cause as the way to avoid paying the claimant's bonus; (b) the defendant chose the option of termination for cause; and (c) as there were in fact no grounds for termination for cause, the defendant had to concoct the grounds.

75 Remember – every question in cross-examination must serve one or more of the purposes discussed earlier. By asking leading questions, in particular, questions requiring only a "yes" or "no" answer,

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cross-examining counsel controls where the evidence is going. Asking an open-ended question allows the witness to control his narrative.

76 As a final observation on this topic, sometimes counsel preface their cross-examinations by telling the witness that all his questions will only need a "yes" or "no" answer and that the witness should just answer accordingly. Suffice it to say that I have yet to try a case in which counsel has managed to stay true to such an assertion.

(4) Ensure there is foundation for question

77 As s 145(1)(*b*) of the Evidence Act makes clear, counsel must ensure that he has a factual foundation for the questions put in cross-examination. To illustrate, with reference to the example at paras 71–72, counsel must first have established, either on documents or through questioning, that the defendant (a) had to pay a $5,000 penalty and (b) had $17,000 in his bank account, such that the defendant could afford to pay the penalty on his own, before counsel is entitled to pose the question to the defendant: "You did not want to use your own moneys to pay the penalties because you found the claimant to be an easy source of funds, isn't that right?"

(5) Keep questions simple

78 Simple questions work best. Consider the following question:

> Q Would you agree with me, the truth is, that you have been told about the fact that your father accepted that the defendant was not involved in the day-to-day management of the company when he gave evidence yesterday, and therefore in your evidence today, you are trying to lie to this court to supplement the evidence. Would you agree with me?

79 This was a convoluted question. The question should have been broken down into separate and simpler questions, *eg*:

> Q In his evidence yesterday, your father accepted that the defendant was not involved in the day-to-day management of the company. You have been told about his evidence, haven't you?
>
> A …
>
> Q Your evidence today is not the truth because you are just trying to support your father's evidence. Agree?
>
> A …

80 Next, avoid compound questions. Each question should comprise only one question. This makes it easier for the witness to understand the

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question. In addition, it would then be clear what the witness's answer means. The examples that follow illustrate this point.

81 Consider the following question:

> Q Please look at 1AB168. 1AB168 shows the component vendor specifications. Have you seen this document before? Did you see this document before you signed the contract? Or was it after the contract had been signed?

82 There are three separate questions. If the witness answers with a 'yes" or "no", neither the counsel nor the judge will know which of the three questions the witness was answering. The questions should be asked separately. In this example, if the witness says that he has never seen the document (the first question), the other two questions would be unnecessary. If the witness says he saw the document before he signed the contract (the second question), the third question (whether he saw the document after the contract had been signed) would be unnecessary.

83 The following is another example:

> Q So can I confirm that, after you signed this memorandum of agreement on the 1st of February, you were basically under pressure to do two things. One is to pay the deposit within five banking days, correct? And second, you needed to remove the rig and move it to a separate wharf, yes?
>
> A They … the shipyard gave us …
>
> Q Yes or no, yes or no?
>
> A Not so.

84 The question that was asked consisted of two separate questions. What did the witness's answer mean? The questions should have been asked separately:

> Q After you signed the memorandum of agreement on 1 February, you were under pressure to pay the deposit within five banking days, correct?
>
> A …
>
> Q You were also under pressure to remove the rig and move it to a separate bank wharf, yes?
>
> A …

85 In the next example, the defendant had to account for rental income that he received. The defendant was asked in cross-examination:

> Q I am suggesting to you that your computation set out at paragraph 70 of your AEIC is simply false. It is false, firstly, because you haven't produced any documentation to support this. Two, you have put in expenses that depress the actual net rental proceeds so as to give a false impression that the

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actual net rental proceeds are much lower than what you had received. You agree, disagree?

86 What was the witness supposed to agree or disagree to? The witness might have agreed that he had not produced any supporting documents but disagreed that his computation was false. The questions could have been asked in the following manner instead:

Q You have not produced any documentation to support the expenses in your computation in paragraph 70.

A Agree.

Q In fact, the amount of expenses in your computation are inflated.

A Disagree.

Q As a result, the actual net rental proceeds are higher than what is stated in your computation.

A Disagree.

87 The following is another example. The case involved a dispute over a half-share in a property:

Q My instructions are that you are lying. And let me say why.

A I am not in the habit of lying.

Q Yes. Now let me tell you why. Because at the funeral of your late father, X had a discussion with you and your two brothers who were present at the funeral regarding the half-share of the property and all three of you acknowledged to X that the half-share belongs to X who is the beneficial owner of the property. Do you agree with that?

A I disagree.

88 What did the witness disagree to? That there was a discussion with X at his late father's funeral? That his two brothers were present at the discussion? That the discussion was about the half-share in the property? That the three of them acknowledged that the half-share in question belonged to X?

89 Again, the questions should have been asked separately. For example:

Q You had a discussion with X at your late father's funeral regarding the half-share in the property.

A Agree [or disagree].

Q Your two brothers were present at this discussion.

A Agree [or disagree].

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> Q All three of you acknowledged to X that the half-share in the property belongs to her.
>
> A Disagree.

90 As an aside, counsel should not accuse a witness of lying just because the witness's evidence is different from the client's. It may be different if, *eg*, there is objective evidence that proves that the witness is clearly lying.

(6) Do not argue with witness

91 Counsel may not get the answer that he expects. The witness's answer may even be unreasonable or illogical. There is no need to argue with the witness or to try to beat sense into him to make him see the unreasonableness or illogicality of his answer. It should be left to closing submissions during which time, counsel can argue that the witness's answer is so unreasonable or illogical that it should be rejected. Counsel just needs to make sure that he has satisfied the rule in *Browne v Dunn*.[12]

92 The following is an illustration of counsel arguing with the witness:

> Q I have just taken you through the inconsistencies between the annual income statement that you have prepared and the income statement generated by the system used by the company. Can you explain why your statement is different?
>
> A There is nothing to explain. Where is the inconsistency?
>
> Q I have already taken you through the inconsistencies between your statement and the system-generated statement.
>
> A I disagree that they are inconsistent.
>
> Q How can you say that? The two statements are clearly inconsistent because they show different numbers.
>
> A I disagree.
>
> Q You are being unreasonable and obstructive.
>
> A How can you say that?
>
> Q Because your insistence that there are no inconsistencies flies against the evidence.
>
> A I disagree.

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Q Let me ask you again – do you have an explanation for the inconsistencies between the income statement prepared by you and the system-generated statement?

A I have already told you there are no inconsistencies.

93 Counsel should stop after the first answer. The witness has already been taken through the difference in the numbers in both statements and has been given the opportunity to explain why his statement differs from the system-generated statement. Counsel can submit in closing submissions that the witness has no explanation as to why the numbers in his statement are different from those in the system-generated statement and that his statement should not be relied on.

94 There is also no need to keep repeating the question just because the witness has not given the answer that counsel expects. Counsel should move on once the question has been asked and answered. There is also no need to rephrase and ask what is essentially the same question, unless there is some indication that the witness may not have understood the previous question correctly. Finally, there is no need to be concerned that counsel must "win" the exchange with the witness in order to convince the court of where the truth lies. It is not an oratorical contest and the court is not evaluating a performance. The court does not proceed on the simplistic basis that the evidence of a witness is credible, reliable and true in all respects by virtue only of the fact that he made no concessions or admissions in cross-examination.

(7) Listen to witness's answers

95 Listen to the witness's answers. Do not be too anxious to move on to the next question that you have prepared once the witness answers the previous question. Do not be concerned that the court expects quickfire repartee *à la* an episode of *Suits* such that counsel must be immediately ready with the next question once the witness has answered the previous one. In reality, the court has no issue with counsel pacing the cross-examination and taking slight pauses to digest the witness's answer and refine or formulate the next question. It is important to do so, as otherwise, one might miss the rest of the witness's answer, which may turn out to be crucial.

96 The following case illustrates the above point. The claimant held 35% of the shares in a company and the defendant held 65%. Both managed different aspects of the company's business. The company did not declare dividends. Instead, the practice was to transfer the company's surplus funds to certain accounts set up in the claimant's name and certain accounts set up in the defendant's name. The claimant's case was

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that the moneys transferred to his and the defendant's respective accounts belonged to both of them in proportion to their respective shareholdings. The claimant sued to recover his share of the funds held in the defendant's accounts. The claimant claimed that the defendant held the claimant's share of the funds on trust for the claimant. The defendant denied that there was a trust.

97 The following exchange took place during cross-examination of the defendant:

> Q I put it to you it did not matter whether the funds were in the claimant's accounts or in your accounts; the moneys were for the benefit of both of you.
>
> A I do not agree. …

98 The defendant had answered the question by disagreeing with the case that was put to him. However, he went on to add the following:

> A … Unless the claimant is saying 'this is what I took from the company and this is the amount that I sent, 100 per cent'. If that is the case, he doesn't need to keep and hold the moneys and so many things that he keeps.

99 This led to the following questions and answers:

> Q Can you explain what you mean?
>
> A I meant if the claimant had transferred 100 per cent of the company's moneys to my accounts.
>
> Q If he had transferred 100 per cent of the company's moneys to your accounts, then what would the position be?
>
> A Then that could be proof of his claim… what he claims could be true.
>
> Q Does that mean that if the claimant had transferred 100% of the company's moneys to your accounts, the moneys would then be shared between the two of you 65:35?
>
> A Yes.

100 Understandably, the case settled shortly after. None of the above would have been possible if the defendant's further answer was missed. As it turned out, the defendant's real reason for contesting the claim was that he had a 50% share of the company's funds that had been transferred to the claimant's accounts and he did not know what was the total amount that had been so transferred. However, this was not a defence to the trust claim; he just needed the claimant to account for the amounts that were transferred to the claimant's accounts.

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IV. Conclusion

101 As stated in the introduction, many of the observations relate to matters or practices that may seem obvious. Yet, they have arisen more often than they should. Perhaps, they have not been noticed as much by counsel. However, they are highly noticeable from my side of the Bench. It is hoped that these perspectives from the Bench will provide some guidance to litigation lawyers, especially the younger members of the Bar.

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