ETHICS IN CHAMBER HEARINGS: OBSERVATIONS ON CERTAIN PRACTICES

Counsel's ethical conduct in interlocutory chamber hearings (including his preparation of materials for this purpose) is rarely the subject of independent focus despite the vital role of these proceedings. This article examines certain areas of chamber practice which require attention in the interest of the integrity of the adversarial process and the administration of justice.[1]

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I. Introduction

1 Interlocutory proceedings in chambers[2] abound in the civil work of the courts and constitute a critical area of the litigation landscape. They are fundamental to the progress of an action in that they enable the parties to effectively prepare their cases, explore options for the settlement of their dispute, and preserve their rights until the case is finally resolved or determined. Despite their enormous significance to the administration of justice, very little attention is given to them by books and articles on ethics. Although the Legal Profession (Professional Conduct) Rules ("LP(PC)R") address ethics in court proceedings generally,[3] none of the provisions focus specifically on hearings in chambers.[4] Indeed, some rules of the LP(PC)R are unnecessarily limited to proceedings in open court. For example, r 55(c) states that an advocate and solicitor must "assist the Court in ensuring a speedy and efficient trial and in arriving at a just decision". There is no reason why the purposes of this rule (which is literally confined to trials) should not be expressly applied (in modified form) to a hearing

1 This article is premised on the author's experience (first, as an ad hoc deputy registrar and subsequently as an ad hoc District Judge hearing appeals), as well as his discussions with other judicial officers. The views expressed in this article are personal to the author.

2 Although this article is primarily concerned with interlocutory proceedings (including appeals from interlocutory decisions), it is also relevant to final hearings in chambers.

3 Part IV is entitled "Conduct of Proceedings".

4 The word "chambers" is not referred to at all in the LP(PC)R.

in chambers.[5] Order 32 of the Rules of Court ("RC"), which declares itself as governing "Applications and proceedings in chambers", comes desperately short of its promise. The Order has nothing to say about what is expected in the course of a hearing in chambers.[6] Indeed, it is the absence of a fixed procedure for chamber hearings which raises various important ethical issues as to how counsel should act and conduct himself in this forum.[7]

2 The purpose of the article is to examine some of the more common ethical issues which arise before a registrar or a judge in chambers. The following section (entitled "Conduct in chambers") includes a consideration of the status of a hearing in chambers, counsel's manner, punctuality, timely filing of written submissions, presentation of argument and use of authorities, the relationship between counsel in the course of the hearing, and the relationship between counsel and unrepresented litigants. This will be followed by "Justification of interlocutory proceedings", which analyses counsel's ethical responsibility regarding the question of whether an interlocutory application or appeal should be initiated. In the final section, consideration will be given to ethical issues which arise from documents used in proceedings in chambers (including, in particular, pleadings and affidavits).

II. Conduct in chambers

A. Status of a hearing in chambers

3 At the risk of stating the obvious, a private hearing before a registrar or a judge in a chamber at the back of the court or in the administrative section of the court premises is no less an adjudication by the court than an open hearing before a judge in the much larger, grander and formal setting of the public court room. Yet, a comparison of counsel's manner in chambers and in open court sometimes gives the impression that the relative informality of a chamber hearing permits a relaxation of attitude to the court and standards of presentation. This is a grave misconception which is wholly unsupported by the law.

5 Rule 55(c) as well as the related r 55(b) are considered in para 8 of this article.

6 It refers to other matters including documents, adjournment, absence of parties, *ex parte* orders, jurisdiction of the registrar, hearings before a judge and in open court, the involvement of assessors or experts, affidavits and papers.

7 There are certain practice directions which do touch on very specific matters and these will be considered in the course of the article.

4 The term "chambers" is not defined by the RC. However, there is no question that a hearing in chambers is a hearing in court.[8] The court operates in chambers as a matter of practicality: normally to adjudicate over interlocutory and other affidavit-based proceedings which do not require the resources of the open court, nor demand public access. The fact that a hearing involving a judge in open court is often referred to as a court to distinguish it from a hearing in chambers does not deprive the latter of its status as a court. The real distinction between hearings in open court and in chambers is that the latter are conducted in private (although a judge sitting in open court may order the proceedings to be held in private (*in camera*) in the appropriate circumstances). The general position is that only the parties or their counsel may present cases in chambers. The court has the discretion to permit the attendance of other persons only if this is appropriate and in the interest of justice.[9] The standing and authority of the court hearing a matter in chambers has been re-affirmed in a spate of recent cases.[10]

B. Counsel's manner

5 It follows from what has been said about the status of a hearing in chambers that counsel must extend the same level of courtesy and politeness to the hearing registrar as he would to a judge in the course of a full trial in open court. Rule 55(a) of the LP(PC)R states that an advocate and solicitor must "act with due courtesy to the Court before which he is appearing" and this clearly includes proceedings in chambers. The rule does not simply require the politeness one would expect from persons at a social gathering! Nor should "due courtesy" in r 55(a) be construed in the same sense as the "courtesy" expected of advocates and solicitors in the course of their relationship (pursuant to r 47). Rule 47 is concerned with professional courtesy between peers whereas the words "due courtesy" in the context of r 55(a) import a deeper level of respect to which the court is entitled by virtue of its standing and authority. The advocate and solicitor must *honour* the court, for the court is an institution which has the ultimate authority and responsibility to dispense justice. An advocate and solicitor who

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8 See *AG v Chee Soon Juan* [2006] SGHC 54 ("*Chee Soon Juan*"), in which the High Court considered the relevant statutory provisions.

9 See *Lee Hsien Loong v Review Publishing Company Ltd* [2007] 2 SLR 453 ("*Lee Hsien Loong*") for a thorough discussion of the principles involved. Pupils are normally permitted to sit with counsel in chambers in the interest of legal training.

10 See *Chee Soon Juan* (in which a party was held in contempt for conduct in chambers); *Lee Hsien Loong* (foreign legal adviser not permitted to attend hearing in chambers because, *inter alia*, he had made disrespectful remarks about Singapore's judiciary); *Chee Siok Chin v AG* [2006] 4 SLR 541 at [15] and *Chee Siok Chin v AG* [2006] 3 SLR 735 at [7] and [8] (concerning the nature of the discretion of the registrar or judge in chambers to order that proceedings be heard in open court).

fails to honour the court fails to honour himself as an officer of the court.[11] Honour comes from honouring: "*Honor est in Honorante*".

6 Indications are that many practitioners fail in this responsibility to the court irrespective of their career level. For example, it has been reported that the conduct of some experienced counsel in chambers, particularly before the younger registrars, has been disrespectful, if not insolent. Such conduct is grossly improper and unbefitting an advocate and solicitor, particularly a senior practitioner, who should set the standard of correct behaviour. He should know better than to discourteously attempt to impose his views of the case on the court so as to influence the outcome of the proceedings. Counsel are entitled (indeed, expected) to argue their cases forcefully on behalf of their clients.[12] However, such leeway is not a licence to denigrate the court and to compromise its integrity. Even a junior registrar of the Subordinate Courts hearing a simple, routine matter is entitled to the same respect and courtesy due to the Court of Appeal adjudicating a case of national importance. A court is a court whatever its level of authority and the subject matter of the proceedings.

7 At the other end of the spectrum, some of the younger practitioners have at times given the impression that their newly acquired status as advocates and solicitors has graced them with a monopoly on wisdom. Some present their arguments on the assumption that they will be accepted without question. They may become visibly resentful when a cited authority has not made the expected impact on the registrar. Others come into chambers late[13] without apology or excuse, and there is a lack of contriteness when the court raises their improper conduct. Insufficient research or lack of preparedness, perhaps the outcome of youthful over-confidence, is also a feature of the immature presentation in chambers. Giving evidence from the bar is another. Self-reflection and a profound consideration of the advocate and solicitor's role in court, which must always be consistent with the interests of the administration of justice which he is duty-bound to assist,[14] would do much to inculcate the appropriate attitude. Various aspects of this responsibility will be considered under the following headings.

11 See *Ethics and Professional Responsibility: A Code for the Advocate and Solicitor* (Academy Publishing, 2007) ("*Ethics and Professional Responsibility*") ch 7.

12 See r 12 of the LP(PC)R.

13 See the following paragraphs concerning punctuality.

14 LP(PC)R r 2(2)(a).

C. Punctuality

8 Counsel are required to be punctual in chambers as a matter of respect for the authority of the court.[15] As a general principle, it is inexcusable to keep the court waiting. Punctuality is also vital to the efficiency of the administration of justice which counsel is bound to assist.[16] Rule 55 emphasises this principle by providing that counsel "shall at all times … use his best endeavours to avoid unnecessary adjournments, expense and waste of the Court's time,[17] and assist the Court in ensuring a speedy and efficient trial and in arriving at a just decision".[18] It is submitted that the word "trial" should be interpreted purposively to extend to all court hearings including proceedings in chambers. Practice directions in both the Supreme Court and Subordinate Courts are consistent with this interpretation and emphasise the importance of punctuality by requiring all advocates and solicitors:

> … appearing in any cause or matter to be punctual in attending Court as delay in the commencement of the hearing leads to wastage of judicial time. Appropriate sanctions may be imposed for solicitors who do not arrive for hearings on time.[19]

9 The excuse that counsel "had to be in another court" is not generally acceptable. It is not for the court to subject itself to counsel's convenience. If counsel cannot avoid concurrent hearings, or hearings so close to each other that he is bound to be late for one of them, his law practice should make the necessary arrangements to enable him to limit his representation to one of the hearings.[20] On a related matter, it is not acceptable practice for the "busy" counsel to ask the opposing counsel to represent the former in an uncontested proceeding:

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15 See "Counsel's manner", at paras 5–7 of this article.

16 LP(PC)R r 2(2)(a).

17 LP(PC)R r 55(b). With regard to the adjournment and vacation of trial dates (including part-heard cases) and other hearing dates, see Supreme Court Practice Directions, 2007, paras 56 and 57; Subordinate Courts Practice Directions, 2006, para 38.

18 LP(PC)R r 55(c).

19 Supreme Court Practice Directions, 2007, para 13(2). The Subordinate Courts Practice Directions, 2006, para 134(2) states: "… appearing in any cause or matter are to be punctual in attending Court as delay in commencement of hearing leads to wastage of judicial time. Appropriate sanctions may be imposed for late attendances."

20 It is acknowledged that proceedings in the Supreme Court generally have precedence over proceedings in the Subordinate Courts. Accordingly, counsel appearing in the Supreme Court would not ordinarily be entitled to excuse his absence or lack of punctuality on the basis that he had to appear in the Subordinate Courts.

> The Honourable the Chief Justice[21] has observed with concern the increasing tendency of solicitors to absent themselves from Court or Chambers in cases where they do not object to the orders being sought by the opposite side. Save in the most exceptional and unforeseen circumstances, a solicitor from the firm on record must attend all proceedings in respect of the cause or matter in which the firm is acting, even if it does not intend to oppose the orders sought by the other side. The practice of asking the opposing solicitor to mention the matter on one's behalf is also not acceptable and should be discouraged.[22]

D. Presentation of written submissions on time

10 The following directions on written submissions,[23] concerning contested *inter partes* applications in chambers, apply to proceedings in the Subordinate Courts:

> (1) To facilitate and expedite the hearing of contested *inter partes* applications before a Registrar in Chambers and Registrar's Appeals before a District Judge in Chambers, the applicant and the respondent to the application shall file their Written Submissions no later than 3 working days prior to the hearing date fixed by the Court and shall serve a copy thereof on the other party to the application or his solicitor.
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> (2) The Written Submissions filed by parties shall set out as concisely as possible:
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> > (a) the circumstances out of which the application arises;
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> > (b) the issues arising in the application;
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> > (c) the contentions to be urged by the party filing it and the authorities in support thereof; and
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> > (d) the reasons for or against the application, as the case may be.
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> (3) This Paragraph applies only in the following matters:
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> > (a) Application for summary judgment under Order 14, Rule 1 and Rule 5 of the Rules of Court;
> >
> > (b) Application for determination of questions of law or construction of documents under Order 14, Rule 12 of the Rules of Court;

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21 This practice direction was issued during the term of Yong Pung How CJ.

22 Supreme Court Practice Directions, 2007, para 13(1). The Subordinate Courts Practice Directions, 2006, para 134(1) corresponds substantially except for the first sentence, which is omitted.

23 The Subordinate Courts Practice Directions, 2006, para 19(1)–(3).

(c) Application to set aside judgment under Order 13, Rule 8 or Order 19, Rule 9 of the Rules of Court;

(d) Application to strike out pleadings and endorsements under Order 18, Rule 19 of the Rules of Court;

(e) Registrar's Appeals under Order 55B of the Rules of Court; and

(f) Any other application as may be directed by the Court.

11 The requirement of written submissions and their submission prior to the date of hearing are intended, in the words of the practice direction, to "facilitate and expedite" the proceedings. This process enables the court and the parties to consider the issues, the arguments and the authorities, and to fully prepare for a complete and thorough hearing. This practice direction has too often been honoured in its breach than in its observance. On so many occasions, counsel only present their submissions at the hearing itself (having only just filed them or promising to file them immediately), with the consequence that the opposing counsel have had no opportunity to consider the legal points raised and to prepare their responses. The underlying principle of the practice direction, which is a primary tenet of the entire civil process, is openness between the parties to promote scrupulous adjudication by the court in the interest of the administration of justice. The refusal to comply with the direction directly contravenes r 2(2)(a) of the LP(PC)R, which requires counsel to assist in the administration of justice.

12 It is often extremely difficult for the parties to engage in productive and purposeful arguments over difficult issues of law at the hearing without having had a reasonable opportunity to consider the authorities beforehand. As registrars do not normally reserve their judgments[24] (in order to expedite the interlocutory processes), they cannot be expected to make reasoned decisions on complex points of law if the authorities are only made available at, or just before, the hearing. In these circumstances, the court may have no option but to adjourn the proceedings, in which event the counsel in breach of the practice direction ought to pay for the wasted costs personally by reason of his unreasonable conduct pursuant to O 59 r 8 (RC). The omission of a specific costs sanction in the practice direction (despite the inclusion of costs sanctions in other practice directions) may be one reason why it has often been ignored with impunity.[25]

24 Judgments may be reserved as a matter of discretion when more time is needed for judicial deliberation.

25 Counsel must also comply with the requirements concerning the content of the written submissions (Subordinate Courts Practice Directions, 2006, para 19(2)) (*cont'd on the next page*)

E. Presentation of argument and use of authorities

13 The principle that counsel must present the law accurately and never cite legal authorities out of context, or interpret them in a manner which would mislead the court,[26] may need more time to fully flower in our courts. Judgments continue to be cited for a specific statement favourable to the counsel's case even though it is taken out of context, or its scope is restricted or limited in an earlier or later part of the judgment, or it is disapproved of in another case – and none of these qualifying factors are brought to the court's attention. An obscure or older authority may be relied on even though there is a rule which is not referred to because of its unfavourable effect. A statutory provision may be interpreted in a manner which conflicts with the tenets of proper construction or case law. In some instances, reliance is placed on vague notions of justice despite the obvious application of a limited principle of law which denies any remedy. Sometimes counsel are not prepared to discuss the authorities they rely on in the context of other sources of law despite the court's invitation to do so.[27] Foreign authorities are not uncommonly relied on even though they may be of minimal persuasive value in the face of more pertinent cases decided by the Singapore courts. And there are still instances in which counsel fail to raise judgments which are adverse to their arguments despite the clear ethical imperative.[28]

14 These are just some situations in which the principle of forthrightness, which underlies counsel's duty to assist the court in the administration of justice,[29] has been compromised. It is appropriate to recount the applicable rules of ethics in the context of what has just been discussed. Counsel's primary duty is to the court and he fulfils this by assisting in the administration of justice.[30] His obligation to conduct the case "in such a manner as he considers will be most advantageous to the client" is subject to his duty to the court.[31] He is commanded "to assist the Court … in arriving at a just decision".[32] Accordingly, he must not "deceive or mislead" the court.[33] He is "personally responsible" for

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and file submissions in all the stipulated proceedings (Subordinate Courts Practice Directions, 2006, para 19(3)).

26 *Ethics and Professional Responsibility*, at paras [04-026]–[04-029]. Also see the LP(PC)R rr 54, 56 and 60.

27 This is one of the reasons why written submissions must be filed in advance according to the practice directions. See paras 10–12 of this article.

28 LP(PC)R r 60(c).

29 LP(PC)R r 2(2)(a).

30 LP(PC)R r 2(2)(a), r 54.

31 LP(PC)R r 54.

32 LP(PC)R r 55(c).

33 LP(PC)R r 56.

his presentation of the case.[34] This means, *inter alia*, that he has to be objective in his submissions on the law,[35] be certain that those submissions are accurate,[36] and inform the court of all legal authorities (of which he is expected to be aware) even if they are unfavourable to his client's cause.[37]

15 The manner of citing a case is another important consideration and the approach of some counsel in this respect can be improved. For example, although the headnotes of reported cases are merely the summary of the facts and principles gleaned by an individual tasked with this role, counsel often cite headnotes without taking the court through the judgment. If counsel seeks to rely on a judicial proposition, he should refer the court to the specific paragraph(s) of the judgment. Counsel should not merely repeat the judgment extract but explain its application to, and its effect on, the point of law in issue. Counsel must be sensitive to the court's concerns when taking it through the authorities by measuring the pace of his submissions. He may have to take the court through the law more slowly on one point and more quickly on another. The court's reaction to counsel's submissions is normally visible and counsel should respond accordingly. Counsel's preparation for a case should include the anticipation of questions which the court might ask. The assistance of counsel enables the court to scrutinise a judgment to the extent necessary in the interest of the proper determination of the law.

16 With regard to the submission of authorities, counsel often rely on secondary and incidental legal sources despite being in a position to present the reported case law or the statutory provision or rule itself. The Subordinate Courts Practice Directions 2006, paras 53(6)–(8) set out the regulations concerning reliance on authorities:

> (6) Counsel are advised to be more circumspect in their use of secondary authorities such as textbooks, journals, periodicals and other treatises. As far as possible, counsel should rely on primary authorities to support the proposition of law argued for; and
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> (7) If it is necessary to cite secondary authorities, counsel should ensure that the material to be cited is directly relevant to the case before the Court. Counsel are also reminded of their duty to ensure that such material is not cited out of context. The following are specific guidelines for the citation of different types of secondary authorities:

34 LP(PC)R r 60(a).
35 LP(PC)R r 60(b).
36 LP(PC)R r 60(e).
37 LP(PC)R r 60(c).

(a) Textbooks that are generally recognised as leading textbooks in the relevant area of law may be readily cited to the Court.

(b) If counsel wish to cite academic articles in journals and periodicals in support of a particular proposition of law, they should ensure that they are citing a statement, rather than a critique, of the law. Citation of academic articles should be limited to those written by eminent authors of reputable standing. The articles should also have been published in established journals and periodicals.

(c) Legal opinions written by other counsel not having conduct of the case before the Court should generally not be cited as authority. Such legal opinions are considerably less authoritative than academic articles, as the views expressed in these private opinions have not been subject to the rigorous scrutiny of editorship and public critique.

(8) Counsel's attention is drawn to Order 59 Rule 8 of the Rules of Court which gives the Court the power to make an order for costs personally against errant advocates and solicitors, who have wasted or incurred costs unreasonably or improperly. The Court will not hesitate to invoke its powers under Order 59 Rule 8 of the Rules of Court in cases where costs have been wasted due to counsel's indiscriminate citation of unnecessary and irrelevant secondary authorities.

17 Several points arise from these directions. Counsel must make every reasonable effort to produce the actual case law, statutory rules and other sources on which they intend to rely.[38] Secondary authorities such as textbooks, journals, periodicals and other forms of publication should only be relied upon if necessary.[39] Necessity assumes that counsel is not able to secure the primary materials through the exercise of reasonable efforts. Furthermore, the secondary material must be "directly relevant" and must not be "cited out of context".[40] This condition links with the general principle discussed in a preceding paragraph that counsel must be candid and forthright in his presentation of the case.[41] The words "directly relevant" should be interpreted to mean that the secondary source concerns one or more issues before the court and assists the court in the process of adjudication. Counsel should not waste the court's time by introducing material which is purposeless. If he has acted unreasonably in this regard, he may be ordered to pay the ensuing costs personally.[42]

38 Subordinate Courts Practice Directions, 2006, para 53(6).
39 Subordinate Courts Practice Directions, 2006, para 53(7).
40 Subordinate Courts Practice Directions, 2006, para 53(7).
41 See para 13 of this article.
42 Subordinate Courts Practice Directions, 2006, para 53(8).

18 Even if counsel is entitled to rely on secondary authorities, there are guidelines[43] which set the scope of their applicability. Law books may be cited if they are "generally recognised as leading textbooks in the relevant area of law".[44] This phrase could include any book which has acquired a sufficiently authoritative status by reason of judicial references to it. It could also include any book which has yet to be cited to the courts (because it concerns an area of law which has yet to be subjected to adjudication), but has nevertheless earned significant standing (for example, in academic or professional circles). The direction includes foreign books which are regarded as "leading" works in their respective countries or which have acquired such a status from Singapore's perspective.[45] It is quite possible that several works in a legal domain may be classified as leading text books if they have satisfied the necessary criteria. In the event that no leading text book addresses a particular point of law before the court, it may be within the scope of the practice direction to tender a "non-leading" text book which covers the issue in a manner which is accurate and helpful to the court. It could be argued on a purposive construction that the "non-leading" text book is "leading" in the context of that particular point (because it is the only viable source available). Alternatively, that non-leading text book may be referred to in the circumstances because it is in the nature of the guidelines to offer this flexibility.

19 The direction also imposes certain requirements in relation to articles.[46] Primarily, they "should be limited to those written by eminent authors of reputable standing" and "have been published in established journals and periodicals". If, as in the usual case, the article is cited in respect of a legal point before the court, counsel "should ensure that they are citing a statement, rather than a critique, of the law". It is submitted that this condition does not limit the citation of the article to merely descriptive statements of the law. The courts will rely on the analysis of a legal principle (whether in a book or article) if it is sound and helpful. The reference to the word "critique" is probably intended to refer to mere criticism devoid of any reasoning (as this would not assist the court in its deliberations on the law). Articles are distinguished from "[l]egal opinions written by other counsel" not involved in the case.[47] These are excluded as a general rule because they are "considerably less authoritative …".[48] As these are guidelines,[49] other sources of secondary materials (for example, annotations, reference works, monographs,

43 Subordinate Courts Practice Directions, 2006, para 53(7)(a)–(c).
44 Subordinate Courts Practice Directions, 2006, para 53(7)(a).
45 Normally, the Singapore courts will consider foreign text books which are classified as "leading" in their respective jurisdiction.
46 Subordinate Courts Practice Directions, 2006, para 53(7)(b).
47 Subordinate Courts Practice Directions, 2006, para 53(7)(c).
48 Subordinate Courts Practice Directions, 2006, para 53(7)(c).
49 See the first sub-paragraph of para 53(7).

short case notes and manuals) are not excluded. However, for the purpose of citation, these would have to meet the criteria for standing and quality set out in the practice direction.

F. Relationship between counsel

20 A word needs to be said about the relationship between counsel in chambers. Rule 47 of the LP(PC)R is a general provision which states: "An advocate and solicitor shall treat his professional colleagues with courtesy and fairness." Rule 60(b) provides that he must not "… allow his personal feelings to affect his professional assessment of the facts or the law or to affect his duty to the Court". The upshot of these rules, in the context of chamber proceedings, is that when one counsel is presenting his arguments, the other must conduct himself courteously and professionally. As a matter of mutual professional respect, the counsel who is not presenting arguments should not interrupt the presenting counsel unless it is absolutely necessary that the former should interject at that point in time rather than when it is his turn to submit and respond. For example, when the presenting counsel is submitting on facts which are not part of the evidence or he is obviously misstating the established facts, the court should be made immediately aware so that it is able to adjust its perspective.[50]

21 Counsel must also remember that remarks such as "My learned friend is misleading the court" or "My learned friend is masking the true facts" or "My learned friend knows that what he has just said is not true" are viewed extremely seriously by the court as they constitute allegations of grave misconduct. The issue of whether presentations have been misleading or otherwise unethical can be left to the court, which is able to come to the appropriate conclusion after considering the case as a whole. Discourtesy may also take the form of visible emotional reactions by the non-presenting counsel in response to the arguments of the presenting counsel. These include grimaces and other facial contortions (which could be mistaken for stomach trouble!), shaking of the head, hands being raised to the face, looking up at the ceiling and incessant movements in the chair. Needless to say, some control is necessary in deference to r 47 and also out of respect for the court.[51] Sometimes this behaviour is spontaneous and on other occasions it is a manoeuvre to put off the presenting counsel and/or to influence the court. Conduct which is intended to influence the court is grossly improper as it constitutes an interference with the court's sole prerogative to decide the case as it sees fit.

50 Some argument may follow upon the issue raised by the interjection.
51 Also see paras 5–7 of this article.

G. Relationship between counsel and unrepresented litigants

22 It may difficult for counsel to relate to an opposing unrepresented litigant who does not understand the legal and procedural issues. The civil process requires a relationship of action and response between litigants. For example, the statement of claim and defence, affidavits in support and in opposition, and legal submissions for and against. Accordingly, counsel must, in the interest of the administration of justice and in the interest of his client, do his best to maintain a "court relationship" with the unrepresented litigant.[52] Rule 53A of the LP(PC)R states:

> An advocate and solicitor shall not take unfair advantage of any person or act towards anyone in a way which is fraudulent, deceitful or otherwise contrary to his position as advocate and solicitor or officer of the Court.

23 Although this rule is entitled "Relations with third parties", it should be interpreted to apply to an unrepresented litigant. There are two primary reasons for this view. Firstly, the wording of the rule is all-encompassing. The words "unfair advantage" are clearly appropriate in a case where the unrepresented party faces a qualified lawyer, and the phrase "act towards anyone" should be literally interpreted. Secondly, if this rule does not apply to an unrepresented litigant, there is no other rule which would specifically govern counsel's conduct towards him. Furthermore, counsel is bound by his paramount obligations to assist in the administration of justice[53] and not to obstruct the unrepresented litigant's access to justice.[54] It is therefore disheartening to see counsel behaving in a rude or even intimidating manner whether just outside chambers or even in chambers (after the completion of a hearing). In one situation, an unrepresented litigant wished to speak to opposing counsel after a hearing (while both were still in chambers). The counsel waived him away rudely and walked out of the door.[55]

III. Justification of interlocutory proceedings

24 Although the advocate and solicitor has considerable latitude in advising his client whether he should apply for an interlocutory remedy, his conduct is qualified by his responsibilities to the latter, the court and

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52 This does not prevent counsel from advising his client to apply to strike out the unrepresented litigant's action or defence, or to seek some other summary remedy if the circumstances justify this outcome.

53 LP(PC)R r 2(2)(a).

54 LP(PC)R r 2(2)(d).

55 For a consideration of the general principles concerning the conduct of an advocate and solicitor towards an unrepresented party, see *Ethics and Professional Responsibility*, at paras [25-011]–[25-017].

the public.[56] With regard to the client, he is required by r 12 of the LP(PCR)R to "… use all reasonably available legal means consistent with the agreement pursuant to which he is retained to advance his clients' interest".[57] In the context of interlocutory relief, this means that the advocate and solicitor must consider all possible remedies which would benefit his client. However, he must not advise his client to make an interlocutory application which he knows is bound to fail irrespective of any argument he raises and any evidence he presents. An application in such circumstances would not "advance his client's interest" in compliance with r 12. Moreover, such conduct may constitute a breach of r 13 if it "unnecessarily or improperly escalate[s] his costs that are payable to him". The advocate and solicitor would also be in breach of his obligation not to "do any act which would compromise or hinder" his obligation "to act in the best interests of his client".[58]

25 The LP(PC)R do not specifically address the nature of the advocate and solicitor's duty in respect of advice concerning the initiation of a legal proceeding (including interlocutory applications and appeals against interlocutory decisions). It is submitted that he must reasonably believe (having considered the law and the facts), that there is a prospect or chance that the application or appeal will be successful, and that such an outcome would benefit his client in the context of the retainer. Counsel may be entitled to file an interlocutory application or appeal even if the applicable law does not favour his client, as long as he reasonably believes that there is a realistic basis on which to argue for the modification of the law.[59] Quite apart from the test just proposed, it is imperative that the advocate and solicitor properly evaluates the case with his client so that the latter may make an informed choice concerning the application or appeal.[60] This would include discussing the extent of the risk of failure, the costs which would have to be incurred according to the different outcomes, and whether the benefit sought "justifies the expense or the risk involved".[61]

26 With regard to his duties to the court, the advocate and solicitor who advises the client to make an interlocutory application or to bring an appeal which has no prospect of success (or is bound to fail), would

56 The principles to be considered also apply to his advice on initiating legal proceedings.

57 LP(PC)R r 12.

58 LP(PC)R r 2(1)(c).

59 For the position in other jurisdictions, see, for example, the ABA's Model Rules of Professional Conduct (2006 Ed) r 3(1) and the New South Wales (Australia) Legal Profession Act 2004 (No 112) Division 10.

60 See J Pinsler, "Litigation and the Client's Right to Make an Informed Choice" (2008) 20 SAcLJ 21 and the cases cited therein.

61 LP(PC)R r 40.

be in dereliction of his responsibilities to assist the administration of justice[62] (because the proceeding would not be in the interest of justice) and to make proper use of the court time and resources (because they would be unnecessarily incurred and wasted).[63] The advocate and solicitor would also be accountable to the public by disregarding the injunction to facilitate access to justice.[64] The unjustified engagement of court time and resources would militate against the acceleration of justice sought by more needy litigants.

27 Interlocutory applications in chambers raise a particular concern because they are easily made and are not, as in the case of writs and pleadings, ordinarily subject to the opposing party's pre-emptive application to strike out.[65] However, an inappropriate application may be discouraged by a procedural rule which penalises the applicant in costs. For example, in the context of proceedings for summary judgment, O 14 r 7(1) states:

> If, on an application under Rule 1, it appears to the Court that the [applicant] knew that the [respondent] relied on a contention which would entitle him to unconditional leave to defend, then, the Court may dismiss the application with costs.[66]

28 It is surprising how many applications for summary judgment are made even though the applicant and his advocate and solicitor must have believed that there was at least one issue which justified unconditional leave to defend. This tendency to seek summary judgment with impunity is attributable to the considerable advantages to be obtained. If granted, summary judgment presents to the applicant the remedy he seeks within a relatively short period of time, and spares him the costs and effort which would otherwise have to be incurred in pursuing the case to trial.

29 Although O 14 r 7 concerns the applicant's knowledge, there is the underlying assumption that the advocate and solicitor has fulfilled his responsibility of properly advising the applicant (his client) on the legal circumstances and the likelihood of success (if any).[67] It is quite possible that a primary reason why inappropriate applications for summary judgment are frequently made is that they are rarely dismissed with costs pursuant to O 14 r 7. The applicant may confidently assume

62 LP(PC)R r 2(1)(a).
63 LP(PC)R r 55(b).
64 LP(PC)R r 2(1)(d).
65 See O 18 r 19 (RC). Normally, arguments concerning the propriety of the application will be canvassed at the hearing.
66 The same rule applies to a defendant who applies for summary judgment on the basis of his counterclaim (see O 14 r 7(2) (RC)).
67 See J Pinsler, "Litigation and the Client's Right to Make an Informed Choice" (2008) 20 SAcLJ 21.

that he has nothing to lose as, in the worst case scenario (if, as he expects, O 14 r 7 is not applied), an order granting the defendant unconditional leave to defend would normally entail a direction that costs be in the cause. In this event, the applicant would only have to pay the costs of the O 14 proceedings if he fails to prove his case at the trial. Where the case is not strong enough for summary judgment but is proved at trial (where, normally, the lower standard of proof on a balance of probabilities applies), the applicant will recover the costs of his unjustified application.

30 If the advocate and solicitor reasonably believes that there is at least one irrefutable triable issue which his client would have to face (so that unconditional leave would be given), he must bring O 14 r 7 to his client's attention and advise that an application for summary judgment would not be appropriate. The absence of a specific rule in the LP(PC)R on this matter does not detract from the general responsibilities of the advocate and solicitor considered in the preceding paragraphs. It is sometimes forgotten that the summary judgment under O 14 is an exceptional relief intended for cases where the plaintiff can convincingly establish his claim without having to resort to trial. As the Court of Appeal stated in *Habibullah Mohamed Yousuff v Indian Bank*:[68] "The power to give summary judgment under O 14 is intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where it is inexpedient to allow a defendant to defend for mere purposes of delay … ."[69] The common law dictates that the trial is the proper forum for the adjudication of normal disputes and that the processes preceding the trial, including the disclosure and production of documentary evidence, and the exchange and filing of the affidavits of the evidence-in-chief, are fundamental to the fairness and integrity of the court system. In contradistinction, the O 14 proceeding, being interlocutory in nature, is determined on the basis of limited sources such as pleadings and affidavits. Normally, the hearing is unable to meet the standards of a full determination of the facts by the trial judge. Accordingly, the summary process must be engaged for its proper purpose and not abused. Just as the defendant's counsel must not manipulate the facts or cloud the issues in order to create the semblance of a triable issue or defence, so must the applicant's counsel avoid presenting a false impression of his client's or the respondent's case in order to mask the facts which establish the latter's entitlement to unconditional leave to defend.

68 [1999] 3 SLR 650.

69 The extract goes on to provide: "Where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend … ."

IV. Documents relied on in chambers

31 The interlocutory judge[70] is in a less favourable position than the judge at trial regarding the availability of materials. In most interlocutory applications, he will only have affidavits and pleadings to rely upon, whereas the trial judge normally has access to oral and documentary evidence which can be scrutinised through cross-examination and other evidence produced in the course of trial. Therefore, it is essential to proper adjudication that the limited materials before the interlocutory judge are uncompromising in their reliability and clarity. What is the advocate and solicitor's responsibility in respect of the content of pleadings and affidavits and the manner of their drafting?

A. Pleadings

32 Although the primary objective of pleadings is to formulate and identify the issues in dispute so as to enable the parties to effectively present their cases at trial, their role in interlocutory proceedings may be of singular importance. For example, in an application for summary judgment under O 14 (RC), the court relies on the statement of claim to discover the constituent elements of the action and the relief claimed, and it examines the defence in order to determine whether the defendant is able to raise some matter to resist the application. The veracity and accuracy of pleadings is often a vital feature of the interlocutory process.

33 Unfortunately, pleadings frequently fail to meet the demands of adjudicative integrity. That is, they fail to come up to the standard which is necessary to place the interlocutory judge in an optimal position to reach a correct decision. In not a few instances, the lawyer's tendency is to keep his options open by pleading his client's case "broadly" so that he has room to manoeuvre should the need arise at a later time. This attitude is often attributable to the pleader's concern about the general rule that pleadings bind the parties to the issues raised and the points made. Such a fear is unfounded if one considers the numerous cases in which the court has shown itself willing to permit amendments to modify pleadings, even late in the proceedings if this is in the interest of justice.[71] It should also be said that some pleadings include allegations which are speculative, unsupportable, irrelevant or intended to confuse (contrary to their true objective, which is to clarify), or which can only be described as exhibiting bravado. Such practices are unethical simply

70 *Ie*, a judge or registrar hearing a matter in chambers.

71 Normally where the opposing party would not suffer undue prejudice.

because pleadings which lack veracity and/or clarity compromise the ability of the court to dispense justice.

34 What is the approach of the LP(PC)R to pleadings? Rule 59(a) concerns pleadings and other documents.[72] It provides, *inter alia*, that the advocate and solicitor "shall not contrive facts which will assist his client's case or draft any … pleading … containing":

> (a) any statement of fact or contention (as the case may be) which is not supported by his client or instructions;

35 Two questions arise from this provision: (i) what conduct constitutes contrivance? and (ii) is the advocate and solicitor entitled to rely wholly and unqualifiedly on the information and instructions he is given by his client? With regard to (i), the *Shorter Oxford Dictionary*[73] defines "contrive" as "plan or design with ingenuity or skill". It goes without question that the advocate and solicitor must not knowingly include false assertions and facts in his pleading. This is consistent with the fundamental rule in the LP(PC)R that an advocate and solicitor must never mislead the court in any way[74] and is bound to conduct himself fairly towards his professional colleagues.[75] It is submitted that contrivance would also include the embellishment or exaggeration of facts with the result that the original content of the information provided by the client is altered. The pleader is entitled (indeed, expected) to express the facts in a manner which is readable and complies with the rules which govern pleading. However, the style he engages for this purpose must not change the substance of the information he is given.[76]

36 As for (ii),[77] the purpose of the para (a) of r 59 is to ensure that the pleading is entirely consistent with the facts as conveyed by the client. The implication of the words in para (a) is that the advocate and solicitor may assume that the information given by his client is true and draft his pleading accordingly. However, unquestioning reliance on the client's account of the facts may not be justified in all circumstances. In *Wee Soon Kim Anthony v Law Society of Singapore*,[78] Chan Sek Keong J, as his Honour then was, said:

> It is not for an advocate and solicitor, whether in his capacity as counsel or solicitor, to believe or disbelieve his client's instructions,

72 These other documents include any "originating process, pleading, affidavit, witness statement or notice or grounds of appeal".
73 1993 Ed.
74 LP(PC)R r 56. Also see r 60(f) in relation to the presentation of evidence.
75 LP(PC)R r 47.
76 The process of drafting is considered below.
77 See "(ii)" in the preceding paragraph.
78 [1988] SLR 510 at para 12.

> unless he himself has personal knowledge of the matter or unless his client's statements are inherently incredible or logically impossible.

37 The words "personal knowledge" in the above extract should be construed to the effect that if the advocate and solicitor knows or considers – on the basis of other evidence or circumstances in the case – that the client's factual account may be untrue, then he must raise the issue with the client and seek clarification. He should explain to his client their respective responsibilities not to mislead the court.[79] Such an approach would be in keeping with the "spirit of the rules", which has been so strongly emphasised in recent cases.[80] Moreover, r 59(a) must be read in the light of the paramount obligation in r 2(1)(a), which requires the advocate and solicitor to positively "assist in the administration of justice".[81] In any event, as a matter of strategy, the advocate and solicitor would need to discuss with his client any assertion of fact which is inconsistent with, or contradicted by, other facts or circumstances so as to eliminate inherent weaknesses in his case.

38 At the present time, the parties do not have to account for their pleadings in the same way that they do as deponents in respect of their affidavits.[82] There is much to be said for the English practice whereby every "statement of case" (including a claim, defence and reply) must be verified by a statement of truth.[83] Either the party or his legal representative (on the party's behalf) must sign the statement of case certifying the party's belief that the facts are true. The accountability of the client in such circumstances would have a significant role in reassuring the pleader of the integrity of his craft.

39 Another concern which arises from current practice is the frequent failure to comply with the rules of pleading.[84] For example, multiple allegations are contained in a single paragraph contrary to O 18 r 6. Evidence is pleaded despite the primary rule in O 18 r 7(1) that the pleading is to contain "a statement in a summary form of the material facts on which the party pleading relies for his claim or defence …" and not the evidence by which those facts are to be proved. The actual words in a document or discussion are sometimes included even though they are not material (this constitutes a breach of O 18 r 7(2)). Material facts which raise defences or new issues in the dispute are often

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79 See *Ethics and Professional Responsibility*, at para [04-020].

80 See, for example, *Law Society of Singapore v Tan Phuay Khiang* [2007] 3 SLR 477 at [100]; *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR 308 at [82]; and *Wong Keng Leong Rayney v Law Society* [2006] SGHC 179 at [84].

81 Other provisions also emphasise the requirement of forthrightness. See, for example, rr 54, 56 and 60(a) of the LP(PC)R.

82 Affidavits are considered at paras 41–46 of this article.

83 CPR Pt 22.

84 The primary pleading rules are found in O 18 (RC).

omitted even though they are specifically required to be pleaded pursuant to O 18 r 8. Submissions on the law appear at times although O 18 r 11 only entitles the pleader to raise points of law. Replies are unnecessarily filed and served presumably out of ignorance or disregard of the implied joinder of issue which operates in respect of a defence under O 18 r 14(1).

40 The failure to comply with the rules of pleading can seriously impede the proceedings and consequently compromise the administration of justice. Ethical breaches would certainly occur in these circumstances. For example, improper drafting would constitute a breach of r 12 of the LP(PC)R, which requires counsel to use "all reasonably available legal means … to advance his clients' interest". Rule 13 would also be infringed as an inept pleading may escalate costs, for example, by generating applications to strike out certain paragraphs or for further and better particulars or amendments. In these circumstances, the errant counsel would not be regarded as using "his best endeavours to avoid … expense and waste of the court's time …"[85] and assisting the court "in ensuring a speedy and efficient trial …".[86]

B. Affidavits

41 In the context of affidavits, r 59(a) states, *inter alia*, that the advocate and solicitor "shall not contrive facts which will assist his client's case or draft any … affidavit … containing":

> (a) any statement of fact or contention (as the case may be) which is not supported by his client or instructions;

42 The discussion of this provision in relation to pleadings[87] applies to the affidavit as well. As the affidavit is concerned with the actual evidence of the deponent, the advocate and solicitor must exercise great care to ensure that its substance is not altered in any way. His purpose must be to present his client's evidence as clearly and precisely as he can in the interest of proper judicial determination of the facts.[88] However, r 59(a) must not be construed as permitting counsel to unquestioningly accept the truth of everything he is told by his client. The information may be inherently unbelievable or shown to be false by the established facts or other circumstances.[89] In this event, counsel must question his client on the validity of the information and, if appropriate,

85 LP(PC)R r 55(b).
86 LP(PC)R r 55(c). Also see r 2(2)(a) concerning counsel's duty to assist in the administration of justice.
87 See paras 34–40 of this article.
88 *Ethics and Professional Responsibility*, at paras [04-011]–[04-016], [04-18]–[04-021] and [08-023].
89 See paras 36–37 of this article.

advise him that it is illegal to knowingly present false evidence to a court.[90]

43 In addition to the obligations imposed by r 59(a), r 59(c) precludes the inclusion in an affidavit of:

> … any statement of fact other than the evidence which in substance according to his instructions the advocate and solicitor reasonably believes the witness would give if the evidence contained in the affidavit or witness statement were being given orally.

44 Rule 59(c), which applies to all affidavits, imposes on the advocate and solicitor the obligation to exclude from the affidavit any facts which he reasonably believes the deponent would be unwilling to testify to. Therefore, it is incumbent upon the advocate and solicitor to discuss with the deponent any part of the affidavit which raises such a concern. For example, some facts may be obviously untruthful or exaggerated or they may be shown to be dubious or unreliable by other facts. The advocate and solicitor is not at liberty to blindly assume that every fact recounted by the client for the purpose of the affidavit is a fact about which the latter would be willing to give evidence. As the test is an objective one, the advocate and solicitor must act as a reasonable advocate and solicitor.

45 A distinction must be made between affidavits used in interlocutory proceedings ("interlocutory affidavits") and affidavits of the evidence-in-chief ("AEICs"). While the veracity of an AEIC is normally put to the test through cross-examination of the deponent at trial,[91] the deponent of an interlocutory affidavit may only be cross-examined if the court considers the process to be clearly justified by the circumstances.[92] If the deponent in interlocutory proceedings assumes that he will not be questioned on his affidavit, he might be tempted to take the calculated risk of distorting the truth or manipulating the facts with impunity. He may well be satisfied with such a scenario if all he needs to do to succeed is to show there is a point of contention.[93]

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90 *Ethics and Professional Responsibility*, at paras [04-012], [04-18]–[04-021]. If counsel is aware that the client has given false testimony, he may apply to be discharged from acting further pursuant to r 57 of the LP(PC)R. Regarding counsel's responsibility for his client's conduct, see *Ethics and Professional Responsibility*, ch 5.

91 If the deponent's evidence needs to be challenged. For the governing procedure, see O 38 r 2 (RC).

92 See *Tang Choon Keng Realty v Tang Wee Cheng* [1992] 2 SLR 1114 and other cases considered in *Singapore Court Practice 2006* (LexisNexis) at para 38/2/14; *Singapore Civil Procedure 2007* (Thomson Asia) at para 38/2/12.

93 As in the case of an application for summary judgment.

46 Therefore, r 59(c) does not offer the same level of assurance of reliability in respect of the interlocutory affidavit as it does with regard to the AEIC. It follows that the advocate and solicitor must not take advantage of the situation by assuming that the client would be willing to subject himself to cross-examination on his affidavit when in fact both are aware of the improbability of this outcome. Furthermore, r 59(c) should not be interpreted so as to permit the inclusion of facts in an affidavit on the basis of the advocate and solicitor's reasonable belief, if the advocate and solicitor knows that the client would give evidence of the facts regardless of their truth. This interpretation is necessary to the "spirit" of r 59(c)[94] and is consistent with the advocate and solicitor's responsibility to "assist in the administration of justice"[95] (in particular, "in arriving at a just decision"), and related responsibilities in the LP(PC)R.[96]

V. Conclusion

47 Much of this article has been concerned with the interpretation of rules and directions, and it has proposed practices in the absence of specific statutory guidelines. Ultimately, however (heretical as this proposition may seem), the rules should not be seen as the cornerstone of ethical conduct. They present a paradox: for while a rule's existence sets a required standard of conduct, it also presents the opportunity for its own negation. A rule can only be infringed if it exists. And even if the rule is not contravened, cleverness or cunning (from a moral perspective) may be used to comply with its letter but not its spirit. The finding of a "loophole" or some other means of avoiding the consequences of a rule may be acceptable in the context of the general law governing rights.[97] But this is not the proper approach to the professional responsibilities of the advocate and solicitor. His ethical disposition is an entirely personal matter. The moral standards of his office are not limited by the letter of any rule for his true calling is derived from the inner resonance of what is right and wrong, a deeper sense which can never quite be fully articulated through formal expression. The High Court has recently ignited a spark by declaring that advocates and solicitors must be conscious of the "spirit and intent,

94 See the cases cited in n 80.

95 Pursuant to r 2(1)(a) of the LP(PC)R.

96 See, generally, rr 54, 56–58, and 60(a) and (f) of the LP(PC)R. The extent to which an advocate and solicitor is responsible for his client's conduct is considered in *Ethics and Professional Responsibility*, ch 5.

97 Subject, of course, to the court's entitlement to adopt the appropriate interpretation of the rule.

rather than just the plain letter" of the rules.[98] The legal profession has the responsibility to maintain and fan this flame.

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98 *Law Society of Singapore v Tan Phuay Khiang* [2007] 3 SLR 477 at [100]. Also see similar observations in *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR 308 at [82] and *Wong Keng Leong Rayney v Law Society* [2006] SGHC 179 at [84]. This is the third in a series of articles in which the author has emphasised the critical importance of complying with "the spirit of the rules". See J Pinsler, "Litigation and the Client's Right to Make an Informed Choice" (2008) 20 SAcLJ 21 and "A Clarion Call to Lawyers to be 'Unflinchingly Loyal' to Their Clients" (2007) 19 SAcLJ 231.