

SABAH LAW SOCIETY

Continuing Legal Education Program

**‘Strategic Approach on Civil Litigation and
Writing Impactful Submissions – Sharing
Experiences’**

**Speaker: Tan Sri Datuk Seri Panglima Richard
Malanjum**

Former Chief Justice, Malaysia

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Contents

- Impact of Covid19 on the legal profession
- What is strategic approach to litigation
- Civil litigation
 - How and where do I begin
 - What do I ask the client
 - How do I handle the client
 - What I must get the client to do and provide
 - Facts or Law?
 - Which come first before I begin my pleading?
 - Pleadings
 - What are the expectations of the Bench from Pleadings
 - Time and costs factors
 - How can I save costs and time to get the result
 - ‘Shortcuts’ to the result?
 - Trial preparation
 - What are the expectations of the Bench
- Effective submissions – trial and appellate
 - The dos and don’ts
 - Expectations of the Bench
 - Length of submissions and contents
 - Use of authorities

Impact of Covid19

- Life changing – lucky to be part of it?
- Affected all aspects of our life – physical, social, economic, mental, relationship, spiritual,
- On the legal profession – compelling us to adapt or else we move to another profession or trade
- During economic downturn the corporate and conveyancing works may be less but likely litigation works will increase – importance of retooling ourselves

Impact of Covid19 on the legal profession

- Conventional hearings
 - Interlocutory – chambers hearing – use of e-review, etc
 - Trial –
 - public access – principle of open justice-practiced in commonwealth countries-public scrutiny on court proceedings including evidence and documents-decision made in public
 - Article 14(1) of the International Convention on Civil and Political Rights – all persons have equality before the court – entitled to fair and public hearing by impartial and competent tribunal established by law
 - Public hearing has its origin even before the Magna Carta – see: Scott v Scott (1913) AC 417 – Lord Atkinson- ‘because it is felt that in public trial is to found, on the whole, the best means for winning for its public confidence and respect’
 - Article 8 Federal Constitution – equality before the law
 - Dato Sri Najib bin Abd Razak v PP (2019) 4 MLJ 281 – applied to exclude the media- failed- court proceedings should be open and accessible to the public in the interest of transparency – s.15 (1) Courts of Judicature Act 1964 – open justice is fundamental to a functioning democracy and promotes good governance – Hodgson and Others v Imperial Tobacco Ltd (1998) All ER 673 – to avoid ill-informed comments in the media – the court to be as open as is possible and practicable
 - Key component in the Rule of Law – Jeremy Bentham – ‘publicity is the very soul of justice – where is no publicity there is no justice
 - Lord Bingham –Rule of Law – all persons bound and entitled to benefit from laws publicly made ..and publicly administered in the courts
 - Open justice is not absolute – media can be banned especially if it is likely to interfere with the right to a fair trial, privacy

Impact of Covid19 on the legal profession

- Virtual hearings- legal or illegal?
 - s15 Courts of Judicature Act 1964 – public access
 - Proviso – expedient in the interest of justice, public safety, public security or propriety or for other reasons to do so – ‘in camera’
 - s19 – High Court sitting at places as per instruction by the Chief Judge- virtual?
 - s 39 of the same Act for Court of Appeal – for President to direct and s 75 for the Federal Court as the Chief Justice may direct
 - s 101 Subordinate Courts Act 1948
 - Similar provision as for the superior courts
- Need for statutory amendments and Rules similar to those in other jurisdictions eg Singapore, UK, Australia – video links and by electronic means
- Can the public participate online? Implications? Courtroom atmosphere?
- To the parties – demeanor of witnesses and assessment by the judge? control and conduct of proceeding by the judge?
- Interviewing clients and witnesses?
- Mediation?
- Safety of documents?
- Economic impact? Costs in managing office? Revision of fees scale?

Strategy and Tactics

- This talk is only on knowledge and experience sharing. Some Rules of Court might have changed?
- There are not more than five cardinal tastes, yet combinations of them yield more flavours than can ever be tasted- optimal uses of options and advantages available for success-go for killer points using the laws available- be creative
- The quality of decision is like the well-timed swoop of a falcon which enables it to strike and destroy its victim- timing and target are critical-know the opponent and hit its weakest points
- Opportunities multiply as they are seized- maximized whatever advantages available
- You have to believe in yourself-only trust yourself to begin with and be confident with your ability in court
- “It's better to keep your mouth shut and appear stupid than open it and remove all doubt”- Mark Twain

Civil Litigation

- How and where do I begin – Plaintiff or Defendant
 - what do I ask the client – Fee deposit? His personal details? Why he is seeing you? If he can pay fees? Conflict position?
 - How do I handle the client-Attitude wise ? Judgmental? Abusive? Polite? Caring?
 - What I must get the client to do and provide- When? Documents? Evidence? Contacts? Names? Dates? Retainer form? Agreed fees? Written statements?
 - How do you react when client asks on possibility of success – Guarantee? Cautious? Preempt Judge attitude? Blame the system?
 - What to do when client asks on the legal position of his case? Tell the law? If not sure of the law what to tell the client?

Civil Litigation

- Facts or Law?
 - Which come first before I begin my pleading?
 - For Plaintiff or Defendant - Study the law? Study the facts and evidence and their qualities? Consider the best and possible causes of action and relief? Consider possible defences/reply and responses to them? Second opinion? Study the current judicial thinking on the subject- local and overseas? The roadmap?
- Pleadings
 - What are the expectations of the Bench from Pleadings
 - Concise background facts and cause of action/defence and relief prayed for- narration clear and in chronological order
 - Precise language and format used- plain grammatically correct and yet in legal language
 - Precise reference to legal principles relied upon
 - Clear issues posed

Civil Litigation

- Time and costs factors
 - Client concerns – when is the end result known? So need to be very careful as you plan the roadmap. It is the result that the client is interested. Explore every avenue to get to the end as quickly as possible including amicable settlement. It is not an opportunity to show off your intelligence or otherwise. Your vanity comes last or never at all.
 - How can I save costs and time to get the result?
 - ‘Shortcuts’ to the result:
 - Counsel for the Plaintiff – study the defence carefully and other cause papers filed for the Defendant. Consider these items:
 - Procedural defects/irregularities? Service? JID? ADR?
 - Admission and or bare denial – apply any or some of R o C Order 14, 14A , 18 r.19, 20, 22A, 23, 24, 26, 27, 29, 33 r.2, 81,

Civil Litigation

- Time and costs factors (cont..)
 - ‘Shortcuts’ to the result: (cont..)
 - Counsel for the Defendant – study the Statement of Claim closely – note the cause of action, parties involved, limitations - many sources of limitations and not confined to the Limitation Ordinance/Act, consider pre-requisites to be fulfilled before filing an action, procedural defects and or shortcomings e.g. premature suit, erroneous service, jurisdictional issue, consider any or some of these Orders in R o C:
 - O 15, 16, 18 r.19, 22B, 23, 24, 26, 27, 33,

Civil Litigation

- Trial preparation
 - Great care for pre trial case management orders including ‘unless order’ (peremptory/Hadkinson order), ADR, agreed facts, agreed issues, witness statements, bundles – pleadings, parts A, B, C, service and exchanges,
 - What are the expectations of the Bench
 - All cause papers are in order
 - Witnesses ready
 - No more interlocutory application
 - No adjournment
- Always keep in mind- to safeguard the interest of the client and to get best result as could be; so even at this stage do not give up on the idea of amicable settlement. Trial is never certain no matter how good you might think your case is or how smart you think you are!

Civil Litigation

- What are the expectations of the Bench (cont..)
 - Parties know their respective cases – the cause papers, the facts, the issues, the law related,
 - Documentary evidence made handy for the hearing
 - Only pertinent and relevant questions to be asked
 - Time saving approach
 - Reasonable and amendable – not objecting for the sake of objecting
 - Polite, respectful and humble
 - No misleading statements
 - Helpful to the Court
 - Punctual
 - No surprises

Effective Submissions

- Trial Submissions

- The Dos and expectation of the Bench

- Structured – to write so that the Bench may have easy time to write the judgment by adopting what is in the submissions

- The flow

- introduction- in summary what is the claim or defence about,

- the agreed facts,

- the agreed issues to consider,

- the respective positions of the parties on the disputed facts and issues;

Effective Submissions

- The flow (cont..)
 - the narration of the case on each disputed fact and issue to say why the court should rule in the party favour e.g. it is the plaintiff case that....bringing in the evidence of the relevant witnesses and other documentary evidence citing the bundles and pages for ease of reference,
 - but keep in mind what are the elements- facts and law- needed to be proved to succeed so better in a proper flow of the elements,
 - Make end submission on each of the element considered proved by the evidence highlighting that the proved facts satisfied the law required to be established to succeed on the issue involved
 - Emphasis on the critical points in your favour and may determine the case one way or another

Effective Submissions

- The flow (cont...)
 - Use of authorities – relevant and appropriately in that just state the principles or summarize the principles but if the facts are important then to summarize the facts; no necessity to reproduce lengthy quotations – make easy reference to bundle of authorities with highlighted portions in the judgments
- Simple, polite, gentle and plain language with no or minimum grammatical errors – need not be lengthy submission especially if a case is quite straightforward.
- Distinguish authorities if necessary instead of hiding or just ignoring it or just saying not applicable when in fact it is relevant to the issue under consideration
- Do not write a thesis as a submission just to exhibit your knowledge in the law
- One suggestion: it can be helpful if you read some good judgments on the subject you are doing before writing your submissions. Study the pattern of the judgments then try to keep your submissions along those lines

Effective Submissions

- Appellate Level Submissions
 - If for appellant
 - Structured
 - Introduction- what is the appeal about and the parties
 - Brief facts as found by the court below
 - The facts and issues determined by the court below
 - Which issues not agreed upon and deal each one stating where the errors are in the findings and conclusions of the court below and how and why the errors committed and what should be the correct version
 - Always consider alternatives that may be of lesser consequences to the appellant in the event the appeal is dismissed and put to the court for consideration

Effective Submissions

- Appellate Level Submissions (cont...)
 - If for appellant (cont...)
 - Do not make it too voluminous – to the point and easy to be used in writing judgment
 - Go for the most important point first and do not waste time on minor or technical issues that could not be a basis to allow the appeal
 - Do executive summary of your submission if the main submission is more than 15 pages. It is better to do executive in points format with the proper flow according to the argument presented in the main submission
 - Make sure references in the main submission and executive summary are correct

Effective Submissions

- Appellate Level Submissions (cont...)
 - If for appellant (cont...)
 - Know the judgment or judgments of the court or courts below thoroughly especially those that you think are erroneous
 - Know the authorities and legislations cited in your submissions well and why they are applicable and relevant to your appeal
 - Be ready to submit additional points while on your feet and when asked by the appellate judges
 - Know your appeal records well as able to find quickly the pages when asked by the judges
 - Do core bundles of pleadings and the relevant documents for your appeal

Effective Submissions

- Appellate Level Submissions (cont...)
 - If for Respondent
 - Structured as that of the appellant but to say why the judgment of the court below is correct. You need to defend the judgment on the facts and the law not only from the attack by the appellant but may be from the judges as well
 - Answer each of the points raised by the appellant and stating why it will not alter the judgment conclusion
 - If there are technical issues raised point out why they do not cause any miscarriage of justice
 - Important to defend the finding of facts of the court below
 - Do core bundles too including the pleadings unless you are happy with the bundle of the appellant
 - Know the authorities and legislations well to be able to state why they are applicable and relevant to your case

Conclusion

- Each case requires different approach
- If you are not familiar with the law involved in the case it is best to pass it to someone who is familiar
- Continuously update your knowledge in the development of the law by reading cases, legislations and legal articles
- Always be creative but no dishonesty
- Always comply with directions of the court
- Listen carefully to whatever said during hearing and record them down
- Always make sure you do not create a situation when the Bench loses trust in you as a counsel

Q & A

Thank you for listening