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THE DECLINE OF ORAL ADVOCACY OPPORTUNITIES: CONCERNS AND IMPLICATIONS

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Singapore has produced a steady stream of illustrious and highly accomplished advocates over the decades. Without a doubt, these advocates have lifted and contributed to the prominence and reputation of the profession's ability to deliver dispute resolution services of the highest quality. However, the conditions in which these advocates acquired, practised and honed their advocacy craft are very different from those present today. One trend stands out, in particular: the decline of oral advocacy opportunities across the profession as a whole. This is no trifling matter. The profession has a moral duty, if not a commercial imperative, to apply itself to addressing this phenomenon.

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I. Introduction

1 Effective oral advocacy is the bedrock of dispute resolution.[1] It is also indisputable that effective oral advocacy is the product of training and experience. An effective advocate is forged in the charged atmosphere of courtrooms and arbitration chambers. An effective oral advocate does not become one by dint of age.

2 There is a common perception that sustained opportunities for oral advocacy in Singapore, especially for junior lawyers, are on the decline. This commentary suggests

* This commentary reflects the author's personal opinion. The author would like to thank the editors of the *SAL Practitioner*, as well as Thio Shen Yi SC and Paul Tan for reading through earlier drafts and offering their thoughtful insights.

1 Throughout this piece, any reference to "litigation" is a reference to contentious dispute resolution practice, including but not limited to court and arbitration proceedings, unless otherwise stated.

that this perception is true and, although nascent, this trend is slated to continue and may leave our legal profession bereft of the critical mass of skilled advocates necessary to sustain a thriving dispute resolution industry if left unchecked. The strain on the profession will be particularly acute in an international legal hub like Singapore, which is becoming increasingly open to the participation of foreign advocates in Singapore-seated arbitrations and even local commercial litigation under the aegis of the Singapore International Commercial Court.

3 By drawing attention to the trend, it is hoped that conversations on how to tackle and reverse this trend and its potentially debilitating effects will be provoked within and across the profession, and eventually, decisive collective action will be taken to combat the trend.

II. Golden age of oral advocacy in Singapore

4 Next year marks the 30th anniversary of the amendment to the Legal Profession Act[2] establishing the appointment of Senior Counsel ("SC"). Modelled after the Queen's Counsel scheme in England,[3] there have been 81 SC appointments since 1989.[4] With a few exceptions, SC appointees are typically practising litigators. This is unsurprising, given that the SC scheme is "meant for advocates".[5] Although SC candidates are assessed holistically, they are typically renowned for their proficiency in advocacy, especially oral advocacy.

5 Quite apart from according due recognition to the *crème de la crème*, the SC scheme served another important purpose. As S Jayakumar, then-Minister for Law, explained, it was hoped that the SC scheme "will provide the inspiration for the younger members of the profession to strive for excellence in

2 Cap 161, 2001 Rev Ed.

3 For more detailed elaboration of the Queen's Counsel scheme, see Paul Tan, "In Defence of the Defensible: An Overview of the SC Scheme" *Inter Se* (Academy Publishing, January–June 2008) at pp 23–24.

4 See the Roll of SC at <https://www.sal.org.sg/Services/Appointments/Senior-Counsel/Directory> (accessed 21 June 2018).

5 SC Selection Committee, "An Interview with the SC Selection Committee" *Inter Se* (Academy Publishing, January–June 2008) at p 33.

their profession".[6] In a speech to a forum of SCs, the former Chief Justice Chan Sek Keong reminded that the scheme was intended to "spur young advocates to emulate their achievements".[7] Prescient words they were and remain to this day.

6 Indeed, hardly a law student in Singapore in the 1980s would have completed law school without hearing of the exploits of the leading advocates of that era, many of whom would go on to make up the first batch of SCs. The household names included the late Joseph Grimberg, Harry Elias, Tan Kok Quan, Woo Bih Li and Wong Meng Meng, to name a few.

7 Collectively, these legends inspired the next generation of SCs, many of whom have made their mark in Singapore and the rest of the world in their respective fields, including in public office. The likes of Davinder Singh, Law and Home Affairs Minister K Shanmugam, former Attorney-General and Judge of Appeal V K Rajah, and the Honourable the Chief Justice Sundaresh Menon have established themselves as the who's who of the regional and even global dispute resolution fraternity. These legal giants and their illustrious peers have set the bar for exceptional oral advocacy and, in so doing, continue to inspire the next generation of advocates.

8 But are we at the end of this remarkable epoch? Has the profession done enough to not just inspire and spur, but also cultivate and nurture, the next generation of advocates who bear the burden of sustaining Singapore's golden age of oral advocacy or, better yet – dare we hope – take it to new heights?

9 This may not be a question that is at the forefront of the minds of practitioners and policymakers. Their attention is, not surprisingly, focused on other more immediate and obvious concerns in this fast-moving, intensely competitive business climate. But this topic is not any less significant or urgent. The supply and availability of effective advocates is an indispensable ingredient of any flourishing dispute resolution industry. The failure to plan for and ensure renewal across the

6 *Parliamentary Debates, Official Records* (17 February 1989) vol 52 at cols 744–745 (S Jayakumar, Minister for Law).

7 Chan Sek Keong CJ, "Dinner for the Judiciary and the Forum of Senior Counsel" (9 May 2008) at para 9.

profession has serious implications for the practice and delivery of dispute resolution services in Singapore.

III. Producing exceptional advocates

A. Path to becoming an exceptional advocate

10 How a newly minted lawyer goes from being a clueless, fumbling advocate to a competent, then exceptional, advocate is an enigma. It does not appear to have been the subject of any serious study. This is not surprising. After all, personal attributes, character traits, temperament, predispositions and innate talent differ across advocates. Circumstances, opportunities, and the reaction to them, are also unequal. Perhaps, owing to the sheer number of variables and the inherent subjectivity of any such qualitative assessment of the variables, a proper study of this topic has been shunned, out of fear that the end result will be speculative and unhelpful.

11 This commentary seeks to change that perception by using objective data and statistics available to piece together the lead counsel experiences of various exceptional Singapore advocates, SCs and non-SCs. The idea is to investigate and better understand the type and number of opportunities available to these exceptional advocates in the early stages of their careers and determine the existence and extent of correlations between the availability of oral advocacy opportunities and advocacy development.

B. Surveying the early careers of exceptional advocates, both Senior Counsel and non-Senior Counsel

(1) Methodology and approach

12 The survey tracks the careers of four groups of exceptional advocates:[8]

8 Data from 14 SCs and 14 non-SCs were reviewed. The breakdown of the 28 illustrious advocates reviewed is as follows: (a) seven SCs who were called to the Singapore Bar in the 1980s ("1980s SC Group"); (b) seven non-SCs who were called to the Singapore Bar in the 1980s ("1980s Control Group"); (c) seven SCs who were called to the Singapore Bar in the 1990s ("1990s SC Group"); and (d) seven non-SCs who were called to the Singapore Bar in the 1990s ("1990s Control Group").

(a) advocates who were called to the Singapore Bar in the 1980s and who have since been appointed SCs;

(b) advocates who were called to the Singapore Bar in the 1980s and who have yet to be appointed SCs;

(c) advocates who were called to the Singapore Bar in the 1990s and who have since been appointed SCs; and

(d) advocates who were called to the Singapore Bar in the 1990s and who have yet to be appointed SCs.

13 The core concept of the survey is simple: plot a chart of the advocacy opportunities available to each advocate, using the date of each published judgment of High Court and Court of Appeal cases in which the advocates featured as lead counsel. The dates are further organised into three sub-categories which correspond to the underlying nature of the proceedings under the judgment: (a) a matter that is not a trial, *ie*, mainly interlocutory matters and originating summonses (henceforth referred to as a "non-trial matter"),[9] (b) a trial,[10] and (c) a Court of Appeal matter. The key objective is to track the time it took for the advocates to lead their first non-trial matter, trial, and Court of Appeal matter, and also the time it took for the advocates to reach ten published High Court and/or Court of Appeal judgments.

14 It is important to *not* overstate the significance of this endeavour. This high-level survey is not, and does not pretend to be, a rigorous, statistical analysis more commonly expected of scientists and mathematicians. It is true that the data is skewed. Not every case results in a written judgment. Even if there is a judgment, it may not be published. Nor is the available data exhaustive. Among other things, the absence of a database of arbitration cases means that advocates' arbitration practice (if any) is discounted. What the survey attempts to provide is a baseline overview which may be tested

9 This refers, in the main, to interlocutory applications, appeals from the State Courts and originating summonses which do not involve cross-examination of witnesses.

10 "Trial" here refers to a hearing, typically in a writ action, which involves the cross-examination of witnesses. In a small number of cases, judgment is exercised in determining whether the matter is properly categorised as a trial or non-trial matter.

against more in-depth studies of this topic.[11] Despite the shortcomings and inherent limitations of the survey, its results are arguably compelling.

(2) Trends and patterns revealed from the survey

15 Two sets of observations are apparent from the data. The first set of observations is based on a comparison of the careers of advocates who went on to become SCs against those who have yet to be appointed SCs. The second pertains to the general availability of lead counsel advocacy opportunities across the years.

(a) Comparison between Senior Counsel and non-Senior Counsel

16 There are three key takeaways.

17 First, there appears to be a weak correlation between the time it takes an advocate to land his or her first lead counsel role in the High Court or Court of Appeal and whether the advocate would later go on to be appointed an SC. This suggests that developing one's oral advocacy is a journey, not a sprint, even if getting out of the blocks early and fast may have a positive impact on advocacy development.[12]

18 Second, the time it takes an advocate to land his or her first lead counsel role in the High Court or Court of Appeal has changed over the years. The advocates who were called to the Bar in the 1980s and went on to be appointed SCs *generally* secured their first lead counsel role ahead of their non-SC peers.[13] This might be an indication that earlier exposure to lead counsel roles contributed positively to the advocacy development of advocates called to the Bar in the 1980s.

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11 Whilst the raw survey data has been intentionally omitted from the commentary, for a number of reasons including its sensitive nature, the raw survey data may be made available on request.

12 See para 18 below.

13 The median number of years it took the 1980s SC Group to obtain their first published judgment as lead counsel in a non-trial and *trial* context are four years and seven years, respectively. The mean for the same statistic is 3.9 years and 6.9 years, respectively. The median number for the 1980s Control Group is five years (non-trial) and six years (trial), while the mean is 4.9 years (non-trial) and 7.7 years (trial).

19 However, advocates who were called to the Bar in the 1990s and went on to be appointed SCs *generally* secured their first lead counsel role around the same time as – in some cases, later than – their non-SC peers.[14] This suggests that the positive effect of landing lead counsel roles earlier on in one's career on advocacy development may be less pronounced than before.

20 Third, it appears that the regularity of lead counsel roles in the High Court and Court of Appeal has a strong correlation to whether the advocate goes on to be appointed SC. Across the entire time frame reviewed, an advocate who had a consistent lead counsel practice in the High Court and Court of Appeal was generally more likely to be appointed SC.[15]

21 On the reasonable assumption that SC appointment bears testament to the quality of that advocate's oral advocacy, there is a credible case to be made that the regularity of lead counsel roles plays an integral function in developing advocacy ability. If true, this corroborates the hypothesis that developing a high level of advocacy competency is a function of the number of opportunities an advocate has to practise and hone his or her craft. Coupled with the observable decrease in regular lead counsel opportunities over the years,[16] this may help to explain why the positive effect of landing lead counsel roles earlier on in an advocate's career on advocacy development is less pronounced now as compared to the past.

14 The median number of years it took the 1990s SC Group to obtain their first published judgment as lead counsel role in a non-trial and trial context are four years and seven years, respectively. The mean for the same statistic is 3.6 years and 7.0 years, respectively. The median number for the 1990s Control Group is three years (non-trial) and six years (trial), while the mean is 3.0 years (non-trial) and 6.7 years (trial).

15 The median number of years it took each group of advocates to obtain an aggregate of ten published judgments, across the High Court and Court of Appeal, is as follows: (a) seven years and ten years, respectively, for the 1980s SC Group and the 1980s Control Group; and (b) ten years and 14 years, respectively, for the 1990s SC Group and the 1990s Control Group. The mean number for the same statistic is: (a) 7.9 years and 11.6 years, respectively, for the 1980s SC Group and the 1980s Control Group; and (b) 10.0 years and 12.7 years, respectively, for the 1990s SC Group and the 1990s Control Group.

16 See para 25 below.

(b) Availability of advocacy opportunities generally

22 Three other observations relating to the number of lead counsel opportunities are apparent from the survey.

23 The time it takes advocates to land their first published judgment as lead counsel in a High Court matter, even trials, has not changed significantly since the 1980s. In fact, the data suggests that advocates now may even have a better chance of landing a lead counsel role in a High Court matter, both trial and non-trial, earlier on in their careers.[17]

24 However, the opposite is true for Court of Appeal matters. The time it takes an advocate to land a lead counsel role in a Court of Appeal matter has increased considerably over time.[18]

25 Finally, it is becoming more difficult for advocates, even those who would later go on to be appointed SCs, to maintain a regular calendar of lead counsel hearings in the High Court (both trial and non-trial) and the Court of Appeal consistently.[19] This is evidenced by the discernible increase in

17 For instance, the 1990s Control Group on average took 3.0 years to land their first published judgment as lead counsel in a non-trial matter and 6.7 years for their first published judgment as lead counsel in a trial, compared to 3.9 years and 6.9 years for the 1980s SC Group.

18 The median number of years it took the advocates to land their first published judgment as lead counsel role in a Court of Appeal matter is: (a) six years for the 1980s SC Group; (b) seven years for the 1990s SC Group; (c) eight years for the 1980s Control Group; and (d) seven years for the 1990s Control Group. Although the median number suggests that the 1990s Control Group took a shorter time than the 1980s Control Group, the mean which is arguably more reliable for this particular statistic confirms that the 1990s Control Group on average took a longer time than the 1980s Control Group. In this regard, the mean for the same statistic is: (a) 5.4 years for the 1980s SC Group; (b) 9.3 years for the 1990s SC Group; (c) 8.1 years for the 1980s Control Group; and (d) 9.4 years for the 1990s Control Group.

19 One possible reason for this is that more senior lawyers are giving up advocacy time to junior lawyers, particularly in relation to interlocutory matters. Another could be that there are fewer cases per lawyer. To properly study this latter hypothesis, it would be necessary to compare the growth in number of lawyers with the growth in number of cases heard by the High Court and the Court of Appeal over the years. The data may reveal that even though the High Court and Court of Appeal appear to be packed with more hearings, the growth in the number of practising lawyers (specifically, litigators) outstrips the growth in the number of

(*cont'd on the next page*)

the time it takes for the advocates to reach ten published judgments across the High Court and Court Appeal in which they are lead counsel.[20]

26 In short, the competition for lead counsel opportunities is extremely keen. Even if advocates land lead counsel roles early on in their careers, likely in a non-trial matter, it is difficult to build on that by landing lead counsel roles in trial and Court of Appeal matters on a regular basis.

IV. Implications for the future

27 Owing to the inherent limitations of the survey methodology, the trends and correlations suggested by the data are at best preliminary. Accordingly, before any firm conclusions may be drawn from the data, it would be ideal if not necessary to conduct a comprehensive, industry-wide study which maps out the careers of a larger sample of advocates using a broader set of data points, with the data then compared and tested against the above survey results.

28 Nevertheless, the survey results merit positing four likely implications.

29 First, the dearth of regular, sustained lead counsel opportunities translates directly to a shortage of opportunities for advocates to hone their craft. The experience from the comparison of the careers of exceptional advocates who have gone on to become SCs and those who have yet to suggests that this shortage of opportunities may have a limiting effect on advocacy development.

30 Second, the diminished frequency of advocacy opportunities lengthens the runway for maximisation of the advocate's advocacy potential. This is because the gradient of the advocate's innate learning capacity will naturally taper with age. Additionally, the advocate's learning imperative may be deprioritised as the advocate takes on management and other business-oriented responsibilities in the latter stages of

cases heard. In other words, the pie may have been enlarged, but there are now more mouths to feed.

20 The 1980s SC Group took 7.9 years on average. In comparison, the 1990s SC Group took 10.0 years, some 20% longer.

his or her career. This is a particularly acute problem in our system where the roles of advocates and solicitors are fused. The end result of fewer advocacy opportunities is an increase in the likelihood that the advocate will never reach his or her full advocacy potential.

31 Third, when the advocate is leading his or her first High Court trial or Court of Appeal hearing anywhere between ten and 15 years after admission to the Bar, there will invariably be immense pressure to put in a conservative or "safe" performance, so to speak, to avoid disappointing clients who are generally more demanding and less forgiving towards advocates at that level of seniority. One small misstep, which might have been overlooked if the advocate were more junior, could rock the client's confidence in the advocate. As if the room for error is not already incredibly small, the advocate has to contend with an abundant supply of competent, seasoned lead counsel jostling for work, as advocates continue to practise actively beyond their 60s.

32 In such trying conditions, the advocate will naturally be tempted to stick to what he or she perceives to be tried and tested techniques. Bearing in mind that the advocate would not have had a wealth of lead counsel experience at this juncture, these tried and tested techniques are likely to be those that the advocate has gleaned from observing, as a junior, a more senior advocate in previous hearings. This approach may work for some advocates, and in some situations, but not all. Learning through observation is undoubtedly valuable. However, effective advocacy is not transferrable by osmosis. There is no substitute for actual trial and error. Each advocate is cut from a different cloth.

33 The absence of a safe space and environment for the advocate to develop – through experimentation of different techniques, a style that complements the advocate's particular personality and disposition, and thereafter push the envelope of his or her craft through constant refinement – is likely to cap the advocate's development and maturation into an exceptional advocate.

34 Last but not least, when the opportunity to lead a hearing comes around so infrequently, the aspiring advocate may start to feel less of an advocate and more of a solicitor. Talent drain is likely to follow. Quite apart from attrition due

to stress, burnout and such similar factors, the rising availability and popularity of in-house legal counsel and compliance roles coupled with pursuits outside of the law becoming more fashionable and acceptable culturally may push more advocates frustrated with the lack of progression of their advocacy development out of the Bar, and sooner. A depleted Bar is evidently not a good thing for the profession. As more talent leave the profession, the quality of advocacy across the Bar, as a whole, is likely to stagnate, or worse still, deteriorate.

V. Concluding observations

35 Declining oral advocacy opportunities across the profession, and particularly at the junior levels, is therefore a matter of considerable importance. Its impact on the dispute resolution services industry in Singapore, as a whole, cannot be understated and should not be underestimated. The standard of advocacy of the Bar is no less a critical component of the "Singapore" brand of dispute resolution as the neutrality of Singapore as an arbitral seat, the impartiality and independence of the Judiciary, and the efficiency of the legal system are.

36 Hitherto, Singapore has never had to worry about producing the next generation of exceptional advocates. Indeed, we are still reaping the rewards from the toil and exploits of the past and current generations of exceptional advocates who have projected Singapore's reputation for skilled oral advocacy far beyond our shores. But that is not a reason to be complacent. The industry and profession should seize the moment to plan and build for the future, from its current position of strength.

37 If Singapore is to sustain its golden age of oral advocacy, renewal of advocates who are able to distinguish themselves and hold their own against the best that the region and the wider global community have to offer is imperative. Renewal does not happen overnight. It also does not happen by chance. Building up the next generation of advocates is the product of concerted, intentional, whole-of-industry collaboration.

38 This can only begin when all of the stakeholders – from law firms and senior practitioners, law schools and educators,

to policymakers and the Judiciary – openly acknowledge that the decline in advocacy opportunities across the Bar is a real and pressing problem that afflicts the entire legal services industry. Half the battle would be won as long as mindsets and attitudes are changed. Identifying the proximate causes of the decline in advocacy opportunities, arresting the trend, and conceiving and implementing remedial workarounds such as structured and continuous advocacy training, will all follow naturally when the profession collectively commits to owning the problem.

39 Just as the times and operating conditions have changed, so too must the profession's priorities and assumptions. The duty to develop, prepare and inspire the next generation of advocates does not belong to a single stakeholder, but the entire profession. The future of Singapore's dispute resolution services industry depends on how we, the profession, approach and embrace this responsibility.