

ETHICS AND CIVIL PROCEDURE

MALAYSIAN JUDGES

Lord Clarke of Stone-cum-Ebony

14 September 2011

Introduction

1. This is my first visit to Malaysia for many years. It is a great pleasure to be here and to have been invited to address such a distinguished audience. My principal topic this morning is ethics, in particular as it relates to civil procedure and to the role of the judges. I have chosen it because ethics has become a topic of more and more importance in England in recent years and because, as I see it, ethical behaviour by counsel is critical to the way the judges conduct civil litigation under the present rules, which emphasise the importance of co-operation between the parties and between the parties and the court which is quite different from the way the system worked under the old Rules of the Supreme Court (or RSC). Moreover I know that ethics has become a hot topic much discussed in many jurisdictions. For example I recently went to a conference in Washington, where it was one of the central subjects for debate.
2. I was called to the English Bar as recently as July 1965 – a very long time ago. That was at a time when nobody was taught advocacy and nobody was taught ethics. It was not thought that advocacy (or indeed ethics) could be taught. As to ethics, it was no doubt thought that it was obvious that members of the Bar should (and would) act ethically and, as to advocacy, it was undoubtedly thought that

good advocacy depended upon experience. In recent years it has become to be appreciated that, although good advocacy is likely to owe much to experience, its essential principles can be taught. While the importance of ethics was always appreciated, in recent years both the English courts and Parliament have emphasised the importance of the advocate's duty to the court and the Bar's Code of Conduct has included detailed provisions on the same topic.

3. I am today only addressing ethics and not advocacy. What I propose to do is to identify some of the principles stated by the courts, to refer briefly to the relevant statutory provisions and to the Code of Conduct and then to give some examples from my own limited experience over the years. Finally, I will say a word about judicial behaviour, since I am sure you will agree that it is not only advocates who should adhere to appropriate standards of behaviour. So too should judges. In some parts of the world guidance has been produced setting out the relevant principles. I shall refer at the end to some guidance produced by the American Bar Association (or ABA) which focuses both on the "Courts' Duties to Lawyers" and "Judges' Duties to Each Other".
4. My main purpose this morning is not to discuss detailed problems that may arise in practice. I have no relevant experience of your system, so that I would be entirely unqualified to express views on specific problems. Indeed, it would be presumptuous for me to do so. My main purpose is to underline the importance of ethical behaviour in the courts, and especially among advocates. I do so because many of these principles seem to me to be of universal significance which apply to advocates and judges everywhere. They certainly apply to us as English judges. Only time will tell whether Lady Justice Hallett and Mr Justice David Steel agree. I hope they will.
5. I would like to begin with two statements of principle by one of the greatest advocates of the 20th century in England, Norman Birkett QC. He later became Birkett J and then Birkett LJ, and indeed was one of the UK judges at the

Nuremburg war crimes trials, although it is as an advocate in the criminal courts, especially the Old Bailey, that he is principally remembered. He said this:

“The court must be able to rely on the advocate’s word; his word must indeed be his bond and when he asserts to the court those matters which are within his personal knowledge the court must know for a surety that those things are represented.

The advocate has a duty to his client, a duty to the court and a duty to the state but he has above all a duty to himself that he shall be, as far as lies in his power, a man of integrity.

No profession calls for a higher standard of honour and uprightness and no profession perhaps offers greater temptation to forsake them, but whatever gifts an advocate may possess, be they never so dazzling, without the supreme qualification of an inner integrity he will fall short of the highest standard.”

I am indebted to the Recorder of London, Peter Beaumont QC, for drawing my attention to these stirring words. Every advocate should follow them. It seems to me that it is of the utmost importance that judges should be able to trust counsel. I shall come back to this critical point in a moment.

6. As I said a minute ago, these principles are not unique to England or (I should say) England and Wales. One of the topics discussed at the conference in Washington, which was organised by the American Inns of Court, was on professionalism and ethics. One of the papers included this contribution on integrity:

"Loss of reputation is the greatest loss you can suffer. If you lose it, you will never recover it. Whether other lawyers or judges or clerks ... trust you and take your word, whether you are straight with your clients ... whether principles and people matter to you, whether your adversaries respect you as honest, fair and civil, whether you have the guts to stand up for what you believe - these are some of the hallmarks of integrity. Personal integrity is at the heart of every law career. You can't get it out of a computer - or from a law book - or from a commencement speaker. You have to live it and practice it every day with every client, with every other lawyer, with every judge and with every public and private body. And if your reputation

for integrity is alive and well so will your career and so will your well being.¹

I agree and, as they say in the Court of Appeal in England, there is nothing I can usefully add.

The courts

7. I turn to the principles laid down in the English cases. In doing so, I freely confess that I have relied upon a lecture given in Mauritius by Philip Bartle QC. Fortunately I have his permission. Otherwise I would be guilty of infringing the very principles of ethics which I am advocating.

8. In so far as Birkett's principles refer to counsel's duty to the court they are consistent with a number of statements of high authority. Examples given by Philip Bartle are these. In *Rondel v Worsley*², (now largely overruled by *Arthur Hall v Simons* below) Lord Denning MR, who was perhaps the most famous Master of the Rolls we ever had, said this in 1966:

“(Counsel) ... has a duty to the Court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants, or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice”.

9. In *Saif Ali v Sydney Mitchell*³ in 1980 Lord Diplock put it thus:

“The special characteristic of a barrister's work upon which the greatest stress is laid by their Lordships was that he does not owe a duty only to his client; he owes a duty also to the court. This is an overriding duty which he must observe even though to do so in the particular case may appear to be contrary to the interests of his client. Furthermore a barrister has to exercise his judgment as to where the balance lies

¹ James A George, The “Rambo” problem: Is Mandatory CLE the Way Back to Atticus? 62. La. L. Rev 467, 505(2002), George (quoting Jerome P Facher, Washington Lee Law School Commencement Speech, May 14 2000)

² [1966] 3 WLR 950 at p. 962

³ [1980] AC 198

between these competing duties immediately and without opportunity for calm reflection as the trial inexorably proceeds...

The rules which may appear to conflict with the interests of the client are simple to state, although their application in borderline cases may call for a degree of sophistry not readily appreciated by the lay client, particularly one who is defendant in a criminal trial. A barrister must not wilfully mislead the court as to the law nor may he actively mislead the court as to the facts; although, consistently with the rule that the prosecution must prove its case, he may passively stand by and watch the court being misled by reason of its failure to ascertain facts that are within the barrister's knowledge. Questions of considerable nicety may arise as to what constitutes sufficient foundation or relevance to justify the particular aspersion which his client wants him to make".

In *Giannarelli v Wraith, Shulkes v Wraith*⁴, Mason CJ said (in an Australian case in 1988) that the barrister's duty to the court:

"epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case."

Finally, in *Arthur Hall v Simons*⁵ in 2002, Lord Hoffmann said:

"Lawyers conducting litigation owe a divided loyalty. They have a duty to their clients, but they may not win by whatever means. They also owe a duty to the court and the administration of justice. They may not mislead the court or allow the judge to take what they know to be a bad point in their favour. They must cite all relevant law, whether for or against their case. They may not make imputations of dishonesty unless they have been given the information to support them. They should not

⁴ [1988] 81 ALR 417 at p.421

⁵ [2002] 1 AC 615 at p.686 and p.692

waste time on irrelevancies even if the client thinks that they are important. Sometimes the performance of these duties to the court may annoy the client...

I have no doubt that the advocate's duty to the court is extremely important in the English system of justice... The substantial orality of the English system of trial and appellate procedure means that the judges rely heavily upon the advocates appearing before them for a fair presentation of the facts and adequate instruction in the law. They trust the lawyers who appear before them; the lawyers trust each other to behave according to the rules, and that trust is seldom misplaced... ”

Lord Hope said much the same in the same case:

“The advocate's duty to the court is not just that he must not mislead the court, that he must ensure that the facts are presented fairly and that he must draw the attention of the court to the relevant authorities even if they are against him. It extends to the whole way in which the client's case is presented, so that time is not wasted and the court is able to focus on the issues as efficiently and economically as possible. He must refuse to put questions demanded by his client which he considers unnecessary or irrelevant, and he must refuse to take false points however much his client may insist that he should do so. For him to do these things contrary to his own independent judgement would be likely to impede and delay the administration of justice.

... The duty which the advocate undertakes to his client when he accepts the client's instructions is one in which both the court and the public have an interest. While the advocate owes a duty to his client, he is also under a duty to assist the administration of justice...his duty to the court and to the public requires that he must be free, in the conduct of his client's case at all times, to exercise his independent judgment as to what is required to serve the interests of justice. He is not bound by the wishes of his client in that respect, and the mere fact that he has declined to do what his client wishes will not expose him to any kind of liability”.

10. These principles are easy to state but it can readily be seen that they are not always easy to apply. However, it is the principles which I want to stress. I do so because they are in my opinion of great importance from the judge's point of view and thus to the administration of justice. I will return to this point in a moment.

The legislation

11. The advocate's duty to the court was first given a statutory foundation in England by section 42 of the Access to Justice Act 1999, which inserted new subsections into sections 27 and 28 of the Courts and Legal Services Act 1990. These duties have now been replaced in identical terms in the Legal Services Act 2007 section 188 (in force from 1 Jan 2010).
These subsections apply to every person who exercises rights of audience before any court and who conducts litigation in relation to proceedings before any court.
12. Section 188(2) and (3) (formerly section 27(2A)) provides that:
 - “(2) A person to whom this section applies has a duty to the court in question to act with independence in the interests of justice.
 - (3) That duty, and the duty to comply with relevant conduct rules imposed on the person by section 176(1), override any obligations which the person may have (otherwise than under the criminal law) if they are inconsistent with them.
13. The rules of civil procedure in England are known as the Civil Procedure Rules (or the CPR). These rules were introduced as a result of a detailed report on Access to Justice produced by Lord Woolf when he was Master of the Rolls. They came into force in 1999 and they made a big difference to the way civil procedure is conducted in England. One of the important provisions of the CPR is a duty imposed on the parties (and therefore their counsel) to co-operate with each other and with the court. This involves the parties' disclosing fully their cases and their evidence to the other side and to the court long before the trial begins. In the old days, part of the game was to take the other side by surprise if at all possible. That is not now possible.
14. Also, in 1968 in a case called *Allen v Sir Alfred McAlpine & Sons Ltd*⁶ the Court of Appeal very foolishly held that defendants had no duty to take active steps in an action and that it was permissible for them to let sleeping dogs lie. It was well

known that plaintiffs' solicitors were often very sleepy indeed. So long delays often occurred and then, when they woke up, the defendants applied to strike the action out for want of prosecution. If the court struck it out, which it would do if it held that there could no longer be a fair trial because of prejudice caused by the delay, the plaintiff simply started again, this time against his solicitors. At the trial of the action against the solicitors (or their insurers) the question was what were the plaintiffs' prospect of success at the original trial. This was a difficult question to answer because the court had already held that a fair trial was impossible. I am pleased to say that under the CPR this cannot happen because it is the duty of the defendant as well as the plaintiff to minimise delay.

15. Under the CPR it is the express duty of the parties, and hence their legal advisers (including advocates), to help the court to further the overriding objective to enable the court to deal with cases justly.

By CPR 1.3. dealing with a case justly includes, so far as is practicable, ensuring that the parties are on an equal footing; saving expense; dealing with the case in ways which are proportionate to the amount of money involved, to the importance of the case, to the complexity of the issues and to the financial position of each party; ensuring that it is dealt with expeditiously and fairly; and allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

16. These are very wide obligations and have in the main been construed widely, although Philip Bartle has drawn attention to a decision of the Court of Appeal in 2007, namely *Khudados v Hayden*⁷, where it was held that the overriding objective did not impose a duty on a barrister to draw to the court's attention evidence which was favourable to the other side and unfavourable to his client. It said this:

⁶ [1968] 2 QB 229

⁷ [2007] EWCA Civ 1316 at [39]

“Ensuring that the parties are on an equal footing requires the court to ensure that each party is afforded a reasonable opportunity to present his case under conditions which do not place him at a substantial disadvantage vis à vis his opponent. In my judgment fairness does not require counsel to place his own client at a substantial disadvantage by acting contrary to his interests.

Whatever may be the requirement to help the court, it cannot in my judgment, extend so far as to impose upon counsel a duty in conflict with his proper duty to his client”.

So it is not always clear what the position may be.

17. The overriding objective has frequently been widely construed. Philip Bartle gives this example from the 1992 decision of the Court of Appeal in *Ashmore v Corporation of Lloyd's*⁸ that:

“The parties and particularly their legal advisers in any litigation are under a duty to cooperate with the court by chronological, brief and consistent pleadings which define the issues and leave the judge to draw his own conclusions about the merits when he hears the case. It is the duty of the counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner. In nearly all cases the correct procedure works perfectly well. But there has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination.”

The Code of Conduct of the Bar

18. The Code seeks to balance the duty of the barrister to the court and his duty to his client. It is a balance which it is often difficult to carry out. Tricky questions can arise which are not easy to answer, although in real life problems arise only rarely and should be approached with a large dose of common sense. I say this although I once got up in the Court of Appeal, after my opponent had addressed them at

considerable length, and said that justice and commonsense suggested that the judge at first instance was right. Oliver LJ immediately said to me: ‘Mr Clarke, commonsense suggested the world was flat.’ I was flummoxed and thus speechless. I should not have been because later, when thinking about it in Middle Temple Lane where all the best points are thought of (after the case is over), I realised that the Lord Justice was wrong – because of the horizon.

19. The Code highlights the nature of the balance which has to be struck. As before I am grateful to Philip Bartle for extracting the relevant provisions. They are these. Chapter 3 sets down “Fundamental Principles” which govern a barrister’s conduct and seeks to identify the relevant balance between the duty which he owes to the court and the duty he owes to his client.

20. By paragraph 302, a barrister has an overriding duty to the court:

- i. to act with independence in the interests of justice
- ii. to assist the court in the administration of justice, and
- iii. not to deceive or knowingly or recklessly mislead the court.

By paragraph 303(a), a barrister must “promote and protect fearlessly and by all proper and lawful means the lay client’s best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including any colleague, professional client or other intermediary or another barrister, the barrister’s employer or any Authorised Body of which the barrister may be an owner or manager)”. By paragraph 307(c), a barrister must not compromise his professional standards in order to please his client, the Court or a third party, including any mediator.

21. Chapter 7 includes these duties. By paragraph 701(a), a barrister “must in all his professional activities be courteous and act promptly, conscientiously, diligently and with reasonable competence and take all reasonable and practicable steps to avoid unnecessary expense or waste of the court’s time and to ensure that

⁸ [1992] 1 WLR 446, at p.453

professional engagements are fulfilled.” Legal professional privilege protects a client from having communications he has had with his legal advisors about the matter on which they have been instructed being disclosed to a third party, unless those instructions were sought in furtherance of a criminal enterprise.

In addition, paragraph 702 provides that a barrister must preserve the confidentiality of the lay client's affairs even after the barrister has ceased to act for the client.

22. Paragraph 708 gives specific instances of the obligations on a barrister when conducting proceedings in court. They include obligations that a barrister is personally responsible for the conduct and presentation of his case and must exercise personal judgement upon the substance and purpose of statements made and questions asked; must not, unless invited to do so by the court or when appearing before a tribunal where it is his duty to do so, assert a personal opinion of the facts or the law; must ensure that the court is informed of all relevant decisions and legislative provisions of which he is aware whether the effect is favourable or unfavourable to the contention for which he argues; must bring any procedural irregularity to the attention of the court during the hearing and not reserve such matter to be raised on appeal; must not adduce evidence obtained otherwise than from or through the client or devise facts which will assist in advancing the lay client's case; must not make a submission which he does not consider to be properly arguable; must not make statements or ask questions which are merely scandalous or intended or calculated only to vilify insult or annoy either a witness or some other person; must if possible avoid the naming in open Court of third parties whose character would thereby be impugned; must not by assertion in a speech impugn a witness whom he has had an opportunity to cross-examine unless in cross-examination he has given the witness an opportunity to answer the allegation; must not suggest that a victim, witness or other person is guilty of crime, fraud or misconduct or make any defamatory aspersion on the conduct of any other person or attribute to another person the crime or conduct of which his lay client is accused unless such allegations go to a

matter in issue (including the credibility of the witness) which is material to the lay client's case and appear to him to be supported by reasonable grounds.

23. These seem very daunting obligations but in reality they are not so bad as they sound and are central to the discharge of the obligations identified by Birkett.
24. Although I have referred to the Code of Conduct of the Bar, advocacy in England is no longer the preserve of the Bar. There are now both solicitors and, for some cases, legal executives who have rights of audience. The solicitors have a similar code which contains similar, if not identical, principles. So no doubt do codes issued by ILEX and other equivalent regulators outside the jurisdiction. The ethical principles to which I have referred of course apply to all advocates and not just to barristers.

Relevant (or irrelevant) experience

25. I have some experience in this regard. I leave it to you decide whether or not it is of assistance but, if it is of assistance it is to underline the importance of ethics in practice at the Bar. Its importance is again that recognised by Birkett, viz integrity. It is not to put it too high to say that the well-being of a democratic society depends upon the rule of law and the rule of law depends upon the impartial administration of justice by independent judges, which in turn depends upon the complete absence of corruption in the system.
26. Judges in England and Wales are not of course all brilliant, although all my colleagues in the Supreme Court can of course properly be so described. There are hopeless judges, just as there are hopeless advocates. Some judges and, indeed some advocates (not of course present here today) may even be, or at least be said

to be, incompetent. Fortunately we have been free of corruption amongst the judiciary.

27. In all my 18 years on the Bench I have never been offered a bribe. Pity! I have not therefore had the opportunity offered to the (no doubt apocryphal) judge in the USA, who received an envelope from both parties before a trial began. When he opened them, he found US\$10,000 in one from the plaintiffs and US\$5,000 in the other.

When the trial began he explained the position in open court and said that he proposed to give US\$5,000 back to the plaintiffs, which would enable the trial to proceed on an equal playing field.

28. When I first started I spent many years practising at the maritime and commercial Bar. As time went by I obtained a certain amount of experience as to what should and should not be done. My first recollection is as a pupil. My pupil master, Barry Sheen (later Sheen J) was instructed in a shipping collision action between the owners of a Spanish cargo vessel and British Rail as owners of a ferry. British Rail was at the time part a state owned entity. The Spanish were convinced that they could not possibly win against an organ of the state, at any rate without sending an appropriate sweetener to the judge. They told their counsel (Barry Sheen) that they proposed to send something to the judge and, so far as I recall, asked him how they should set about it. He was appalled and said that, if they did any such thing he would have nothing to do with them or their case. So far as I am aware, they did not approach the judge. At all events the trial proceeded and the Spanish won 100 per cent.

29. The expertise, competence and integrity both of the judges and lawyers are of critical importance. The Admiralty and Commercial courts in London continue to be fora of choice in a wide variety of international disputes. As a result legal

services in London have made a significant contribution to the UK's invisible exports.

Long may it last, but it will only do so if advocates maintain those standards – including that of absolute integrity – in the future. For these reasons, I suggest that the judges, in whatever part of the world they operate have strong reasons for upholding high standards among the lawyers who conduct cases before them.

30. I do not want to sound too holier than thou but I do genuinely believe in the importance of standards. As my mother would say, standards must be kept. That is not to say that there may not be an element of self-interest in maintaining these standards. At the Bar in general and, and at a small Bar in particular, self-interest is an extremely good disciplinarian. When I first started I practised in a very small area indeed, mostly against my old friend David Steel, now Mr Justice David Steel, who is of course (I am very pleased to say) here today. We were principally engaged in what was known as wet shipping work. They were mostly ship collision cases – first collisions in the Thames and later collisions in the English Channel – which kept us amused for years until the authorities very meanly introduced one way traffic lanes at the most hazardous points in the Channel which reduced the number of collisions dramatically.
31. I like to think that we would in any event have followed the principles set out in the cases I have mentioned to the letter, but the significance of being part of a small specialist Bar was this.

One might have a good case one day but one would almost certainly have a bad case the next. Everyone knew everyone else and it soon became clear who you could trust and who you could not. It soon became known whose ethical standards were (how shall I put it?) lower than they should have been. There were few people in that category and they did not on the whole last long because, at the Bar, reputation is everything. I would advise all advocates always to follow the highest

ethical standards. That is partly because it is in principle the right thing to do, but also because by doing so the lawyer's reputation and hence his or her practice will be much enhanced. So too will the reputation of the courts before whom he or she appears.

32. I have two examples of integrity which are to my mind a testament to the way our system operates. In the first example, I was counsel in a maritime case against Nicholas Phillips, later of course Master of the Rolls and Lord Chief Justice and now President of the Supreme Court. I handed him a document in the course of the trial which I intended him to have. Unfortunately, like a fool, I also gave him at the same time a number of my client's witness statements, which were of course privileged and which I certainly did not intend him to see.

33. What should he do? Should he return them to me without looking at them? Would that be a breach of his duty to his clients?

Should he disclose them to his clients on the basis that they were plainly relevant to the issues in the action and use them as appropriate in cross-examination of my witness? Should he return them to me but read them first and, either with or without making copies, then use their contents at the trial? At the time this happened, there was as I recall no learning on the correct approach. Now there is. In fact he immediately returned them to me without looking at them. He did it instinctively without looking at the documents. He did it because it was the right thing to do in circumstances when he knew that I had disclosed them to him by mistake. The subsequent authorities show that his decision was correct.

34. My second example is this. I was involved as a junior in a substantial piece of commercial litigation. It was the afternoon before the trial. I was present at a discussion with my leader, Michael Thomas QC, who was later Attorney General in Hong Kong. We thought that our clients' case was probably correct but the evidence in support of it was thin. A brown envelope appeared addressed to my

leader. He opened it. It was from Michael Mustill QC (later of course Lord Mustill). It said, in effect: 'Dear Michael, You might be interested in the enclosed document. Yours ever, Michael'. In the envelope there was a document which showed that our clients' case was correct and that they would almost certainly win if it was put before the court. The other side had to capitulate. The disclosure was of course an example of the operation of the English rules of disclosure.

35. These high standards are critical, not only in the world of which I (at any rate at one time) had experience, but across the board. It is particularly so of criminal trials. I am ashamed (or at least very sorry) to say that I never addressed a jury as counsel, but I did try a number of cases as a judge, viz: as an assistant recorder, a recorder and finally as a High Court Judge. The more cases I tried, especially the more serious cases I tried as a High Court Judge, the more it became clear to me that the judge must be able to rely absolutely upon what he (or she) is told by prosecuting counsel. This is particularly true in relation, for example, to the disclosure of unused material and to material which may be subject to public interest immunity. Many of the most striking miscarriages of justice have been caused by a failure by the prosecuting authorities to disclose relevant information which might be favourable to the defence. I do not claim to be an expert on the criminal trial but in no case, either at first instance or in the Court of Appeal Criminal Division, have I ever had cause to doubt the integrity of prosecuting counsel. Long may it continue. I sometimes worry that there may be a temptation in the future for the prosecuting authorities to allow financial pressures and their consequent targets and cuts to lead to their cutting corners. It is difficult, if not impossible, to reconcile cutting of such corners with Birkett's principles of integrity.
36. I do not of course know how these examples resonate with you. In giving them, I am not seeking to comment in any way upon the practice here in Malaysia, but

only to give you a flavour of the way we try to operate in the United Kingdom, which I hope may be of interest to you.

The behaviour of judges

37. Up to now I have been referring principally to the ethical standards required of advocates. As I have said, these seem to me to be of great importance to the judges, because, as judges, we rely upon the good faith of the lawyers who conduct cases before us in very many ways. Moreover, at any rate in England, the judges are chosen from practising lawyers and, to a lesser extent, academics, and we hope that they will bring to the Bench the ethical standards they have followed in practice and, in their turn, will require the same standards who will appear in front of them. In short, the rule of law depends upon the existence of a high quality judiciary, which in turn depends upon the brightest and the best becoming judges.

38. One of the topics discussed at the Washington conference I referred to earlier was entitled ‘Professionalism and Civility on the Bench’. The papers we saw show that there has been much discussion in the USA in recent years about the importance of proper behaviour by judges.

Those papers in particular stress the importance of civility on the bench (both between the judge and counsel and between the judges among themselves) and indeed among lawyers.

39. Two particular comments under the heading of ‘Civility’ caught my eye. The first is a quote from Justice Anthony Kennedy:

“Civility is the mark of an accomplished and superb professional, but it is even more than this. It is an end in itself. Civility has deep roots in the idea of respect for the individual. We are civil to each other because we respect one another’s human aspirations and equal standing in

democratic society. We must restore civility to every part of our legal system and public discourse. Civility defines our common cause in advancing the rule of law. Freedom may be born in protest, but it survives in civility.”

40. The second is that civility is courtesy, dignity, decency and kindness. It has been defined in the Virginia Bar Associations’ Creed as follows:

“Courtesy is neither a relic of the past nor a sign of less than fully committed advocacy. Courtesy is simply the mechanism by which lawyers can deal with daily conflict without damaging their relationships with their fellow lawyers and their own well-being.

Civility is not inconsistent with zealous advocacy. You can be civil while you’re aggressive, upset, angry and intimidating; you’re just not allowed to be rude. Unfortunately, some lawyers and the public don’t understand the differences.”⁹

41. There are a number of codes of practice for judges in the USA to which we were referred, notably in Delaware, Florida and Ohio but I append to my paper the ABA Guidelines for Conduct, first under the heading ‘Courts Duties to Lawyers’ and then ‘Judges Duties to Each Other’.
42. These principles apply to both the Bar and the Bench. They underpin Birkett’s principles of integrity and the ethical principles which are one of the bases of the rule of law. I commend them to you.
43. Finally, I would like to thank you for inviting me to Malaysia, where we have all had a few days’ holiday together during which we have enjoyed ourselves enormously.

⁹ Allen K Harris, The Professionalism Crisis – The ‘Z’ Words and Other Rambo Tactics: The Conference of Chief Justices’ Solution 12 ABA Prof. Law 1 (2001) (citation omitted)

American Bar Association Guidelines for Conduct:

Courts' Duties to Lawyers

1. We will be courteous, respectful, and civil to lawyers, parties, and witnesses. We will maintain control of the proceedings, recognizing that judges have both the obligation and the authority to insure that all litigation proceedings are conducted in a civil manner.
2. We will not employ hostile, demeaning, or humiliating words in opinions or in written oral communications with lawyers, parties or witnesses.
3. We will be punctual in convening all hearings, meetings and conferences; if delayed, we will notify counsel, if possible.
4. In scheduling all hearings, meetings and conferences we will be considerate of time schedules of lawyers, parties and witnesses.
5. We will make all reasonable efforts to decide promptly all matters presented to us for decision.
6. We will give the issues in controversy deliberate, impartial and studied analysis and consideration.
7. While endeavouring to resolve disputes efficiently, we will be considerate of the time constraints and pressures on lawyers by the exigencies of litigation practice.

8. We recognize that a lawyer has a right and a duty to present a cause fully and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments and to make a complete and accurate record.
9. We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents.
10. We will do our best to insure that court personnel act civilly towards lawyers, parties and witnesses.
11. We will not adopt procedures that needlessly increase litigation expense.
12. We will bring to lawyers' attention uncivil conduct which we observe.

American Bar Association Guidelines for Conduct:

Judges' Duties to Each other

1. We will be courteous, respectful and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and facts correctly.
2. In all written and oral communications, we will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.
3. We will endeavour to work with other judges in an effort to foster a spirit of cooperation in our mutual goal of enhancing the administration of justice.