

LAA 3064
MOOT/MOCK AND
PLACEMENT

ART OF ADVOCACY



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Art of Advocacy

- Art of conducting cases in court both by argument and by the manner of bringing out the evidence so as to convince the court.
- It is very important to solicitors who conducting case in court.

Cont....

- Aristotle- 3 elements in a speech.
- A) The speaker
- B) The contents of the speech
- C) The audience.
- Advocacy is art of persuasion or art of convincing others.

Factors Determining Advocacy in Shariah Court

- Adversarial System
- Lawyers play the dominating roles and the judges play the passive role. In this system the judge is only acted like a referee,
- A system which provides a contest of 2 people of conflicting interest.
- Accusatorial system- In Criminal.
- The parties are the one who determine the issue of evidence.
- Practice by the Court in Malaysia, England and Commonwealth Countries.

Cont...

- Inquisitorial System
- It refers to the judge participation actively in the legal proceedings.
- The judge has the right to call witness even the parties' disputes are not willingly to call them.
- Practice by the Court in America and Europe.

Cont...

- Shariah Court. Inquisitorial or Adversarial?

- It is submitted that it is a combination of both inquisitorial and adversarial Systems.

- Surah An-Nisa:135 “ O believers, stand firm for justice and bear true witness for the sake of Allah even though it be against yourselves, your parents or your relatives.

Cont...

- Based on hadith Rasullullah SAW. Said.
- *“I’m only a human being and you bring your disputes to me Perhaps some of you indulge in logic to prove your assertions and it may be that I give my decision or the strength of your argumentation.....”*
- Section 121 Sh. Civil Procedure S’ngor-The Court may at any stage call any evidence which it considers desirable in the interest of justice.
- Section 75-The court may make such interlocutory orders as may be necessary to do justice.

Accepting a Case

- Al-wakalah bil khusumah- Contract of engagement for professional service. In civil law known as Retainer.
- It does not need to be in writing. It may be inferred from conduct. solicitor-client relationship.
- In civil cases it is more preferable to be in writing known as “warrant to act”. If there is no written authority a presumption is made that the lawyers are acting without authority.
- Effects: i)Immunity from law suits of defamation ii) Interference may amount to contempt of court.

Cont...

- Essential features for accepting case.
- A) Identify the lawyer and the client
- B) Identify the purpose for which lawyer is retained.
- C) Deal with the professional fess and cost.
- D) Should be signed by both parties.
- Rule 25 of the Legal Profession (Practice and Etiquette) Rules 1978.- To disclose all circumstances to client.

Cont...

- The Cab Rank Rule-Rule 2 of Legal Profession (Practice and Etiquette) Rules 1978.
- The lawyer is bound to act for anyone who wishes to retain service. Reason i. To ensure that anyone who requires a lawyer will get one because lawyers are not given the choice of client. (SM must come within the the practice of the practical lawyer.) ii. Lawyers act for the sake of the duty as a lawyer and not because he has a choice to act or not to act.
- After accepting the case lawyers must do the best for the client and the client must be able to pay the fee.

Cont....

Exception to the Cab Rank rule.

- Rule 3-Not accept if embarrassed-
- Rule 4-In the event of conflict of interest.
- Rule 5- Difficult to maintain, professional independence.
- Rule 6-Unable to appear
- Rule 27-Where the outcome will affect in a pecuniary sense.
- Rule 28-It appears that you become material witness in the matter.
- Rule 54-knowingly agree to appear or to act to appear for a party represented by another lawyer.

Cont...

- ◆ Is it Cab Rank Rule applies to the Peguam Syarie?
- ◆ Since there is no such rules in the Peguam Syarie, it does not apply.
- ◆ But in Islam we may refer to 5 legal implications. It is proposed that such rules to be incorporated under the Peguam Syarie Rules.
- ◆ Preferable, should not act for family member.

Preparation of the Case

- Good advocacy depends on good preparation.
- Foundation of success is preparation. It consists of:
 - i. Evidence (documents and non-documentary)
 - ii. Gathering witnesses
 - iii. Research on the law.
- In Malaysia lawyers do both preparation and presentation of the case in court.

Preparation of Documents

- It is essential to have a thorough knowledge of the law of evidence and procedure. Q-What has to be proved or disproved? How is your case to be approved and your opponents' disapproved?
- Researching the law which applies to the case. Read reported cases.
- Documentary evidence is very important in civil cases.
- In criminal cases facts, witness and circumstantial evidences are more important.

Cont...

First Stage

- It begins since the time you are engaged as a solicitor. Early stage is discovery and inspection of evidence.
- Read everything-papers and documentary exhibit.
- Inspection of document. Client must make full disclosure.
- Make copies of those documents and peruse all of them.
- Try to prevent any element of surprise.

Cont...

Second Stage

- Show it to the client and decide which document to be used and left out. i) List of all documents ii) List of documents to be used.
- Gathering the documents.
- We must disclose the existence of document in our possession which are favorable or not. i) To help us finding the truth ii) able to assess the evidence. No element of surprise in civil case.
- Rule 23 : To supply to court all information.
- Acts as an officer of the court rather than as champion for the client.

Cont...

Third Stage

- Prepare a chronology of events as soon as you begin your preparation of the facts in earnest.
- Your aim should be to see and understand what really happened. By analyzing the facts.
- Prepare Plaintiff's bundle, defendant's bundle and "agreed bundle of documents".
- agreed bundle of documents". Initiative by both parties to agree on certain documents to be submitted to the court.
- Ensure that the bundle is correctly paginated.

Cont...

Fourth Stage

- Decide how to adduce the documents as evidence.
- Original documents or primary evidence.
- Documents should be authenticated.
- Identification of documents and marking the documents as exhibit.

Cont...

- Tips
- Preparation and presentation depends on the orderliness. Keep your court papers in good order or in chronological order. Page numbers.
- Prepare a bundle of documents. Make sure it is not too thick or large. Labeling the documents.
- Having clear and detailed knowledge of how you intend to present the case at the time when do your pleadings.
- Cite authorities, set out in good order.

Cont...

- General principle, when making allegations we should pile up as many facts which lead to the conclusion of the arguments.
- When defending we should seek to isolate the facts alleged against us.
- Look at the exhibits.
- What is the central issue in the case?
- What factors support the prosecution or plaintiff on the central issue and what the defense?
- Are the exhibits consistent with the case you want to make?

Documents in Mooting

- Bundle of Documents:-
- Wakalah Peguam Syarie
- Appeal Notice
- Documents to support your appeal.Exhibit.
- Bundle of Authorities
- Prepare your submission with authorities.
- Quran, Hadith, enactment, view of fuqaha' and etc.
- Make sure that only recognised reference are being submitted.

Preparation of Witness

- 2 types of witnesses. i) Witness of facts ii) witness of opinion.
- Better if we find out the witness from the client.
- Interview your witness. Why?
 - i) to know his testimony in favour to us or not. ii) reliability iii) whether he has been interviewed by other parties or not.
- Ensure that he is willingly act as a witness unless it is necessary to force witness to come for the trial. “Subpoena”.

Cont...

First Interview

- Witness must be interviewed as early as possible. Never coach your witness.
- During interview ask the witness to relate the story to the case. The matter must be within his knowledge.
- Interview the witness separately. Seek clarification and reduce the statement in writing.
- Prove the testimony. Ask question if necessary.
- Give the witnesses statement which comprise of things which is admissible or not, relevant or not.

Cont...

- Second Interview
- To see whether there is any recollection that he has not disclose. To compare with the testimony of other witness.
- Try to fill any gap and find any contradiction.
- Don't ever coach the witness to give false evidence. Offence of Perjury and abetting.

Cont..

- Third Interview
- Prepare written statement signed by the witness known as affidavit.
- Formulate the question to be asked in examination in chief.
- Tell the witness how long would the case is expected to last. Formulate cross examination question. Witness must be prepared to be cross examined.

Cont...

- Write out chronology of event
- Research. The requirements of law and it's related.
- Realize the weakness in the evidence and sometime you may have to reformulate the case.
- Best witness comes first. Prepare list of witness.

Speaking In Court

- Qualities needed by a Peguam Syarie
- A good voice
- Command of words
- Confidence
- Persistence
- Knowledge of law (Law of evidence, Professional ethics, Logic or Knowledge of Mankind and of affairs and General principles of law.)
- Experience

Cont....

- Good Advocacy
- Appearance- must look neat and tidy.
- Speak clearly
- Keep your papers and document in good order.
- Punctual, do not rush.
- Cite relevant authorities and in chronological order.
- Equal approach either big case or small case.

Cont...

- General Principles
- Find out who is the judge and list of your case. Be punctual.
- Introduce ourselves and our opponent in a courtesy manner.
- The lawyers should not be standing up together.
- Prepare all the documents and call witness on time if necessary.
- Avoid any conduct which amount to contempt of Court.Calm and patient.

Cont...

- As a general rule brevity in a speech of any sort is a great virtue.
- Begin the speech by introducing the parties to the dispute followed by statement of the points at issue. Words that simply child can understand.
- Explain the detailed facts in dispute. Make sure you understand it firmly. Strive for accurate statement of fact.
- Deal with opponent's argument point by point.

Cont...

- Explain your rival's contention accurately and fairly.
- Be good humored if necessary.
- Deal in detail with the law applicable to the case.
- Clarity in speaking and useful ornaments.
- Don't be sycophantic but be polite and respect the court.
- Don't speak too fast and never express your opinion.

Cont...

Legal Profession (Practice and Etiquette)

Rules 1978

- Rule 13- To guard against insulting or annoying question
- Rule 14-Not to ask irrelevant question.
- Rule 15-Respect to court
- Rule 18-To conduct with courtesy and fairness.
- Rule 30-Not to wear robes when appear as a witness.
- Rule 31-To uphold dignity of the profession

Required Reading

- Michael Hyam, *Advocacy Skills*, 1990, Blackstone Press Limited
- Jeffrey Pinsler, *Evidence, Advocacy and The Litigation Process*, 1982, Butterworth.
- John Munkman, *The Technique of Advocacy*, London, 1991, Butterworths.
- *Legal Profession (Practice and Etiquette) Rules* 1978

Thank you

“You are what you read”