Speech by The Honourable Geoffrey Ma at The 2022 Peter Taylor Memorial Address of the Professional Negligence Bar Association Gray's Inn Hall, London 28 September 2022

Fearless Advocacy: More Relevant and Practical than Romantic[1]

1. It is a great honour to be asked to deliver this year's Peter Taylor Memorial Address and to do so in Gray's Inn Hall, a place I hold very dear. I am grateful to the PNBA for this evening's invitation and particularly happy to have in the audience many old friends. I was originally invited to give this Address two years ago but Covid intervened. I am much relieved finally to be here this evening!

2. It would be remiss of me to start without first acknowledging Lord Taylor of Gosforth. Unfortunately, I did not know him personally but we had the privilege of his and Lady Taylor's visit to Hong Kong in 1996, when he delivered a lecture to commemorate the Tenth Anniversary of the City

[1] I am grateful for the assistance I have received from the Judicial Assistants of the Hong Kong Court of Final Appeal: Ms Noel Chan, LLB (Chinese University of Hong Kong), LLM (UCL), Barrister; Mr Matthew Choi, BSocSc (University of Hong Kong), LLB (University of Hong Kong), LLM (Cantab), Barrister; Ms Tiffany Yau, LLB (Chinese University of Hong Kong), BCL (Oxon), Barrister.

University of Hong Kong. The title of the lecture was "*The Independence of the Judiciary in a Democracy*".

3. The address today on fearless advocacy was chiefly inspired by two people. One of my most precious photographs recalls a cloudless day in London on the rooftop of Brick Court Chambers with a dear old friend, Sir Sydney Kentridge KC. Sydney and I go back nearly 45 years, to my days in pupillage in the Chambers then known as 1 Brick Court. Sydney was the person who encouraged me to accept the appointment as Chief Justice of Hong Kong, advising me never to lose sight of the paramount importance of being principled and urging me to stay in the post for at least seven years. I have succeeded in the second part of this advice: I completed over 10 years as Chief Justice when I retired in January last year. On the first part, I have done my level best, hoping that I have not let my old friend down. Sydney is, for me, the embodiment of fearless advocacy. It is a wonderful tribute to him that we see the recent publication of *The Mandela Papers*. Tom Grant is to be commended and congratulated.

4. The second inspiration for this Address is Rupert Jackson, another old friend whom I have much admired over the years. He is of course fearless: his work, resulting in the 2010 civil justice reforms as supplemented by the 2017 measures, met with some resistance but Rupert finished the job and I think

myself (having had a part to play in the reform of our own civil justice system in Hong Kong known as the Civil Justice Reform) that history will prove many of his principal arguments right. But Rupert Jackson's work in the civil justice context is not the inspiration from which I draw in this talk. It is rather from the view that he has expressed from time to time regarding the direction of the law on professional negligence. This is well illustrated in the 2015 Peter Taylor Memorial Address he delivered on "*The Professions: Power, Privilege and Legal Liability*". One of the recurrent themes was the erosion of the immunities (or to put it in the vernacular, preferential treatment) that had once been accorded by the courts to professions. He referred to the belief that the social tide had turned from the deep respect for professional people into the view that professionals in the modern era represented on analysis no more than privileged groups with specialist knowledge, who exploited this knowledge to achieve a greater status and increased financial benefit. This change was seen in the United Kingdom. It was also seen in Hong Kong. In his view, this change percolated into the law on the liability of professionals. As Rupert Jackson has said "*in defining the legal liabilities of professional persons, we must shed the mythology of earlier centuries ....*".

5. In his Address, Rupert Jackson makes reference to what he calls the *coup de grace* that was delivered to barristers' immunity (at least in civil cases) by the seven person House of Lords in *Arthur J S Hall & Co (a firm) v*

Simons.[2] This caused me to ask the question: are advocates[3] now to be put in the same boat as other professionals, with similar liabilities but without due recognition of the uniqueness of their calling? I use the word "*calling*" deliberately; my argument is that the advocate's profession can still properly be referred to as a calling. After all, we still refer to 'calls' to the Bar.

6. This is not a mere play with words. Most of you are advocates in the courts. I was one for many years. There is something of substance to be seriously considered here. The advocate's profession is not one that can be entirely defined by referring to common law liabilities or professional regulations on conduct, although there are hints here and there as to the point I am making. There is something more to being an advocate that is often hard to pin down or to define with any degree of precision. It reflects the duty owed to the public interest while at the same time acknowledging the duty owed to the client, and the recognition that these two pillars of an advocate's professional duty must be in practice be reconciled. Put another way, the traditional duties owed by advocates to the administration of justice (duties owed to the court) and to the client – both of which in equal measure represent the public interest –

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2 [2002] 1 AC 615.

3 Mainly barristers, but this term also includes all advocates including solicitor advocates. Although there are some differences between different types of advocates, for the purposes of the present talk I do not draw any distinctions and simply employ the term "*advocates*".

demand a certain quality of advocates. What is this quality and why is it relevant?

7. I identify this vital quality as fearless advocacy. Its relevance is that it underlies the practice of law in our courts. These days, and this applies the world over, when the law and the work of the courts are often viewed through the multi-faceted prism of politics and geopolitics, and of hyperbole and diametrically opposite - and seemingly irreconcilable - positions taken, it is crucial that the law and its proper purpose remain intact. When cases come to be dealt with by courts, however controversial they may be or however far-reaching the consequences, it is critical that we do not lose sight of the fundamentals. And these fundamentals ultimately represent the foundation of the rule of law and the concept of justice itself.

8. It is axiomatic that whatever the political, social or economic fallout that may result from decisions of the courts, judges only deal with questions of law and the application of the law to facts. The integrity of the legal process depends on the recognition of this important approach, captured in the time-honoured saying that courts only decide cases according to the law and not extraneous factors. There was a lack of understanding over this for example in the Brexit litigation in the United Kingdom (particularly following the decision of the Divisional Court) and such misunderstandings on the part of the

public regularly exist in Hong Kong. The constitutional role of the courts is (or should be) clear to judges and lawyers. The painstaking exercise of giving reasoned judgments represents the attempt to explain in proper detail the reasons why, according to law, a particular outcome has been reached.

9. Where does the advocate come in and why must the advocate be fearless? I must first put matters in context. Most of us work in jurisdictions where legal proceedings are adversarial in nature. That by itself gives a clue as to the role of advocates because it is from this precept from which duties owed to the court emanate. This role is crucial because courts must have the proper materials in front of them before judges can even start to adjudicate justly on any matter. In civil jurisdictions based on Roman-canon procedure, which places the responsibility on judges not just to adjudicate but also to gather evidence, the role of the lawyers (and the nature of their duties) are somewhat modified. Such systems, inquisitorial in nature, require a substantial staffing of judges. As an interesting historical illustration of the staffing requirements in civil jurisdictions, in the 18th Century, France had 5,000 Royal judges to man the courts whereas in the English courts of Chancery and Common Law at that time, the judges numbered about 15.[4] Advocacy is an important component of the administration of justice and this rests on the principle that justice is best

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[4] John Dawson *A History of Lay Judges* (The Lawbook Exchange Ltd, 1999).

served if parties to a legal dispute through their legal representatives are able to present their cases before an independent and neutral judge where their positions are necessarily "*antagonistic*".[5]

10. The term "*fearless advocacy*", appears, somewhat unusually, in statute form in Hong Kong. One of the statutory provisions that was sought to be introduced by The Civil Justice Reform in Hong Kong was the power to make wasted costs orders against legal representatives in civil proceedings. The Bar in particular was anxious that due recognition be given to the role of advocates. This resulted in a statutory provision[6] stating in terms that when a court is considering whether or not to make a wasted costs order against a legal representative, in addition to all other relevant circumstances, the court must specifically to "*take into account the interest that there be fearless advocacy under the adversarial system of justice*". The interest that is referred to here is the public interest.

11. Though it is perhaps somewhat unusual to see the term "*fearless advocacy*" employed in a statute, it is of course an accepted concept and a frequently used term. In *Ridehalgh v Horsefield*, one of the public policy justifications for the immunity provided to advocates in connection with the

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5 See *Ridehalgh v Horsefield* [1994] Ch 205, at 224F-G (Sir Thomas Bingham MR).

6 Section 52A(5) of the High Court Ordinance Cap 4.

conduct of cases in court was that they had to be free to conduct cases "*fearlessly*".[7] This term is much employed in the cases when discussing the duty owed by an advocate to the client. Even though the phrase "*fearless advocacy*" does not feature in the English legislation dealing with the making of wasted costs orders against legal representatives[8], it is nevertheless an important factor to be taken into account: see, for example, *Medcalf v Mardell*[9], where Lord Hobhouse of Woodborough said[10]:-

> "*51. The starting point must be a recognition of the role of the advocate in our system of justice .... The duty of the advocate is with proper competence to represent his lay client and promote and protect fearlessly and by all proper and lawful means his lay client's best interests ....*
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> *52. .... Unpopular and seemingly unmeritorious litigants must be capable of being represented without the advocate being penalised or harassed whether by the executive, the judiciary or anyone else.*"

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7 At 235C-D.

8 Section 51(b) of the Supreme Court Act 1981.

9 [2003] 1 AC 120.

10 At paras 51 and 52.

One also sees references to fearless advocacy in codes of conduct.[11]

12. It is usually when discussing an advocate's duty to the client that the term is used. It is worthwhile to remind oneself why this is so and it is not simply because the advocate is remunerated. I can illustrate this with a reference to two leading figures in the mid-20th Century in the United States in the struggle for equality for African-Americans. Charles Houston[12] was Dean of Howard Law[13] and Thurgood Marshall, a graduate of Howard Law, was the first African-American to be appointed as the Associate Justice of the Supreme Court.[14] Charles Houston was an immensely influential figure, teaching law the practical way. His attitude to practice at the Bar was best described by Thurgood Marshall in 1978:-

> "*And he taught us how the law was practiced, not how it read. Because, you see, in those days Harvard, Yale, Columbia – you name them, the big law schools – were bragging that they didn't*

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[11] See Rule 15.1 of the UK's Code of Conduct in the BSB Handbook; Rule 35 of Australia's Legal Profession Uniform Conduct (Barristers) Rules 2015; Rule 5.1-2 of Canada's Model Code of Professional Conduct.

[12] 1895-1950.

[13] The Howard University Law School (located in Washington DC) is one of the oldest law schools in the USA. It is popularly known as Howard Law.

[14] Justice Marshall (1908-1993) was appointed to SCOTUS in 1967. He graduated first in his class at Howard Law in 1933.

> *train lawyers, they trained clerks to start off in big Wall Street law firms. Charlie Houston was training lawyers to go out and go in the courts and fight and die for their people.*"[15]

This for many people represents a significant part of an advocate's function, namely to fight to the best of one's ability for the client's rights in a court of law, using the law – and nothing else – to benefit the client. Romantic notions though Marshall's words may evoke, as we shall see presently, they do not nor were they intended to mean that in acting for one's clients, this is without limits. Thus, for example, duties owed to the court will prevent untoward conduct on the part of the advocate. That said, certainly as far as the conduct of criminal cases are concerned, greater leeway is given to the advocate in defending a client and this greater leeway promotes fearless advocacy.

13. In criminal proceedings, it is interesting to note the duties of counsel when the client has confessed his guilt to the offence charged. While some may argue that counsel should withdraw from representing the client, this is not the case. In Hong Kong, as elsewhere, the only limitation on counsel is in putting forward a positive case inconsistent with the confession. Accepting this, counsel is able to (and if he continues to act for the client, expected to)

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[15] Tribute to Charles H Houston: Amherst Magazine 1978 (reproduced in *Thurgood Marshall: His Speeches, Writings, Arguments, Opinions and Reminiscence* (ed. Mark Tushnet, 2001).

challenge the prosecution witnesses by way of credibility or otherwise. The Code of Conduct of the Hong Kong Bar Association states this to be the duty of counsel (Annex 12):-

> "*His duty is to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence with which he is charged.*"

The position is similar in the United Kingdom: see gC9 of the Code of Conduct.

14. The duty to act in the best interests of one's client is an important facet of the fundamental principle that all parties who have business before the courts are entitled to be represented and to have their case properly heard and dealt with according to law. This is known as having access to justice.[16]

15. Access to justice is one of the indicators of the rule of law and it is for the benefit of all. We have all encountered clients whom we did not like at all, or whose behaviour or conduct appalled us even. But the acceptance that access to justice applies to one and all means that an advocate has a duty to act

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[16] In many jurisdictions there is a constitutional guarantee of access to justice. Article 35 of the Basic Law provides this guarantee in Hong Kong.

for such people "*however unsavoury*"[17] to the best of their professional ability. This professional obligation was at one stage one of the reasons why advocates had immunity from suit.[18] The "*cab rank*" rule which exists in a number of codes of conduct is founded on this obligation and constitutes one of the inner strengths of the Bar. Whether or not you like your clients is actually irrelevant, but you have to act for them. Nowhere is this better described than by Sydney Kentridge. In his talk *The Ethics of Advocacy* given at the Inner Temple in January 2003,[19] he reflected:-

> "*During the long years of apartheid in South Africa, I believe that one of the things which kept the flame of liberty flickering was that opponents of the apartheid regime charged with offences including high treason were able to find members of the Bar to defend them with such skill as they had and with vigour. This was not because they necessarily sympathised with the aims or methods of the accused, but rather because they recognised their professional duty to take on those cases.*"

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[17] As Sir Thomas Bingham MR described such clients in *Ridehalgh v Horsefield* at 235D-E.

[18] See the reasoning in cases like *Rondel v Worsley* [1969] 1 AC 191.

[19] This speech is reproduced in his book *Free Country: Selected Lectures and Talks* (2012) at Pg 65.

16. The existence of the "*cab rank*" rule is a reminder that court proceedings can involve extremely serious consequences regarding one's liberty, property or family. In Hong Kong, Lam JA[20] put it[21] in a case in which the court had to determine whether a person was a fit and proper person to be admitted as a barrister:-

> "*The conduct of a barrister in his or her professional practice often has immense ramifications for the life of a client beyond the immediate outcome of a case. Such ramifications can be financial, emotional, political or social. What happens in litigation could affect the physical, emotional or psychological well-being of a client or those close to him or her.*"

17. I now move on to the other factor which provides an underlying reason for fearless advocacy: the administration of justice. The necessity and justification for fearless advocacy as far as a client is concerned is easy to grasp. You simply have to do your best for the client and what Charles Houston urged is a good way of putting it. The concept of fearless advocacy is, however, more complex when considering the administration of justice, particularly given the potential conflicts that can arise. Where does fearless advocacy fit in here?

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[20] Now Mr Justice Lam PJ of the Hong Kong Court of Final Appeal.

[21] In *Youh Alan Chuen Po (Opposed Admission)* [2013] 2 HKLRD 485, at para 10.

Advocates of course know (or should do) their duties to the administration of justice – these primarily include the so-called duties owed to the court – but why should they be fearless in this regard? My submission is that fearless advocacy is vital.

18. It is first convenient to be briefly reminded of an advocate's duties to the administration of justice. These duties are directly linked to the constitutional duty of the courts to ensure that legal disputes are resolved strictly according to law, and that proceedings are conducted fairly and efficiently.

19. There are many authorities and literature on this subject. I have myself found of particular assistance the classic article by Justice David Ipp "*Lawyers' Duties to the Court*".[22] It is, however, neither necessary nor desirable to add to this learning save to highlight one point: that there can at times be a real conflict between the wishes of the client and the duties owed by lawyers to the administration of justice. The legal position is clear enough. The duty to the administration of justice is of course the dominant one. The administration of justice of course recognises the fact that lawyers owe duties to their clients but occasionally, there is a risk of boundaries being crossed and

[22] (1998) 114 LQR 63.

conflicts arising. These grey areas were discussed by Lord Hoffmann in *Hall v Simons*[23]and he called this "the divided loyalty":-

"*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 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. So, it was said, the possibility of a claim for negligence might inhibit the lawyer from acting in accordance with his overriding duty to the court. That would be prejudicial to the administration of justice.*"

20. The reference in this passage to the fulfillment of an advocate's duties annoying the client is a good way of expressing the point that the relationship between the court and the advocate can be a complex one. The complexity lies in the conundrum that while both judge and advocate are

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[23] At 686E-G.

integral components of the administration of justice, in practice in the discharge of their responsibilities, their paths do occasionally part.

21. This parting of the ways occurs when the client's wishes collide with what the administration of justice demands. The tactic of amply funded litigants to put the other party to countless procedural hoops in a bid to obtain a favourable settlement or simply to wear down resistance, provides a common example of a dubious grey area. You will know of other examples of an advocate's conduct, superficially in the name of fearless advocacy, inhibiting the smooth administration of justice.

22. Another instance is the running of untenable points. As Lord Reid put it in *Rondel v Worsley*[24], "*it is no part of counsel's duty to his client to make submissions which have no validity whatsoever and which are 'drawn from thin air'.*"

23. Yet another example is the mounting of personal attacks, sometimes even against judges in a bid to apply pressure to enable a jury to be discharged or to render convictions susceptible to being quashed an appeal. Such conduct has naturally nothing to do with proper conduct and should not be

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[24] At 227.

excused under the guise of fearless advocacy. *R v Farooqi*[25] was a case in which, in a trial involving terrorism charges, counsel (M) for one of the defendants apart from mounting untenable legal arguments and defying court rulings, also made personal attacks on the trial judge[26]. Giving the judgment of the Court of Appeal, Lord Judge CJ[27] rejected this conduct as fearless advocacy and further stated that advocacy of the kind employed by M "*would rapidly destroy a system for the administration of justice which depends on a sensible .... respectful working relationship between the judge and independent-minded advocates responsibly fulfilling their complex professional obligations.*"

24. This emphasis by Lord Judge on the "*working relationship*" between the court and the advocate is crucial. The point I wish to make is that the duties of an advocate, in particular that of representing the client to the best of one's ability, are part and parcel of the administration of justice, and this (the administration of justice) is the common objective of both court and advocate. This is the very point made by Lord Judge in the same case[28] when he refers to the advocate "*simultaneously performing his responsibilities to his client and to the administration of justice*" and to this being served by the "*mutual respect*" between the judge and advocate.

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25 [2014] 1 Cr. App. R.8.

26 For example, there was a "*thinly vertical*" suggestion the judge was biased; M also encouraged the jury to treat the judge as a "*salesman of worthless goods*": at para.73.

27 At para 115.

28 At para 109.

25. Far from being some sort of unholy alliance, this is the golden thread I have been searching for. There is no "*parting of the ways*", (as I have earlier intimated) save perhaps in a very occasional sense, because conceptually and in practice, both the court and the advocate have a common goal. This common goal is the maintenance of a legal system that ensures the proper administration of justice, and this in short ultimately promotes the existence of what we call the rule of law. It underlies the practice of law in the common law tradition, guaranteeing that vital characteristic of our legal system: a fair trial and justice. All who have business in the courts can expect nothing less, but cannot ask for more. Perhaps now we begin to understand why there must be fearless advocacy: quite simply, it is there to promote the administration of justice and the rule of law.

26. So analysed, we can perhaps more easily appreciate that the furtherance of the public interest in discharging the duties owed to the court is not simply about abiding by rules as though the conduct of litigation was a game in which it is left to a referee to ensure compliance. The duties owed by the advocate are not there only to be observed when someone is watching. Quite the contrary, the duties are to be observed, precisely when no one is watching. Some may see litigation as a tactical game where one tries to get away with something, especially when the court is not watching and there is of

course no equivalent of VAR. Such an attitude would be quite wrong. Acting in accordance with one's duties, even or especially when no one is watching or is there to supervise, is acting in the public interest and in accordance with one's professional obligations. This recognises the overlapping roles of lawyer and judge in the administration of justice. Each recognises that the judge is there to reach a just determination of a legal dispute, not to monitor the legal profession as well.

27. What emerges from the discussion so far is the critical role of the advocate in the context of the administration of justice. And the advocate needs to be fearless in the discharge of the duties here. But why? Are we being just a little precious here? I think there are at least three connected reasons why this must be so.

28. First, this is a matter of obligation, contained sometimes in statutory form, sometimes as prescribed by the cases and mostly in professional codes of conduct. A failure to do so may have consequences ranging from professional sanctions to liability for wasted costs. This aspect can be termed the "*big stick*" approach that forces advocates to conduct themselves properly.

29. Secondly, there is a matter of professional pride that acts as an incentive to be fearless in advancing the interests of the administration of justice.

Lord Hoffmann used the term "*incentive*" in his speech in *Hall v Simons* when he was discussing the question of whether the removal of the immunity that had been granted to advocates would adversely affect the duties owed to the administration of justice. He described such incentives in the following way:-[29]

> "*The first consideration is that most advocates are honest conscientious people who need no other incentive to comply with the ethics of their profession. Then there is the wish to enjoy a good reputation among one's peers and the judiciary. There can be few professions which operate in so bright a glare of publicity as that of the advocate. Everything is done in public before a discerning audience. Serious lapses seldom pass unnoticed.*"

30. But it is the third reason that for me is the most compelling. As Lord Hoffmann also remarks, most advocates need no incentive to do the right thing (for this is after all what fearless advocacy in essence means); they simply do it. And the reason for this unwavering approach is not because there is a big stick being waved to ensure compliance nor is it by reason only of a wish to enjoy a good reputation. The real reason is that a fearless approach in insisting on doing the right thing is an affirmation of the integrity of a system of law based on the rule of law, and this is the system of law that we regard as worth

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[29] At 692F.

preserving and worth fighting for. Many Judicial Oaths require judges to safeguard the law and administer justice without fear or favour. Many Bars contain in their professional codes a duty to uphold justice without fear or favour and an overriding duty to the administration of justice. The Hong Kong Bar's Code of Conduct states in its very first paragraph that respect for and upholding the rule of law and for the freedom of the individual citizen depend to a large extent on the maintenance of high standards by all who practise in the courts. This requirement also features in statutes. For example, s 4(a) of the Lawyers and Conveyancers Act 2006 of New Zealand states the "*fundamental .... obligation to uphold the rule of law and facilitate the administration of justice.*" Section 42(1)(a) of the Legal Practitioners Act 1976 of Malaysia mandates the Malaysian Bar to "*uphold the cause of justice without regard to its own interest or that of its members, uninfluenced by fear or favour.*"

31. The time when fearless advocacy needs to be demonstrated is when there are pressures brought on advocates that can divert them from doing what is proper. Insisting on doing the right thing may sometimes be easier said than done. As Rupert Jackson has reminded us, the legal environment has changed considerably since the days of *Rondel v Worsley*: there are more lawyers than ever before and while the financial rewards are great, so is the competition. Not to put too fine a point on it, the practice of law is big business and when the

object is to maximise profits, it is natural to want to give the client exactly what is demanded. This is where the rub is when the client's wishes conflict with the duty owed to the administration of justice. Although as a matter of law, the duty owed to the court is paramount, there are as I have earlier mentioned numerous grey areas. My worry is that rather than err on the side of the administration of justice, some practitioners will instead prefer to err wholly on the side of what is the wrong choice. This is the theme of a thought-provoking article by Justice Michael Kirby[30] in 1996 "*Billable Hours in a Noble Calling*"[31] in which he laments the waning of ethical standards. He states "*[it] is easier to adopt a purely economic or mercantile view of the law if you have no concept of the nobility of the search for individual justice, of the essential dignity of each human being and the vital necessity of providing the law's protection ....*" and ends his essay with the rhetorical question "*[but] will they heed this call or dismiss it with a yawn and return to billable hours?*"

32. I mentioned at the beginning of this Address how the work of the courts – and this applies particularly to those high profile constitutional and public law cases – are perceived to have political and even geopolitical consequences. These types of case are capable of stirring up much controversy among politicians, journalists and the general public, even outside one's home

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[30] Who delivered the Peter Taylor Memorial Address in 2011 ("*Of Advocates, Drunks and Other Players: Plain Tales from Australia*").

[31] (1996) 21 Alternative Law Journal 257.

jurisdiction. The courts of course only deal with legal issues but this is often not the way many people understand it. They will often see the resolution of legal disputes by the courts as being political in nature and, depending on the result, also view the judges in such cases as being politically inclined one way or the other. I am glad to see that on the whole in Hong Kong, where the courts have had to deal with a number of controversial cases particularly over the past few years, members of the Hong Kong Bar do not fall into the trap of identifying too closely with their client by being a mouthpiece for their client's views, rather than strictly fulfill their responsibilities by confining their submissions to relevant legal aspects of the case and doing so in a balanced, principled and calm manner. From my own experience, I can well imagine just how difficult it must have been for some advocates to resist the wishes of their clients. This requires fearless advocacy.

33. Some may think that in the type of case just referred to, there is an inherent conflict between an advocate's duty to the client and the duty and to the administration of justice. However, as analysed earlier, these two duties complement each other. Often the interests of the client and of the administration of justice will dovetail. I will give one example of this – it is one among many – by referring to a trial that took place in South Africa from 1963 to 1964 known as the Rivonia Trial. The title of this Address suggests that

fearless advocacy is not the romantic notion of films, plays and books, but I cannot resist telling this story, somewhat romantic though it is, albeit true.

34. The Rivonia Trial involved the trial of Nelson Mandela who was charged under the then sabotage legislation in South Africa[32] for, among other alleged acts, the recruitment of persons for the purpose of revolution and the commission of acts of sabotage.[33] He was charged with a number of other defendants including Lionel Bernstein (a member of the South African Communist Party) and Walter Sisulu (the former Vice President of the African National Congress). The defence team, led by Bram Fischer and Joel Joffe, decided on a strategy that was wholly a legal one. The defence was not going to be a series of political speeches and where the evidence could not be disputed, it would not be. While this meant that inevitably there would be convictions, the objective was to avoid capital sentences being imposed. This was also what the defendants wanted, although they (and Nelson Mandela in particular) wanted their views to be properly understood. In other words, the strategy was essentially directed towards mitigation. The tactic was to comply with the legal system, to respect the administration of justice in the courts and to urge leniency, but only by employing proper legal arguments. Nelson Mandela, in the course

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[32] The Sabotage Act (Act 37 of 1963).

[33] Criminal Court Case No. 253 of 1963 (*State v Nelson Mandela and Others)* in the Transvaal Provincial Division of the Supreme Court of South Africa.

of explaining his actions, made what are now regarded as famous words when he said[34]:-

> "*During my lifetime I have dedicated my life to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons will live together in harmony and with equal opportunities. It is an ideal for which I hope to live for and to see realised. But, my Lord, if it needs be, it is an ideal for which I am prepared to die.*"

It is said that it was the defence team which urged him to say "*if needs be*". Nelson Mandela was convicted but spared capital punishment, although he was sentenced to life imprisonment, eventually being released after serving nearly 28 years in prison. There is a good account of the trial in a book written by Joel Joffe "*The State vs Nelson Mandela*". In the Foreword, Mr Mandela credited his defence team in the following way:-

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[34] On 20 April 1964 in the course of making a statement spanning some 5 hours. Procedurally, a statement could be made without being under oath and without being cross examined on it.

> "*The task of snatching victory from the jaws of death needed steadfastness from the accused, commitment and resourcefulness from our defence team ....*"

I would add it also needed fearless advocacy in the commitment to the integrity of the law, that only legal arguments belong in a court of law as well as an unwavering commitment to the administration of justice.

35. The simple fact is that win or lose, whether or not it is a run of the mill case or whether you are defending Nelson Mandela, it is important from a rule of law point of view that an advocate has done not only his or her best in fulfilling professional obligations owed to the client, but has also – and most importantly – discharged the primary obligation to further the administration of justice. By doing this, the advocate promotes the rule of law.

36. The means to an end are as important as the end itself. This requires fearless advocacy. We must remember that such fearlessness is particularly to be demonstrated when times are difficult, not just when times are good.

37. This is why advocates are ideal candidates for the Bench. In his speech made at the City University of Hong Kong, Lord Taylor colourfully put it in the following way:-

> "*In rugby terms, the referee who has played for years in the front row of the scrum is best equipped to know what is going on there and when to blow the whistle.*"

38. I end by a quote from the judgment of Sir Robert Megarry VC at the end of his judgment in *Tito v Waddell* (*No. 2*)[35], a case I remember very well in my days in the Library here at Gray's Inn. The action, tried between 8 April 1975 and 18 June 1976, was about the mining of phosphates in Ocean Island (Banaba) in the Gilbert and Ellice Islands. The Banabans claimed against the British Phosphate Commissioners and the Government of the United Kingdom. There was alleged overmining. The Banabans largely lost the litigation. However, Sir Robert Megarry, near the end of his judgment, paid this tribute to counsel for the Banabans, Mr John Macdonald QC:-[36]

> "*Third, I wish once more to express my very real sense of indebtedness to counsel and solicitors for all that they have done to*

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[35] [1977] Ch 106. The judgment occupies most of the volume of the Chancery Reports for that year.

[36] At 340B-E.

assist me in a case which, though of great interest, has been undeniably burdensome. Although my gratitude is quite general and undifferentiated, I shall add a word about Mr. Macdonald. For a long time his professional practice and, I suspect, much of his private life must have been engulfed by the affairs of Ocean Island. It may be unusual, but I hope that it will not be thought improper, if I say that however disappointed the Banabans may be at the result of this litigation, they have every reason to be deeply grateful to Mr. Macdonald for all the skill and effort that he has manifestly put into his tenacious presentation of their case, both as leading for them in No. 1 and as supporting Mr. Mowbray in No. 2. They must have shared with me the pleasure that I felt when during the course of this litigation I was privileged to call him within the Bar on his appointment to the rank of Queen's Counsel."

39. This is the kind of professional recognition that every advocate strives for. The passage was instrumental in my wishing to become a barrister nearly 45 years ago. I hope it is also indicative of the fearlessness that is the hallmark of a dedicated advocate. More than ever, the legal system needs such advocates – unflinching and fearless in doing the right thing. And the right thing is always worth standing up for.

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