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# TRIAL ADVOCACY AND NITŌJUTSU

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CHRIS DENT\*

## I INTRODUCTION

There can be difficulties in getting law students to think about the actions and strategies involved in trial advocacy.<sup>1</sup> This article resorts to history in order to provide a new way of seeing the courtroom battle and, as importantly, the preparations for that battle.<sup>2</sup> The history is the classic text, *Go Rin No Sho* (the Book of Five Rings),<sup>3</sup> written by the Japanese sword-master Miyamoto Musashi, in the middle of the seventeenth century. While others have considered the application of Sun Tzu's theories to the law,<sup>4</sup> the value of using Musashi is twofold. First, his book has a focus on one-on-one combat — unlike the large-scale troop formations envisaged by the Chinese general and military strategist.<sup>5</sup> Second, Musashi writes of the two-sword method (nitōjutsu), and lawyers have at their disposal two key weapons — facts and the law. To emphasise the point, the first paragraph of Glissan's text on advocacy opens with:

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<sup>1</sup> This, of course, is not the first attempt at a student-oriented description of trial advocacy. See, for example, Les McCrimmon, 'Trial Advocacy Training in Law School: An Australian Perspective' (1994) 5(1) *Legal Education Review* 1; and Les McCrimmon and Ian Maxwell, 'Teaching Trial Advocacy: Inviting the Thespian into Blackstone's Tower' (1999) 33(1) *Law Teacher* 31. Coincidentally, the latter raises the relevance of Japanese *no* theatre for the relevance or performance for advocacy: at 38.

<sup>2</sup> This article's author is well-placed to carry out this analysis. They have been trained in, and worked with, the law for almost as long as they have trained with swords — neither of which have they wielded in anger. As such, this article may be akin to the Hagakure, the recording of the thoughts on Bushido (the way of the warrior) by a daimyo's retainer (who later became a Zen priest), who had no battle experience themselves — see, Yamamoto Tsunetomo, *Book of the Samurai Hagakure*, tr William Scott Wilson (Kodansha, 1983).

<sup>3</sup> As the present author is not an expert in Japanese, multiple translations of Musashi's text will be referred to in order to better communicate the subtleties of his thought.

<sup>4</sup> See, for example, Antonin Pribetic, 'The "Trial Warrior": Applying Sun Tzu's *The Art of War* to Trial Advocacy' (2008) 45(4) *Alberta Law Review* 1017. Nelson quotes Musashi once (David Nelson, 'On Military Strategy and Litigation' (2007) 31(3) *Vermont Law Review* 557, 571–2); however, his focus is on Sun Tzu.

<sup>5</sup> He does, however, say that the 'way of a large-scale battle is the same ... [as] a one-on-one encounter': *The Book of Five Rings — the Real Art of Japanese Management*, tr Bradford Brown, Yuko Kashiwagi, William Barrett and Eisuke Sasagawa (Bantam, 1982).

There is no more important part of preparation of a case than strategy ... [and the] preparation of vital questions of fact and law ... as a component of that preparation ensures that no essential element is overlooked.<sup>6</sup>

Musashi was writing, and fighting,<sup>7</sup> in the Edo period of Japan. It was a period with a rigid social structure. Musashi was not a vassal to any specific daimyo; instead, he travelled in order to improve his skill with swords (a practice known as *musha shugyō*). This involved duels with, generally, *katana*.<sup>8</sup> *Katana* are usually wielded with two hands, however, Musashi advocated using with them with one hand, leaving the other hand to wield the *wakizashi* (a short blade) — because ‘your real intent should not be to die with weapons uselessly worn at your waist’.<sup>9</sup> In other words, when he wrote of techniques, they were aimed at life-and-death engagements. The modern courtroom is not quite so consequential; however, the battles between lawyers are serious and so a metaphor based on the circumstances of Musashi’s life is not too hyperbolic.

First, though, there needs to be an engagement with the value of using metaphors in legal instruction.<sup>10</sup> There is, of course, a tradition of the use of metaphors in legal theory. The most famous is Plato’s “Simile of the Cave”;<sup>11</sup> and Rawls’ “Veil of Ignorance”<sup>12</sup> can also be

<sup>6</sup> James Glissan, *Advocacy in Practice* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2011) 2. He gives no other options other than winning through the use of either law or fact (or both).

<sup>7</sup> Two of his duels, at least, were before 1603, when he is said to have bested opponents when he was 13 and 16. He is also said to have joined Toyotomi’s forces in the Battle of Sekigahara: William Scott Wilson, ‘Introduction’, in Musashi, *The Book of Five Rings*, tr William Scott Wilson (Kodansha, 2002) 15. As multiple versions of Musashi’s book will be referred to, subsequent references will be to the translator.

<sup>8</sup> The *katana*, sometimes referred to as the *daito*, is a curved tempered-steel sword with a single-edged blade at least 2 *shaku* (60cms) in length: John Yumoto, *The Samurai Sword: A Handbook* (Tuttle, 1958) 46.

<sup>9</sup> Wilson (n 7) 30. A key benefit of the use of the swordfighting metaphor is the fact that it allows a visualisation of the words of Musashi. As such, reference will be made to well-known (in certain circles) cinematic sword fights. The benefit of two weapons is shown in *Samurai III: Duel at Ganryu Island* (Toho Studios, 1956). In the final battle with Sasaki Kojirō, Musashi starts the fight with his main weapon in two hands and his *wakizashi* in his obi. He drew the shorter sword, unexpectedly, to deliver the fatal strike. Of note is that Inagaki’s “Samurai Trilogy” is based on Eiji Yoshikawa’s novelisation of Musashi’s life.

<sup>10</sup> This is a separate issue to the use of “analogy” in legal instruction. For a discussion of analogies, see Dan Hunter, ‘Teaching and Using Analogy in Law’ (2004) 2 *Journal of the Association of Legal Writing Directors* 151.

<sup>11</sup> Included in his *The Republic*; as such, it relates the journey of men in the ‘Ship of State ... the central metaphysical’ idea of the text: David Keyt, ‘Plato and the Ship of State’ in Gerasimos Santas (ed), *Blackwell Guide to Plato’s Republic* (Blackwell, 2006) 197. It, in part, distinguishes the ‘world of the intellect ... [from] the world of the senses’: Bertrand Russell, *History of Western Philosophy* (George Allen & Unwin, 2<sup>nd</sup> ed, 1961) 139; and, in part, reinforcing the ideas of the “Good” and of the ‘ideal [S]tate’: AS Ferguson, ‘Plato’s Simile of Light — Part II: The Allegory of the Cave’ (1922) 16(1) *Classical Quarterly* 15, 25. It, therefore, goes to his description of how society should be run, and the notions of “justice” and the relationship between the state and individuals embedded within that society.

<sup>12</sup> The Veil is an aspect of his discussion of the “Original Position”: John Rawls, *A Theory of Justice* (Oxford University Press, 1971) 136–42.

understood as being metaphorical.<sup>13</sup> These are ideas that help communicate deep concepts about justice — concepts that are not always readily connected to the lived lives of students. Metaphors are useful because they are ‘fundamental to the way we understand and experience the world’.<sup>14</sup> As such they can be fundamental to the way we, and students, understand and experience the law. Importantly, they are a ‘way of instigating the imagination and opening up new avenues to understand issues’.<sup>15</sup> The law is complex and difficult to understand; the practice of law is complex and difficult to understand. The use of metaphors may help some students to better understand the issues. Johnson takes this further, ‘even our most abstract theories are webs of body-based metaphors’.<sup>16</sup> This article seeks to communicate important ideas of trial advocacy through a metaphor that is fundamentally based in the body and the mind’s relationship with that body.

## II THE BOOK OF FIVE RINGS AND THE COURT BATTLE

Musashi’s Book of Five Rings includes five scrolls of different elements, with each scroll reflecting a different aspect of his thought. Advice on trial advocacy will be described in terms of the detail of each scroll and will be linked with texts on advocacy in the Anglophone, and so adversarial, tradition.<sup>17</sup> Not all of Musashi’s points will be considered; in the interests of space, only those most relevant to the courtroom will be raised.<sup>18</sup>

<sup>13</sup> There is also the “Experience Machine” of Nozick (Robert Nozick, *Anarchy, State and Utopia* (Basic Books, 1974) 42–5); and more recently, Chris Dent, ‘Law in a “Simulated” Universe — The Educative Value of the Metaphor’ (2022) 4(2) *Law, Technology and Humans* 216.

<sup>14</sup> David Ritchie, ‘Who is on the Outside Looking in, and What do they See?: Metaphors of Exclusion in Legal Education’ (2007) 58(3) *Mercer Law Review* 991, 996, citing Lakoff and Johnson.

<sup>15</sup> Alex Guilerme and Ana Lucia Souza de Freitas, ‘Discussing Education by Means of Metaphors’ (2018) 50(10) *Educational Philosophy and Theory* 947, 947.

<sup>16</sup> Mark Johnson, ‘Mind, Metaphor, Law’ (2007) 58(3) *Mercer Law Review* 845, 865.

<sup>17</sup> This should not, then, be seen as having any connection to the “trial by battle” (though Munkman does say that the advocate is the ‘ultimate successor of the champion in the ordeal by battle’: John Munkman, *The Technique of Advocacy* (Sweet & Maxwell, 1986) 167). There was no theorisation of the actions of the champions in the ordeal. Trial by battle was already of very limited use by the middle of the 13<sup>th</sup> century (Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (Liberty, 2010) vol 2, 662. The laws of chivalry, the closest analogy to a code of conduct in battle (and was not specific to trials by ordeal) only developed from the end of the 12<sup>th</sup> century. Ramon Llul’s *Book of the Order of Chivalry* was composed around 1275, and de Pizan’s *The Book of Deeds of Arms and of Chivalry* was written around 1440. In terms of sword-fighting manuals, amongst the earliest European texts are the Walpurgis manuscript from about 1300 and the 15<sup>th</sup> century fectbuchs of Ringeck and Liechtenauer.

<sup>18</sup> To be clear, all five scrolls will be considered; however, not all of his specific ideas are engaged with. For example, in the Water Scroll, Musashi raises 36 ideas. Some of them are too tied to duelling to be discussed here. For example, there is the directive with respect to the “Body of the Short-Armed Monkey”. The section reads: ‘By the “Body of the Short-Armed Monkey” is meant the idea of not extending one’s hands. It is the ... technique of quickly leaning toward an opponent just when he is about to strike’: Brown et al (n 5) 45. As such, the idea is not easily generalisable to trial advocacy.

A *The Earth Scroll*

The Earth Scroll, also known as the ‘Ground Book’,<sup>19</sup> is an ‘outline’ of Musashi’s ‘own style’ of martial arts.<sup>20</sup> His overview includes the assessment that there are ‘few who are inclined to devote themselves to the path’ of the warrior;<sup>21</sup> few people would be fond of life as a lawyer, and even fewer have any talent for it — Younger, writing as Cicero, asserts that the ‘talent to cross-examine is a rare commodity. No more than three lawyers in all of Rome have it’.<sup>22</sup> More generally, ‘people practice the ways to which they are inclined, developing individual preferences’.<sup>23</sup> This, again, has similarities with understandings like that of Munkman: advocacy ‘cannot be developed without some initial aptitude’.<sup>24</sup>

With respect to the basics of weaponry,<sup>25</sup> Musashi emphasises that the ‘real thing is to practice the science holding both swords’.<sup>26</sup> A lawyer would not only deploy fact or law, they need to practice with both.<sup>27</sup> To be clear, the category of “fact” only includes evidence that is allowed into court,<sup>28</sup> even if it is properly understood as opinion.<sup>29</sup> It does not include the material that a lawyer would want to tender, but is unable to, given the limits of the law of evidence.<sup>30</sup> Further, only using one weapon, despite allowing a more powerful strike, limits possible attacks and defences.<sup>31</sup> ‘Anybody, the first time he takes up a long sword in one hand will find it heavy and difficult to wield ... [but] all things, at first try, are difficult to handle’<sup>32</sup> — including the law and/of evidence when first taken up by law students and junior lawyers.

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<sup>19</sup> Victor Harris, ‘Introduction, *A Book of Five Rings*, tr Victor Harris (Flamingo, 1984) 27.

<sup>20</sup> Wilson (n 7) 46.

<sup>21</sup> Brown et al (n 5) 11.

<sup>22</sup> Irving Younger, ‘A Letter in which Cicero Lays Down the Ten Commandments of Cross-Examination’ (1977) 3(2) *Litigation* 18, 49.

<sup>23</sup> Miyamoto Musashi, *The Book of Five Rings*, tr Thomas Cleary (Shambhala, 1993) 5.

<sup>24</sup> Munkman (n 17) 4.

<sup>25</sup> Musashi discusses the situations, mostly on the battlefield involving armies, that suit other weapons such as spears, halberds, bows and guns: Cleary (n 23) 14. This observation may be linked with other strategies that a lawyer’s client may adopt, such as publicity, when fighting their opponent, and so are outside the scope of the present article.

<sup>26</sup> Ibid 11.

<sup>27</sup> Hampel, Brimer and Kune state that a key aspect of preparation is ‘knowledge of relevant law, evidence and procedure’, with the third being described as the ‘rules of evidence’: George Hampel, Elizabeth Brimer and Randall Kune, *Advocacy Manual: The Complete Guide to Persuasive Advocacy* (Australian Advocacy Institute, 2008) 23.

<sup>28</sup> For example, under *Evidence Act 1995* (Cth), Ch 3.

<sup>29</sup> For example, under *Evidence Act 1995* (Cth), s 79.

<sup>30</sup> ‘To be effective as an advocate both in preparation and in court, you must know the rules of evidence relevant to your jurisdiction’: Hampel, Brimer and Kune (n 27) 41.

<sup>31</sup> Glissan notes, though, that ‘some (albeit not many) cases will involve no factual issues at all, and will be argued purely as questions of law’ (n 6) 2.

<sup>32</sup> Brown et al (n 5) 19–20.

A more difficult concept is that of “rhythm”. For Musashi, there is a ‘rhythm to everything’.<sup>33</sup> He understood that the ‘way to win in a battle according to military science is to know the rhythms of specific opponents, and use rhythms that your opponents do not expect, producing formless rhythms from rhythms of wisdom’.<sup>34</sup> Bound up in the concept, then, is knowledge of the battlefield (the space in which it is fought) and of your opponent (not the other party, but the other lawyer and, during cross-examination, the witness).<sup>35</sup> There is also a role for perception — a continuing awareness of the battle and any need to step back. An example, here, is the observation that ‘there can be tremendous tactical advantage in holding back part of the evidence of a witness for re-examination, if you can be certain that your opponent will be unable to resist the temptation to cross-examine on the topic withheld’.<sup>36</sup> Finally, there is a role for moving beyond learned knowledge and into the space of “formless rhythms”. These points will be drawn out further in the discussion of the later Scrolls.

Musashi suggests a broad approach to learning his way: the ‘true science cannot be attained just by mastery of swordsmanship alone’.<sup>37</sup> He also offers, with no explanation, a list of nine ‘rules for learning the art’:<sup>38</sup>

1. ‘Think without any dishonesty’;<sup>39</sup>
2. ‘Practice and cultivate the science’;<sup>40</sup>
3. ‘Become acquainted with every art’;<sup>41</sup>
4. ‘Understand the ways of all professions’;<sup>42</sup>
5. ‘Know the advantages and disadvantages of everything’;<sup>43</sup>
6. ‘Learn to see everything accurately’;<sup>44</sup>
7. ‘Become aware of what is not obvious’;<sup>45</sup>
8. ‘Overlook nothing, regardless of its insignificance’;<sup>46</sup> and
9. ‘Do not engage in superfluous activities’.<sup>47</sup>

These, of course, can be seen as applicable to life generally; however, their equivalents also appear in texts on advocacy. These include:

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<sup>33</sup> Wilson (n 7) 55.

<sup>34</sup> Cleary (n 23) 15.

<sup>35</sup> Relatedly, Hampel, Brimer and Kune refer to the ‘cycle of evidence’: (n 27) 43.

<sup>36</sup> Glissan (n 6) 13.

<sup>37</sup> Cleary (n 23) 9.

<sup>38</sup> Ibid 16.

<sup>39</sup> Wilson (n 7) 57.

<sup>40</sup> Cleary (n 23) 16.

<sup>41</sup> Harris (n 19) 39.

<sup>42</sup> *The Five Rings: Miyamoto Musashi’s Art of Strategy*, tr David Groff (Chartwell, 2012) 76.

<sup>43</sup> Wilson (n 7) 58.

<sup>44</sup> Cleary (n 23) 16.

<sup>45</sup> Ibid.

<sup>46</sup> Steve Kaufman, *The Martial Artist’s Book of Five Rings* (Tuttle, 1994) 21.

<sup>47</sup> *The Complete Musashi: The Book of Five Rings and Other Works*, tr Alexander Bennett (Tuttle, nd) 80.

1. Have ‘knowledge’ of ‘professional ethics’<sup>48</sup> and the ‘duties to the court’ and others;<sup>49</sup>
2. The ‘harder I work, the luckier I get’<sup>50</sup> and ‘practical judgment and technique ... come only with experience, practice and application’;<sup>51</sup>
3. Have ‘complete familiarity with factual material’<sup>52</sup> (including subject matter of expert evidence) and ‘consciously develop performance skills’;<sup>53</sup>
4. Have ‘knowledge of mankind and of affairs’;<sup>54</sup>
5. ‘Position is sometimes deliberately sought after ... in these cases there is always a corresponding sacrifice and it is a question of practical judgment whether the advantage of position outweighs this’;<sup>55</sup>
6. An advocate should not be ‘distract[ed] from the vital tasks of communication and observation’;<sup>56</sup>
7. ‘Pay attention during direct and cross. The witness may make a statement that could help you’;<sup>57</sup>
8. ‘Nothing [must] come as a surprise. Everything at trial must be planned. Everything must be anticipated’;<sup>58</sup>
9. ‘Proof is weight, not number’.<sup>59</sup>

Of his ‘principles’, Musashi says that the ‘path’ of the warrior ‘should be practiced with the above [list] in mind’.<sup>60</sup> As such, he is arguing for an approach that moves beyond the detail of specific techniques, one that may now be seen as more wholistic. He, himself, broadens his claims in his concluding sentence to the Earth Scroll: ‘On any given path, knowing how not to lose to others, how to help oneself, and to establish one’s reputation — this is the Way of strategy’.<sup>61</sup> It is not difficult to consider trial advocacy to be a “path” to which his assertion applies.

To assist in understanding, at the end of the discussion of each scroll, there will be a small number of key points drawn from the material. For the Earth Scroll, they are:

- You must master both law and fact

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<sup>48</sup> Munkman (n 17) 7.

<sup>49</sup> Hampel, Brimer and Kune (n 27) 12–3.

<sup>50</sup> Glissan (n 6) 5, quoting ‘the Americans’.

<sup>51</sup> Ibid 18.

<sup>52</sup> Hampel, Brimer and Kune (n 27) 183.

<sup>53</sup> Ibid 186, though the authors explicitly restrict that to reducing ‘performance anxiety’ (that said, Younger notes that ‘no advocate ever cures his stage-fright’: (n 22) 18).

<sup>54</sup> Munkman (n 17) 7.

<sup>55</sup> Ibid 169.

<sup>56</sup> Glissan (n 6) 16, in his admonition against using notes.

<sup>57</sup> Stephen Easton, ‘Irving Younger’s Ten Commandments of Cross-Examination: A Refresher Course, with Additional Suggestions’ (2002) 26(2) *American Journal of Trial Advocacy* 277, 316, restating Younger’s Commandment of “Listen to the Witness’ Answer”.

<sup>58</sup> Younger (n 22) 19.

<sup>59</sup> Glissan (n 6) 11, offering an ‘old Latin maxim’.

<sup>60</sup> Brown et al (n 5) 25.

<sup>61</sup> Groff (n 42) 77.

- You must maintain an engaged awareness of witnesses, opponent, judge and jury
- The way of the advocate is a Path chosen, it is a way of life

To be clear, it is not sufficient to simply read these “takeaways”. Terms such as “awareness” are terms of art. The text above, and below, should be engaged with in order to understand its meaning.

## B *The Water Scroll*

The ‘heart’ of Musashi’s school is ‘based on water, putting into practice a method of achieving advantage’.<sup>62</sup> It is named, in part, as a reminder to keep the ‘mind fluid’ and, in part, because ‘water conforms to the shape of the vessel, square or round; it can be a drop, it can be an ocean’.<sup>63</sup> The mind, and its relation to the body, is central to his practice. For Musashi,

Both in fighting and everyday life you should be determined though calm. Meet the situation without tenseness yet not recklessly, your spirit settled yet unbiased ... Do not let your spirit be influenced by your body, or your body influenced by your spirit.<sup>64</sup>

This focused assessment of the mind or spirit<sup>65</sup> does not appear in trial advocacy texts. However, one of the closest iterations is that of Munkman: the ‘ideal state is ... one of alert relaxation’.<sup>66</sup>

Unsurprisingly, there are directions in the Scroll with respect to carriage of the body and the senses that are less relevant to advocacy.<sup>67</sup> Some with a connection include the idea that it is ‘essential to make your ordinary bearing the bearing you use in martial arts and making the bearing you use in martial arts your ordinary bearing’<sup>68</sup> can be linked with bearing in the court, and not forcing a particular demeanour. Further, Musashi noted that it is ‘extremely important to understand

<sup>62</sup> Ibid 80.

<sup>63</sup> Cleary (n 23) 9.

<sup>64</sup> Harris (n 19) 43–44. This is shown in *Samurai II: Duel at Ichijoji Temple* (Toho Studios, 1955) when Musashi, the more settled of the fighters in duels at the Yoshioka School, wins easily.

<sup>65</sup> The word Musashi uses is “kokoru” (Groff, ‘Introduction’, (n 42) 39). The word is ‘not easy to translate into English because it elides into a single word the notions of heart and also of ‘mind, in the emotional sense; spirit; courage; resolve; sentiment; [and] affection’: Tessa Morris-Suzuki, ‘Unfettering the Mind: Imagination, Creative Writing and the Art of the Historian’, in Doug Munro and Jack Corbett (ed), *Bearing Witness: Essays in Honour of Brij V Lal* (ANU Press, 2017) 242.

<sup>66</sup> (n 17) 5. Strictly speaking, he limits this with ‘for an athlete’, though Glissan’s quote of Munkman does not have the same limitation: (n 6) 18. Of course, there are also strong links with the current, popular, notion of “mindfulness” — a concept that is even used in government advice (for example, healthdirect, *Mindfulness* (web page) <<https://www.healthdirect.gov.au/mindfulness>>) — however, these links will not be explored here.

<sup>67</sup> That said, Craddock and Thomas do discuss the importance of correct “posture” and “stance” in advocacy: Lucy Craddock and Mark Thomas, ‘From the Waist Up: Developing Psychomotor Skills for the Court Room’ (2017) 24(3) *International Journal of the Legal Profession* 319, 328–9.

<sup>68</sup> Cleary (n 23) 19.



your opponent's sword, but not to look at it'.<sup>69</sup> Here, the guidance for advocates would be — do not overly focus on the specifics of your opponent's use of law and fact, be aware of their general strategy and how they hope to deliver the “killing” blow.

Musashi spends a significant amount of time, relative to his other points, on five formal techniques (separate from specific strikes) for striking an opponent. The details are not important here;<sup>70</sup> what is, however, is the fact that they all begin from a specified ‘guard’ position (upper, middle, lower, right-hand and left-hand). The “guard” is the position a swordfighter takes at the beginning of the duel.<sup>71</sup> Key aspects of it include the placement of the feet (and as a result the positioning of the hips) and the orientation of the swords. Unsurprisingly, the adopted guard limits the speed and effectiveness of both attacking and defensive movements of the sword.<sup>72</sup> There are not five different forms of preparation for a fighter.<sup>73</sup> Instead, the point is that without sufficient preparation, there is not the solid basis for a successful strike.

Preparation is said to be key for lawyers. For Younger, the ‘chief, the central principle of advocacy, in all its parts and in every aspect, is preparation’.<sup>74</sup> Mauet and McCrimmon devote their entire first chapter to “Preparation for Trial”.<sup>75</sup> Glissan, on his opening page of text, says, “By the time you enter court you will have the entire case analysed by fact and law and prepared according to a plan which you have spent days, perhaps weeks, developing’.<sup>76</sup> The link between an advocate's preparation and Musashi's guard is evident in “Thorough preparation is essential as a *foundation* for competent advocacy’.<sup>77</sup> Without sufficient preparation, there cannot be the solid basis from which to launch an attack, and without a solid basis, any hit will be weak and ineffectual.<sup>78</sup>

Musashi then describes a range of strikes used in his school using evocative language including the ‘running water’ stroke,<sup>79</sup> the ‘flint

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<sup>69</sup> Groff (n 42) 86.

<sup>70</sup> The five techniques relate to the directions in which the sword is moved from the initial guard position. The guard positions include the sword being held in front, the hands at the level of the stomach, with the blade pointing at the opponent; and they include the sword being held to the side, the blade point downwards and to the rear.

<sup>71</sup> Bennett (n 47) 88–93.

<sup>72</sup> Again, in *Duel at Ichijoji Temple*, Musashi wins his duel with Sanjuro because he, after taking a middle guard position, moved his sword to a lower guard. Sanjuro thought that he had an opening to attack, as a result of the change of guard. Musashi had anticipated this and succeeded with his counterstrike.

<sup>73</sup> It may be possible to differentiate legal positions based on the number of witnesses; it may also be possible to discuss bad guards in terms of the deployment of badly drafted documentation (including witness statements), but those possibilities go beyond the high-level assessment presented here.

<sup>74</sup> (n 22) 18.

<sup>75</sup> Thomas Mauet and Les McCrimmon, *Fundamentals of Trial Technique* (Lawbook, 4<sup>th</sup> Australian ed, 2018) 1–30.

<sup>76</sup> (n 6) 2.

<sup>77</sup> Hampel, Brimer and Kune (n 27) 19, emphasis added. This is the opening sentence to their Chapter on “Preparation and Analysis”.

<sup>78</sup> Munkman makes the connection explicitly, ‘Corresponding to the firm base of the military commander, the foundation of strategy in advocacy is a sure knowledge of the case’: (n 17) 168.

<sup>79</sup> Wilson (n 7) 78.

strike’<sup>80</sup> and the ‘autumn leaves hit’.<sup>81</sup> The concept of a strike itself, here, is more mundane and is limited to the words deployed by counsel (whether in documentary or oral form). This is unsurprising given that law is a discipline of words. More specifically, however, a strike can be seen as the use of evidence — either as an attack on the defendant that they breached their obligation (in either a civil or criminal court) or a retaliatory strike saying that they did not. Perhaps the key strike, however, for a lawyer is the closing address or the summation — for Musashi, the ‘means to gain victory by the accuracy of a single stroke’.<sup>82</sup> For Glissan, the ‘influence of the final speech cannot be overestimated’.<sup>83</sup> Younger links it with cross-examination, asserting that effective cross-examination will make the ‘lawyer’s argument’ in the summation, irresistible and a favourable verdict inevitable’.<sup>84</sup> Finally, it is ‘imperative ... that your closing argument logically and *forcefully* presents your side’s theory of the case ... and the reasons why your side is entitled to a favourable verdict’.<sup>85</sup> These final words are what enables a lawyer to cut down the case of the other side and give them victory.

The corollary is that a deployment of law by a lawyer (for example, in the form of an objection) is better seen as a parry.<sup>86</sup> ‘When you attack an opponent ... making as if to stab him in the eyes, you dash his sword to your right with your sword, thus parrying it’.<sup>87</sup> This quote reinforces that any good parry is still aimed at being an attack — it is not simply to defend. With respect to objections specifically, Glissan says, ‘only object when you are on strong ground’.<sup>88</sup> Further, the timing of the parry is important, the ‘idea ... is not to hit particularly hard ... [but] it is essential to be the first to hit and the first to strike’.<sup>89</sup> Again, for Glissan,

The question of when to object may be answered in one word: instantly. Objections to improper questions should be made before the answer is given.<sup>90</sup>

In other words, strike a blow with the law, before the opponent gets to strike with their fact. Alternatively, a strike (a fact) from one lawyer

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<sup>80</sup> Bennett (n 47) 96.

<sup>81</sup> Ibid.

<sup>82</sup> Cleary (n 23) 31.

<sup>83</sup> Glissan (n 6) 182. Though Hampel, Brimer and Kune only raise the ‘final address’ as an example of where ‘effective argument’ should be: (n 27) 127. (n 22) 49.

<sup>84</sup> Mauet and McCrimmon (n 75) 255, emphasis added.

<sup>85</sup> Rendering fact as the *katana* and law as the *wakizashi*.

<sup>87</sup> Cleary (n 23) 28. Musashi says there are only ‘three parries’: *ibid.* The differences between them are not important here.

<sup>88</sup> (n 6) 247.

<sup>89</sup> Cleary (n 23) 30. Here he is referring, specifically, to the ‘slapping parry’. More broadly, “timing”, a common term in ball sports, refers to interaction of an individual’s perception, their (often unconscious) decision-making, their muscle control and body movement and external stimuli, including, but not limited to, the actions of their opponent.

<sup>90</sup> (n 6) 170.

should be aimed to miss both the facts and law offered by their opponent.

The final concept from the Water Scroll to be discussed is “intent”. Musashi distinguishes “striking” from “hitting”: ‘Hitting means something like running into someone ... A strike is when you consciously and deliberately strike the blow you intend to strike’.<sup>91</sup>

Musashi is not saying that “hits” cannot be effective; however, he is saying that an attack should be backed up by clear intent.<sup>92</sup> The deployment of facts in litigation, then, should be similarly backed by intent. With respect to witnesses, ‘One good witness is better than three poor witnesses’.<sup>93</sup> With respect to the evidence: the ‘aim of examination-in-chief is to elicit from the witness a complete, orderly story, told ... [in their] natural way, with the minimum of prompting’.<sup>94</sup> Finally, for cross-examination, ‘Never ask a question to which you do not already know the answer’.<sup>95</sup> Every cut of the lawyer’s swords should be precise and accurate — the intent behind every aspect of their case should be clear, with this going back to the preparation of the case.<sup>96</sup>

Musashi’s ‘Epilogue’ to the Scroll contains the assessment that ‘Studying and practicing each item in this book, fighting with numerous opponents, you gradually attain the principles of the science; keeping it in mind at all times, without any sense of hurry, learning its virtues whenever the opportunity arises’.<sup>97</sup> Overall, then, Musashi’s school necessitates reflection and practice. Such exhortations are also evident in texts on advocacy. For the Australian Advocacy Institute, ‘advocacy can and should be taught as a set of skills and techniques by the workshop method’.<sup>98</sup> In other words, learning through practice, through *doing* — the ‘older I get the better I was’.<sup>99</sup> Or, as noted by Younger: it is only after an advocate has ‘tried ... twenty-five’ cases that they ‘begin to know what to do’.<sup>100</sup>

The takeaways for the Water Scroll are:

- Be clear, and confident, in the basis of your case — everything is grounded in your preparation
- Keep your mind settled — a calm mind is an aware mind

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<sup>91</sup> Cleary (n 23) 26.

<sup>92</sup> A humorous take on this is in *Yojimbo* (Kurosawa Productions, 1961). In one scene, the two mobs of guards are shown facing off. They’re all waving their swords in an imprecise manner, too scared to actually close and do battle. There is no True intent in their actions.

<sup>93</sup> Glissan (n 6) 12.

<sup>94</sup> Munkman (n 17) 41.

<sup>95</sup> Younger (n 22) 19.

<sup>96</sup> Extending the metaphor, a strike cannot have intent, and be effective, unless the stance that the swordfighter takes is solid and well-grounded. Newtonian physics dictate that the power of a physical action comes from pushing off from the ground, the power of a lawyer’s action comes from pushing off from their preparation.

<sup>97</sup> Cleary (n 23) 32.

<sup>98</sup> Hampel, Brimer and Kune (n 27) xxii.

<sup>99</sup> An American ‘saying’ that Glissan reproduces with approval: (n 6) 5.

<sup>100</sup> (n 22) 18.

- Everything builds, and must be designed to build, toward the closing address
- Trial advocacy is a set of skills to be learned, to be practised, to be learned, to be practised, to be learned, to be practised...

Fighting with blades cannot be taken lightly. Standing in court to further your clients' interests also must not be taken lightly.

### C *The Fire Scroll*

The Fire Scroll focuses on 'combat'.<sup>101</sup> Musashi's key purpose is to help the reader 'understand the strength and weakness of opponents' swords'.<sup>102</sup> While not expressed as such, the points highlighted in this section focus on the dynamic (physical) relationship between the two fighters and how it can be manipulated by a combatant. The best analogy for it in the courtroom is cross-examination; and, as such, the witness themselves can be seen as an opponent.

First, there is the exhortation to position yourself appropriately — with the sun, or fire, to your back, and to take the higher ground.<sup>103</sup> Manoeuvre and unsettle them by moving them to 'places where the footing is bad or there is an obstruction on either side'.<sup>104</sup> Linked to this is the analogy of 'traversing critical points'<sup>105</sup> — you should 'know the enemy's strengths and have a firm grasp of your own capabilities'<sup>106</sup> in order to 'attack the enemy's weak point and to put yourself in an advantageous position'.<sup>107</sup> In other words, take as much control of the interaction as possible.<sup>108</sup> At one level, this means act decisively, with the actions being made in the context of the knowledge of your own position and strengths, as well as those of your opponent.<sup>109</sup>

In terms of the initial position taken, for Hampel, the 'purpose of cross-examination is to lay a foundation for your final address, [so]

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<sup>101</sup> Groff (n 42) 58.

<sup>102</sup> Ibid 128.

<sup>103</sup> Musashi, in *Duel at Ganryu Island*, chooses to fight with the rising sun of dawn at his back — despite that meaning he is walking in ankle-deep water.

<sup>104</sup> Cleary (n 23) 35.

<sup>105</sup> Bennett (n 47) 113.

<sup>106</sup> Ibid 114.

<sup>107</sup> Harris (n 19) 68.

<sup>108</sup> This includes after the adversary has attacked: 'When an opponent lashes out with his sword, you overpower his assault by stomping the sword down with your foot, seeing to it that he cannot strike a second time': Cleary (n 23) 39. Musashi emphasises that "stomp" should not be meant literally, it is not meant to be limited to the physical use of the foot. It describes stifling the opponent's action by immediately and assertively seizing the initiative and thus taking the locus of control. For Easton, the advocate 'must be prepared to immediately respond' to an unexpected answer: (n 57) 300. They must "stomp" in order to limit the damage and to counterattack.

<sup>109</sup> The last point was expanded on in the section "Knowing the State of Affairs" — 'knowing conditions, knowing where your opponents flourish or fall, knowing the number of their allies, which means taking in the lay of the land, clearly observing your opponent's condition': Wilson (n 7) 103–4. Musashi adds, 'If you study relentlessly ... you will come to think of the enemy troops as your own and be able to command them to move as you see fit': Bennett (n 47) 125.

cross examination must be directly related to your case theory ... [as such,] before you cross examine a witness, you must know what your arguments will be'.<sup>110</sup> That is, without being clear of the basis, the lay of the land, of cross examination, it is not likely to succeed. With respect to awareness, for Wellman,

proficiency ... requires the greatest ingenuity; a habit of logical thought; clearness of perception in general; infinite patience and self-control; power to read men's minds intuitively, to judge of their characters by their faces; to appreciate their motives; ability to act with force and precision ... and above all, the *instinct to discover the weak point* in the witness under examination.<sup>111</sup>

More specifically, an advocate should 'be aware of the decision-maker, and of how the decision-maker is responding to the evidence'.<sup>112</sup> Finally, Munkman emphasises the need for 'strong material' in cross-examination.<sup>113</sup> Without that base strength, the attack will fail.

With respect to the battle with witnesses, "control" has been emphasised by a number of writers. Most generally, 'Remaining in control of a cross-examination is essential'.<sup>114</sup> For Younger, an advocate should 'not permit the witness to explain',<sup>115</sup> as to do so gives them control of the narrative. This is also linked to his Commandment, already referred to, that a lawyer "should never ask a question to which [they] do not already know the answer".<sup>116</sup> Again, the advocate must control what evidence goes from the witness to the finder of fact. Even the 'old adage. "the best cross-examination is no cross-examination"<sup>117</sup> is relevant here — if, on reflection, the grounds for battle with the witness do not guarantee victory, do not start the fight.<sup>118</sup> And, of course, 'cross-examination opens the gates to re-examination'.<sup>119</sup> This means that an advocate must know the value of a question to their case, and know the risks to their position posed by opening up a fact for re-examination.

It is important to maintain an awareness of the dynamics of the battle, and to use that awareness to anticipate and pre-empt the opponent's actions. Musashi deploys the concept: 'to hold down a

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<sup>110</sup> George Hampel, 'Conducting Cross-Examination' in Elizabeth King, Rianne Letschert, Sam Garkawe and Erin Pobjie (eds), *Victim Advocacy before the International Criminal Court* (Springer, 2022) 126.

<sup>111</sup> Francis Wellman, *The Art of Cross-Examination* (Macmillan, 1935) 8. And, of course, Younger's above-mentioned exhortation to "anticipate" everything relates to having knowledge of the battleground, and of the opponent.

<sup>112</sup> Hampel, Brimer and Kune (n 27) 92. The authors make the point with respect to examination in chief, but it is equally applicable to cross- and re-examination. (n 17) 76.

<sup>113</sup> Glissan (n 6) 109. For Hampel, propositional questions are 'vital to the cross-examiner's ability to control the witness': (n 110) 128. (n 22) 20.

<sup>114</sup> Ibid 19. Wellman attributes the sentiment to David Graham, though Wellman suggests that it may have been said 'more in jest than anything else' (n 111) 23.

<sup>115</sup> Mauet and McCrimmon (n 75) 208.

<sup>116</sup> For Glissan, 'Cross-examination is inherently risky', so an advocate should always ask, "Is my cross-examination necessary?": (n 6) 89.

<sup>117</sup> Hampel (n 110) 133.

pillow'.<sup>120</sup> Its meaning includes 'whenever the opponent evinces any sign of intending to make a move, you perceive it before he acts ... [enabling the] stopping [of the] opponent's attack at the initial outset';<sup>121</sup> and 'the important thing in strategy is to suppress the enemy's useful actions but allow his useless actions'.<sup>122</sup> He also said that 'you should put yourself in an opponent's place and think from the opponent's point of view'.<sup>123</sup> And, when in a 'stalemate',<sup>124</sup> 'it is essential to change your thinking immediately, assess your opponent and understand how to gain the victory by another method'.<sup>125</sup> On the other hand, 'when you and opponents ... are facing off and it is not clear who will prevail ... you stick tight to your opponent, so that you cannot be separated, and in that process find the advantage'.<sup>126</sup> Finally, 'it is bad to repeat the same thing several times when fighting the enemy ... if you attempt a technique which you have previously tried unsuccessfully and fail yet again, then you must change your attacking method'.<sup>127</sup> Expressed differently, 'if the opponent expects mountains, give him the sea; if he expects the sea, give him mountains'.<sup>128</sup>

The combativeness of cross-examination is emphasised in the language of Munkman. For him, three of the aims of the process are 'to *destroy* the material parts of the evidence-in-chief; to *weaken* the evidence ... and to *undermine* the witness'.<sup>129</sup> That said, there are limits, in 'civil, and to an increasing extent criminal, cases, the rules ...

<sup>120</sup> Harris (n 19) 67. Similarly, but not identically, Munkman discusses 'pinning down an evasive witness': (n 17) 109.

<sup>121</sup> Cleary (n 23) 37.

<sup>122</sup> Harris (n 19) 67–8. Further, 'in the midst of fighting, when your adversary's rhythms are thrown off, strike at the point where he begins to collapse. If you ... let it go by, he can recover and renew his attack': Groff (n 42) 143.

<sup>123</sup> Cleary (n 23) 40. An extreme visual example of this is from the film *Hero* (Sil-Metropole, 2002) in which the nameless hero visualises the entire duel with Long Sky before crossing blades. Two aspects of the choreography of the fight scene are worth highlighting — Long Sky heeding how nameless ran, to get a sense of how he moved; and nameless using his scabbard as a parrying tool (not quite two swords).

<sup>124</sup> Bennett (n 47) 117.

<sup>125</sup> Wilson (n 7) 108. In the film *Zatoichi* (Bandai Visual, 2003), Zatoichi won his duel against Gonnosuke on the basis that he knew that the bodyguard would expect him to use a particular grip on the sword (because Zatoichi had used it when they had interacted before). Zatoichi changed his grip in the split second before drawing and prevailed. Also of note is that fact that the titular character chose to keep his eyes closed throughout most of the film because, according to him, blind people sense better. There is also an emphasis on rhythm throughout the movie — emphasised through the use of the dance group The Stripes as background characters.

<sup>126</sup> Cleary (n 23) 43. Kaufman includes, in his version, the broad assessment that it is 'necessary to feint ... to open up the enemy, forcing him to show his strengths and weakness': (n 46) 66. The other translations however, limit this to 'large-scale military science', not one-on-one combat (e.g., Cleary (n 23) 41). Munkman, in a similar vein, discusses 'probing' an opponent as a technique of cross-examination: (n 17) 77–89.

<sup>127</sup> Harris (n 19) 78.

<sup>128</sup> Brown et al (n 5) 76.

<sup>129</sup> (n 17) 52, emphasis in the original. The fourth was to 'elicit new evidence': *ibid.* The High Court has, in more muted terms, said that 'Confrontation ... is of central significance to the common law adversarial system of trial': *Lee v The Queen*, quoted in Hampel, Brimer and Kune (n 27) 103. The authors, nonetheless, note that advocates themselves should not be 'confrontational': *ibid.* 121.

have largely abolished trial by ambush'.<sup>130</sup> The notion of "holding down the pillow", figurately speaking, on a witness is behind the "Commandment" that

Every question on cross-examination should put words into the witness's mouth: all the witness need do is reply, in strict rhythm, "Yes", "No" or "I don't know". That is how a clever advocate controls a witness, and controlling the witness, making him say only what the advocate wants him to say, is the whole idea of cross-examination.<sup>131</sup>

This control is about not letting the witness have any room to move.<sup>132</sup> This control also needs to extend to the advocate themselves. For Younger, the lawyer must 'not quarrel with the witness'<sup>133</sup> — to do so would be to focus on the "minutiae" — and must know when to stop.<sup>134</sup> The goal of cross-examination is the summation, the "large perspective" of Musashi — to 'cross-examine merely for emphasis or about a minor issue can be risky'.<sup>135</sup>

With respect to tactics, 'inflict a wound on a corner of your opponent's body and, as his body grows a little weaker and begins to slump, victory will be an easy matter'.<sup>136</sup> Further, 'we can confuse the enemy by attacking with varied techniques ... feint a thrust or cut, or make the enemy think that you're going to close with him, and when he is confused you can easily win'.<sup>137</sup> And, 'when your opponent is not as skilled as you are, or when his rhythm is fouled up, or when he starts to back off, it is essential to not let him catch his breath'.<sup>138</sup>

With respect to the quality of the opponent, or more specifically, the lawyer on the other side, Younger highlights that some may 'neglect' to take advantage of a tactical error,<sup>139</sup> but that is not a reason to adopt a loose strategy. The guidance around tactics generally can be applied to the courtroom. Attacking the witness is a valid, yet limited,

<sup>130</sup> Mauet and McCrimmon (n 75) 208. More generally, 'surprise is not a major element of most modern trials': Easton (n 57) 282.

<sup>131</sup> Younger (n 22) 19. Easton suggests that the witness be controlled by getting them to use the same answer, such as "yes" for all questions: (n 57) 289; more generally, it is a "how" question that turns control of the courtroom over to the witness': ibid 307.

<sup>132</sup> Witnesses, particularly experienced, expert witnesses, can think for themselves: Easton (n 57) 304. As a result, the questions have to be prepared to control them such that they can display no independence.

<sup>133</sup> (n 22) 20. That does not mean that 'you have to make [them] comfortable during cross': Easton (n 57) 318.

<sup>134</sup> (n 22) 19.

<sup>135</sup> Hampel (n 110) 133.

<sup>136</sup> Wilson (n 7) 113–4.

<sup>137</sup> Harris (n 19) 76.

<sup>138</sup> Cleary (n 23) 45. As a warning, Musashi added, 'Once the stuffing has been knocked out of the enemy, there is no need to keep fixed on him. If this is not the case, continue to maintain vigilance. It is difficult to destroy an enemy who still harbours a residual spirit to fight': Bennett (n 47) 124. For Munkman, an advocate may end up being 'satisfied that, with the weight of evidence produced against him, he is certain to lose: he must then make a quick decision and seek honourable terms before he is forced to unconditional surrender': (n 17) 172. The battle metaphor of Munkman is obvious, the quote is important also for the spirit of "giving up" and the need for self-awareness in order to limit unnecessary damage.

<sup>139</sup> (n 22) 20.

courtroom tactic. Younger has “Nine Pigeonholes of Impeachment”.<sup>140</sup> These relate to attacking their credit, including their capacity to perceive and recall relevant facts. The more effective these attacks, the more damage will be suffered by the opponent’s case. With respect to “various manoeuvres”, Easton suggests that an advocate prepare ‘more questions than [they] will actually use’, so that, as the trial progresses and emphases shift, the advocate ‘use[s] only the questions ... drafted for the issues that have become important’.<sup>141</sup> There is also the ‘baiting of the trap and leading the witness into it’.<sup>142</sup> Finally, there is the tactic of “escalating” questions — using a ‘preliminary series of independently unimportant questions ... to set up a final question that is important’.<sup>143</sup> This returns then to the need, in Musashi and for advocates, to control the battle, to get the victorious outcome that is set out in the preparation.

The takeaways for the Fire Scroll are:

- You must take a position that is aware of, and relative to, your opponent’s
- Cross-examination is an exercise in both control and awareness
- Each successful interaction weakens your opponent, even if only a little

#### D *The Wind Scroll*

The Wind Scroll is of less value to this article as it is here that Musashi writes about the other sword-fighting schools that he had encountered. Given that there is not the understanding of different “schools” of advocacy, it does not have as much to say. That said, given that his assessment was on how the other teachings produce a ‘wayward spirit’ drawing students from the ‘True Way’,<sup>144</sup> there is to be some engagement with the material in the Scroll. The focus, however, will be on what not to do when battling your opponent.<sup>145</sup>

His Introduction to the Scroll notes that other ways of fighting are ‘theatrical, dressing up and showing off ... they are not the true Way’.<sup>146</sup> He then asks, ‘Just learning to swing a sword, to move their bodies effectively or concentrating on how to control their hands: have they truly understood how to achieve victory?’<sup>147</sup> With respect to the latter, a ‘competent advocate must be more than someone performing

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<sup>140</sup> Reproduced in Hampel (n 110) 129–130.

<sup>141</sup> (n 57) 281.

<sup>142</sup> *Ibid* 302.

<sup>143</sup> *Ibid* 298, discussing Younger’s Fourth Commandment.

<sup>144</sup> Bennett (n 47) 73.

<sup>145</sup> The seriousness of this is evidenced by Glissan’s discussion of the ‘deadly sins of cross-examination’: (n 6) 140–9.

<sup>146</sup> Cleary (n 23) 49. Linking this with the use of weapons, ‘Teaching myriad sword techniques is essentially exploiting the Way as a commercial venture ... Thinking there are assorted ways to strike a man with a sword is indicative of a confused mind’: Bennett (n 47) 134.

<sup>147</sup> Groff (n 42) 176.



“to the best of his or her knowledge, skill and ability”<sup>148</sup>. The simple expression of skills is not enough.<sup>149</sup> With respect to the former, Musashi’s assessment that others schools are ‘just full of pretentious talk’<sup>150</sup> ties in with the advice to use ‘simple, sensory, language’.<sup>151</sup> This was expanded on by Easton: ‘when you enter a courtroom in a jury trial, forget that you ever learned words that only lawyers use’.<sup>152</sup> In closing, whether to a judge or jury, ‘avoid a lecturing or oratorical style’.<sup>153</sup> Or, in a form closer to Musashi, ‘language should not be flowery, flamboyant or unnecessarily formal’.<sup>154</sup> Finally, a ‘skilled barrister should avoid being overly theatrical’<sup>155</sup> — they have a job to do, one with a ‘seriousness of purpose’,<sup>156</sup> and all their actions should be directed to that purpose.

A focus of the difference between Musashi’s approach and others is the choice, and use, of blades. Some schools, for example, ‘have a liking for extra-long swords ... they do not appreciate the principle of cutting the enemy by any means’.<sup>157</sup> ‘Since ancient times it has been said that the great includes the small, so it is not a matter of indiscriminately disliking length; it is a matter of disliking the attitude of bias in favour of length’.<sup>158</sup> Similarly, there is ‘no point in unreasonable fondness for a shorter sword’.<sup>159</sup> ‘Some men use a shorter long sword with the intention of jumping in and stabbing the enemy at the unguarded moment when he flourished his sword ... [such an] aim ... is completely defensive’.<sup>160</sup> With respect to attacks,

There should be no such thing as strong sword blows or weak sword blows ... When facing an enemy in mortal combat, nobody thinks of striking weakly or powerfully ... one only thinks of the death of the enemy.<sup>161</sup>

The focus of some schools on the ‘attitudes of the long sword is a mistaken way of thinking ... “attitude” applies when there is no enemy’,<sup>162</sup> others on where the eyes should be ‘fixed’.<sup>163</sup> Either of these

<sup>148</sup> Hampel, Brimer and Kune (n 27) xxii, quoting the “admission oath/affirmation”.

<sup>149</sup> Hampel notes that lawyers develop over time: ‘A beginner should be conservative. An experienced cross-examiner is able to make a better assessment of the witness during cross-examination to determine whether the witness is likely to be cooperative and is more likely to be able to get out of trouble by dealing with difficult situations if they arise’: (n 110) 133.

<sup>150</sup> Groff (n 42) 173.

<sup>151</sup> Mauet and McCrimmon (n 75) 92.

<sup>152</sup> (n 57) 285.

<sup>153</sup> Hampel, Brimer and Kune (n 27) 136.

<sup>154</sup> *Ibid* 17.

<sup>155</sup> *Ibid* 199–200.

<sup>156</sup> *Ibid* 201.

<sup>157</sup> Harris (n 19) 86. Kojirō, Musashi’s foe in *Duel at Ganryu Island*, was noted for his “drying pole”, an extra-long katana. Musashi, in the boat across to the island, fashioned a long bokken (wooden sword) out of a boat oar. He won the duel, showing that he did not overly-favour, and did not rely on, the standard-length katana.

<sup>158</sup> Cleary (n 23) 50.

<sup>159</sup> Harris (n 19) 88.

<sup>160</sup> Cleary (n 23) 52.

<sup>161</sup> *Ibid* 51. Similarly, with a ‘long sword, there is no such thing as killing with greater speed ... if you try to cut too quickly, you will not be able to cut at all’: *ibid* 57.

<sup>162</sup> Harris (n 19) 90.

<sup>163</sup> Kaufman (n 46) 94.

are a ‘distraction’.<sup>164</sup> Fixing the eyes, for example, on ‘one special place, confuses the mind’;<sup>165</sup> instead, should be a broader ‘perception’<sup>166</sup> and the fighter should not be limited by the initial mindset. Other schools focus on different styles of footwork — again, any specific step may lead to a ‘fixation’.<sup>167</sup> This is why for Musashi, ‘the footwork does not change ... I always walk as I usually do in the street’.<sup>168</sup>

Key here is the extent to which other schools emphasise one aspect of combat — whether it be sword length, or footwork — over all the others. To begin, ‘courts will not consider evidence that is found to be inadmissible’<sup>169</sup> — so, wielding inadmissible facts, as if they are evidence, whether documentary or oral,<sup>170</sup> is akin to flailing uselessly with a sword. It is both a waste of energy (resources of time and money) and liable to make the wielder look foolish. ‘Let us avoid asking questions recklessly, without any definite purpose’.<sup>171</sup> Similarly, ‘do not cross-examine for the sake of it just because you may see a potential weakness in the evidence; mere “point scoring” is unnecessary and may be counter-productive to your case’.<sup>172</sup> Further, too great a focus on unnecessary facts is counter-productive at trial — Younger ‘believed an ideal cross-examination should support three, two, or (best of all) one point(s)’.<sup>173</sup> Do not let the witness add facts that are not necessary — ‘you cannot let the witness explain’.<sup>174</sup> ‘Do not ask the one question too many’<sup>175</sup> — because it may “open the door” to ‘otherwise inadmissible material’.<sup>176</sup>

In short, it is ‘only a matter of understanding [the sword’s] effective qualities in your heart and mind; this is what is essential to martial art’.<sup>177</sup> An advocate’s sword is the facts that they have to deploy — they must be precise, the ‘points of law and issues of fact [should] be clearly defined and presented to the court and jury in the fewest possible

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<sup>164</sup> Cleary (n 23) 54.

<sup>165</sup> Wilson (n 7) 135. A filmic example of this is the training duel in *The Last Samurai* (Radar Pictures, 2003) between Algren and Ujio. Algren keeps losing the bouts until he is told to empty his mind — to stop focusing on the minutiae and open his perception. The next practice duel was a draw.

<sup>166</sup> Cleary (n 23) 55.

<sup>167</sup> Ibid.

<sup>168</sup> Harris (n 19) 93. In *Duel at Ganryu Island*, in his fight with Kojirō, he steps as he normally steps (this is a re-enactment of Musashi’s most famous, and apparently final, duel so it occupies more screentime than his other bouts.

<sup>169</sup> Hampel, Brimer and Kune (n 27) 41.

<sup>170</sup> A ‘good witness statement is ... based on relevant and admissible evidence’: ibid 163.

<sup>171</sup> Wellman (n 111) 19.

<sup>172</sup> Hampel (n 110) 126.

<sup>173</sup> Easton (n 57) 283.

<sup>174</sup> Ibid 307.

<sup>175</sup> Mauet and McCrimmon (n 75) 20.

<sup>176</sup> Easton (n 57) 321, quoting Younger.

<sup>177</sup> Cleary (n 23) 58.

words’,<sup>178</sup> the evidence must be, and be only, ‘relevant and material’.<sup>179</sup> They must be wielded with intent — an advocate should not be ‘willing to wound but afraid to strike’ in cross-examination.<sup>180</sup> Overall, the ‘movements of a master in some discipline will not appear fast ... a skilled practitioner never appears to be rushed.’<sup>181</sup> Younger asks, ‘Why don’t lawyers understand, as do practitioners of all other arts, sciences and mysteries, that simplicity marks the master?’<sup>182</sup> For Glissan, examination-in-chief is ‘underestimated most likely because when well done it appears so effortless’.<sup>183</sup> With respect to performance, for Hampel, ‘it is best to assume a demeanour in cross-examination which is conversational, not aggressive or confrontational’<sup>184</sup> — that is, “relaxed”. In order to show that level of skill, the advocate must study and practice; or, as Musashi says in various ways throughout his text, ‘research this principle well and train diligently’.<sup>185</sup>

The takeaways for the Wind Scroll are:

- Mere performance of skills is not enough
- An over-emphasis of any individual skill is not enough
- Proper intent is key

Here, “proper intent” is a term of art — both in terms of what constitutes “proper” and what constitutes “intent”.

### E *The Emptiness Scroll*

The final scroll is, perhaps, the hardest to understand from a modern, Western, perspective, despite the translation of the Scroll extending to only a couple of pages. Relevant here is that emptiness allows *principled* action: ‘With forthrightness as the foundation and the true spirit as the Way, enact strategy broadly, correctly and openly’.<sup>186</sup> Engagement with Emptiness is the stage in the pursuit of the Way at which the purpose is clear and when *proper* actions — with “proper” here having moral connotations<sup>187</sup> — are both clear and put into practice. This understanding, as noted above, links with mindfulness.

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<sup>178</sup> Wellman (n 111) 3–4.

<sup>179</sup> Glissan (n 6) 46. Noting, of course, that the *Evidence Act 1995* (Cth) states: ‘Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding’: s 56(1).

<sup>180</sup> Glissan (n 6) 148.

<sup>181</sup> Bennett (n 47) 139.

<sup>182</sup> (n 22) 19.

<sup>183</sup> (n 6) 46.

<sup>184</sup> (n 110) 134.

<sup>185</sup> Harris (n 19) 92.

<sup>186</sup> *Ibid* 100. This can be linked with an advocate’s reputation – which ‘takes time, effort and vigilance to acquire’: Hampel, Brimer and Kune (n 27) 13 – of note is the fact that the three authors discuss reputation in their chapter on “Ethics and Etiquette of Advocacy”.

<sup>187</sup> It is difficult to show proper conduct in a cinematic swordfight. Inagaki did it, in *Duel at Ichijoji Temple*, by having Musashi recall, after having Seijuro at his mercy (on the ground, with a cut to his arm), an old man (possibly a priest or a swordmaster) telling him, that “swordsmanship is chivalry”. Musashi does not deliver a killing strike.

The Book of Five Rings ends with, ‘In emptiness exists good but not evil. Wisdom is existence. Principle is existence. The Way is existence. The mind is emptiness’.<sup>188</sup>

Beyond and beneath, therefore, the mindset and the techniques of Musashi’s approach to sword-fighting, there is justice and there are principles.

It is not surprising, then, that the Way of the advocate is here tied to the Way of the warrior. Lawyers are bound by law, ethics and duties. Glissan refers to the ‘formal rules promulgated by the various regulatory bodies’ and lists sixteen ‘duties’ and ‘obligations’ as ‘common attributes of all systems’.<sup>189</sup> Hampel, Brimer and Kune only list, and expand on, twelve.<sup>190</sup> In an oft-quoted speech, it was said

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument and ask every question, however distasteful, which he thinks will help his client’s case. But, as an officer of the court concerned with the administration of justice, he has an overriding duty to the court, to the standards of the profession and to the public.<sup>191</sup>

This, of course, highlights the underlying moral obligations, as well as the requirements to wield the sword of fact whenever necessary to win for the client.<sup>192</sup>

Also quoted by Mauet and McCrimmon are Blake and Ashworth:

One practical reason why ethics are import resides in the indeterminacy of legal rules, and indeed the absence of legal rules on some points. Practitioners are inevitably left with discretion, which requires a choice or judgment to be made. Where there are professional codes of conduct, they do not cover all areas and they sometimes lack specificity.<sup>193</sup>

In other words, good lawyers, those practised in the way, understand how such decisions — based on what is “not there” in Musashi’s sense of Emptiness — should be made because they are trained in, and practice, the True Way of the advocate.

The takeaways for the Emptiness Scroll are:

- The way of the advocate is good, it is principled, it is wisdom
- When an advocate is on the Path, their mind is empty as to questions of good and evil

<sup>188</sup> Wilson (n 7) 148.

<sup>189</sup> (n 6) 239.

<sup>190</sup> (n 27) 12–13.

<sup>191</sup> *Rondel v Worsley* [1969] 1 AC 191, 227, Lord Reid, quoted in Mauet and McCrimmon (n 75) 308. Of note is the fact that lawyers were only said to owe specific duties in the nineteenth century (for example, *Davies v Clough* (1837) 8 Sim 262, 267). Prior to that, though, they were referred to as ‘officers of the court’ (for example, *Gerrard’s Case* (1777) 2 W. Bl. 1123, 1125). Both characterisations can be said to broadly link with the underlying morality of the time — see, generally, Chris Dent, ‘The Introduction of Duty into English Law and the Development of the Legal Subject’ (2020) 40(1) *Oxford Journal of Legal Studies* 158.

<sup>192</sup> Though there is the obligation to ‘not make[e] allegations or assertions without foundation’: Hampel, Brimer and Kune (n 27) 12. That is, all strikes have to have intent and should be able to evade parries of law.

<sup>193</sup> “Ethics and the Criminal Defence Lawyer” quoted in Mauet and McCrimmon (n 75) 320.

As with all the precepts offered here, ‘this must be studied diligently’.<sup>194</sup>

### III THE VALUE OF THE METAPHOR

This overview of the connections between the compilation of advice from a range of experts on advocacy and the work of Musashi is, obviously, not aimed at practising lawyers. Instead, its target is students — those who know a little of the law and, in all likelihood, a lot of the popular representations of the work of a lawyer. This is engaged with explicitly in the texts: a ‘cross-examiner ... should not inject personal views and editorial comments into questions — a technique often used in television courtroom dramas’.<sup>195</sup> The value of metaphor is linked with five aspects of Musashi’s way: the focus on swords, on action, on awareness, on how the three lead to the final outcome, and the training that underlies all combat.

First, ‘soldiers sharpen their own tools’.<sup>196</sup> Swords are useful metaphors because they have to be sharp (focused) to be effective. Strong, simple strikes with the swords are also most effective (unnecessary flourishing weakens the blow).<sup>197</sup> Evidence-in-chief must only be ‘based on relevant and admissible evidence’<sup>198</sup> (that is, facts). Objections (the sword of law) must also be strong and focused. It is not enough that a fact, or precedent, is known to a lawyer, it must also be known how to wield it effectively. This applies whether this is a trial in person, or on the documents. As Musashi said, in battle — as that is what trial is — it is ‘essential that the physical aspect and the mental state both be simple and direct’.<sup>199</sup>

With respect to action, all movement starts from a stance. Preparation is key for both Musashi and lawyers. Before going into battle, an advocate needs to be aware of their strengths, have planned their attacks, and be cognisant of possible, and likely, counter attacks.<sup>200</sup> The portrayal of trial advocacy does not, necessarily, conform with a putative ‘student commitment to truth seeking’.<sup>201</sup> It is about argument, argument that is in line with requirements of the law (the clashing of the blade of law against that of fact) and it is about the duties of the lawyer to court and client (the Way of the advocate). Expressed differently, this focus on action is an emphasis on control. Good advocacy (and combat) requires control of the self (in terms of practices), control of the opponent (most obviously with respect to witnesses) and control of the case (starting again from its preparation).

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<sup>194</sup> Cleary (n 23) 43.

<sup>195</sup> Mauet and McCrimmon (n 75) 317.

<sup>196</sup> Cleary (n 23) 8.

<sup>197</sup> ‘Do we detect the weak spot in [the witness’s] narrative? If so, let us waste no time, but go direct to the point’: Wellman (n 111) 20.

<sup>198</sup> Hampel, Brimer and Kune (n 27) 79.

<sup>199</sup> Cleary (n 23) 52–3.

<sup>200</sup> ‘It will always remain essential to prepare the opponent’s case at the early stage in one’s own preparation’: Glissan (n 6) 21.

<sup>201</sup> McCrimmon (n 1) 17.

There is also the importance of the clear goal, the singular purpose — victory. Everything should build towards the defeat of the opponent, whether that be with the final blow of the sword, or the argument contained in the final address. The battle is not won, usually, by a single cut, but the build-up of repeated clashes of law and fact until the final blow is dealt.<sup>202</sup> A sword cut must be full of intent, the argument must be ‘put positively’.<sup>203</sup> From a different perspective — the place from which to start is the ‘closing argument’,<sup>204</sup> everything must build to that.<sup>205</sup> The ‘time for preparing the final address is at the beginning of the case, not at the close of evidence ... the whole case will be conducted on the basis of what you propose to argue in the closing address’.<sup>206</sup> That closing address cannot succeed unless it springs from a secure base; nor can it if the blows of the opponent have failed to be parried successfully.

Awareness is everything in combat. Without knowing how your enemy is standing, you cannot know how they are going to strike with their blades. This applies to how law and facts are deployed in court. There is also the awareness of the different opponents — opposing counsel and their witnesses. The exhortations, above, to listen to witnesses reinforce the need for constant attention in the courtroom. Assessing the demeanour and mood of witnesses, counsel and judges<sup>207</sup> is also important — awareness must be general, rather than focusing on only one or two details. A key failing, perhaps, of law schools is a lack of training around attention — though unengaging lecturers may contribute to any distraction on the part of students.

Overall, then, the use of the metaphor emphasises, not on what students should do, but how they should (mentally) approach the tasks that they need to learn and do. The links with mindfulness have already been made. It, of course, also includes continuous practice/training.

One cannot master the things recorded in this book by just reading the notes and trying to imitate them. They are things that are discovered in a true sense from within oneself. One must exert oneself increasingly and study very hard.<sup>208</sup>

It is not just “learning by doing” but “learning by *action*”. There is

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<sup>202</sup> One of the few cinematic duels that featured, in a relatively realistic way, repeated strikes was in *Harakiri* (Shochiku, 1962). That fight had the duellists Tsugomo Hanshirō and Omodaka Hikikuro, several times, close with a cut and parry and then separate. Tsugomo won after he changed his guard into an unexpected single-handed position. This confused Omodaka, allowing Tsugomo to win. Of note too, is the fact that Tsugomo was fighting for honour, and so merely cut off his opponent’s topknot, rather than kill him.

<sup>203</sup> Hampel, Brimer and Kune (n 27) 135.

<sup>204</sup> Mauet and McCrimmon (n 75) 15.

<sup>205</sup> For Hampel, Brimer and Kune, the only difference between an argument to a judge alone and to a jury is the language used — ‘because there is a common understanding of legal principles ... the language that can be that used between professional people of the same discipline’: (n 27) 128. Other than that, ‘we think it better to approach the judge as another juror’: *ibid.*

<sup>206</sup> Glissan (n 6) 179.

<sup>207</sup> A ‘trial lawyer who knows his judge starts with an advantage that the inexperienced practitioner little appreciates’: Wellman (n 111) 5.

<sup>208</sup> Brown et al (n 5) 33.

no short cut, no royal road to proficiency, in the art of advocacy. It is experience, and one might almost say experience alone, that brings success. I am not speaking of that small minority of men in all walks of life who have been touched by the magic wand of genius, but of men of average endowments and even special aptitude for the calling of advocacy; with them it is a race of experience.<sup>209</sup>

Trial advocacy is not rocket science, but it is, as Wellman says, an “art” — a way of doing, and being, that builds up over time. To return to Wellman, it is a particular way of doing — the ‘family lawyer may have once been competent to conduct ... litigation, but he is out of practice — he is not “in training” for the competition’.<sup>210</sup> That “competition” is do or die.

That said, the metaphor does not have to be understood only in terms of violence. The mindset that Musashi deployed in his duels has significant Zen undertones. There is the ‘spirit of self-reliance’;<sup>211</sup> there is the ‘profound honesty [that] is required in Zen’;<sup>212</sup> and a ‘strong work ethic’.<sup>213</sup> Again, preparation, practice and duties are central to both the *Book of Five Rings* and the law. The confident mindset also was behind Musashi’s art<sup>214</sup> — assessed as being ‘masterpieces of calligraphy and Indian-ink paintings’.<sup>215</sup> He painted in the *sumi-e* style, a form comprised of ‘brushwork amid an otherwise empty background’.<sup>216</sup> As with his use of the sword, the (brush) strokes are the focus;<sup>217</sup> both skills are a ‘path’ to ‘develop the right outlook’.<sup>218</sup> At the core of both his brush and sword work is the attitude, the outlook. To paraphrase the Zen master Takuan Sōhō: ‘If you put your mind in your words — the law, the facts — it will be held there; if you put your mind in your opponent’s words, it will be held there too’.<sup>219</sup> An advocate does not want their mind held, to be controlled. In other words, do not focus on

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<sup>209</sup> Wellman (n 111) 5.

<sup>210</sup> *Ibid* 4.

<sup>211</sup> Brown et al, ‘Introduction’ (n 5) xviii.

<sup>212</sup> *Ibid* xix. This honesty about the self can be linked with the growing role of reflective practice in teaching at law schools. See, for example, Richard Neumann Jr ‘Donald Schon, the Reflective Practitioner and the Comparative Failures of Legal Education’ (2000) 6(2) *Clinical Law Review* 401.

<sup>213</sup> Brown et al, ‘Introduction’ (n 5) xix.

<sup>214</sup> With the confidence being based on preparation, training and a lack of distraction around a fear of failure. Confidence is not arrogance.

<sup>215</sup> Groff, ‘Introduction’ (n 42) 32. Groff includes a reproduction of Musashi’s “Bird on a Branch”; a piece that is not as well-known as his “Shrike on a Dead Tree”.

<sup>216</sup> Brown et al, ‘Introduction’ (n 5) 3.

<sup>217</sup> As a final reference to the movies, *Broken Sword*, in *Hero*, is found in a calligraphy school. He draws each character in sand, repeatedly, as he practises the brushwork that forms the characters.

<sup>218</sup> Brown et al, ‘Introduction’ (n 5), xxx. More fully, his work is a ‘path to enlightenment ... not enlightenment itself’.

<sup>219</sup> *The Unfettered Mind*, tr William Scott Wilson (Kodansha, 1986). The original reads: ‘If you put [your mind] in your right hand, it will be taken by the right hand and your body will lack its functioning. If you put your mind in the eye, it will be taken by the eye and your body will lack its functioning ... No matter where you put it, if you put the mind in one place, the rest of your body will lack its functioning’: at 30. The quotation comes from a letter Takuan Sōhō wrote to Yagyū Munenori, another seventeenth century Japanese sword master, so his sentiments were linked, necessarily, to the minds and actions of swordfighters.

one aspect of the art of advocacy over any other. Any such focus will “hold” your mind — limiting both your awareness and action.<sup>220</sup> Save for those “takeaways” that explicitly refer to an opponent, all are just as valid for the creation of art — whether it be *sumi-e* or film — as they are for duelling and advocacy.

#### IV CONCLUSION

Overall, the use of the metaphor of one-on-one sword combat allows a degree of reflection as a result of the “differentness” of the imagery of facing someone with razor-sharp katana and wakizashi.<sup>221</sup> It allows the imagining of the decisions and preparation of an advocate in light of a readily accessible image of the body and its actions — either from popular culture or even playing as a child (though the latter should not have included actual blades). It is a visual metaphor that breaks a student free of the delimitations of the written word — either from law school or from texts on trial advocacy. Importantly, too, the analogy is quickly communicated. It is not a substantial treatise. It is an article that may be skimmed prior to class — with the added curiosity of it featuring martial arts.<sup>222</sup> It does not have the detail of a 300-page book.<sup>223</sup> None of this is to suggest that the art of the advocate is easy. The art, as for any art, has to be studied and practised in order to be a success at it. The aim, here, is to give enough of the points for students to think about the *practice* of advocacy, the role of training and to imagine the importance of its key aspects — in order for them to transfer the lessons of words into action. As has been said, the ‘only means to truly effective leaning and teaching of the disciplines, skills and techniques of advocacy is ... coaching’.<sup>224</sup>

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<sup>220</sup> To quote the Zen Master again, ‘When facing a single tree, if you look at a single one of its red leaves, you will not see all the others. When the eye is not set on any one leaf, and you face the tree with nothing at all in mind, any number of leaves are visible to the eye ... But if a single leaf holds the eye, it will be as if the remaining leaves were not there’: *ibid* 22.

<sup>221</sup> One limitation, perhaps, of the metaphor is that the “law” blade does not succeed in parrying a blow unless the judge allows it to. Musashi’s *Scrolls* do not allow for the inclusion of the judge in the metaphor. That said, most texts on trial advocacy also make few references to the bench. For example, in Glissan’s text, all entries under “Judges” in the index refer to the chapter on Etiquette: (n 6) 290.

<sup>222</sup> Younger, of course, emphasises the value of satisfying curiosity to convincing a jury of an argument: (n 22) 49.

<sup>223</sup> Glissan’s text, (n 6) is 295 pages long.

<sup>224</sup> Hampel, Brimer and Kune (n 27) xvii.