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## **Responsibilities of Advocate and Solicitor in Malaysia: Revisiting the meaning of misconduct**

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### **Abstract**

The responsibilities of advocate and solicitor include duties towards client, court and the legal profession. Failure to comply with the law relating to the legal profession, advocate and solicitor in Malaysia shall be subjected to disciplinary actions due to misconduct. They shall be struck off as legal practitioners. This paper adopts qualitative research. This paper explains the responsibilities of an advocate and solicitor. This paper suggests that the term "misconduct" is extensive and complicated, and there is a dire need to include the interpretation of the term "misconduct" in section 3 of the Legal Profession Act 1976.

**Keywords:** Responsibilities, Advocate, Solicitor, Misconduct

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### **1.0 Introduction**

Legal profession Act 1976 is the law relating to the legal profession in Malaysia (See Preamble of the Legal Profession Act 1976). This Act is applicable throughout Malaysia but shall only be made applicable to Sabah, and Sarawak with such modifications as the Yang Di-Pertuan Agong may by order make (s. 2 of the Legal Profession Act 1976). Any qualified person may be admitted as an advocate and solicitor (s. 10 of the Legal Profession Act 1976).

Currently, there are 20,384 Advocates and Solicitors in Malaysia (Malaysian Bar, 2021). Advocate and solicitor means an advocate and solicitor of the High Court admitted and enrolled under the Legal Profession Act 1976 (s. 3 of the Legal Profession Act 1976). They are bound to comply with the laws relating to ethics and professional standards of the legal profession. The following are laws relating to ethics, namely (1) The Legal Profession Act 1976 (Act 166), (2) The Legal Profession (Amendment) Act 2012 (A1444), (3) The Legal Profession (Practice & Etiquette) Rules 1978, (4) The Legal Profession (Practice & Etiquette) (Amendment) Rules 1994, (5) Legal Profession (Publicity) Rules 2001 and (6) other Rules & Orders. It is to be noted that failure to comply with the law relating to the legal profession, advocate and solicitor in Malaysia shall be subjected to disciplinary actions due to misconduct.

This paper aims at addressing the issue of misconduct by an advocate and solicitor. It also reviews the implication of misconduct in the legal profession. The example of misconduct of advocate and solicitor will be illustrated through decisions of cases that have developed the law of ethics of the legal profession in Malaysia. This paper is divided into 3 parts. Whilst the first part deals with the responsibilities of the advocate and solicitor towards the client, the second part examines the duties of the advocate and solicitor towards the court. The third

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part looks at the responsibilities of advocates and solicitors to society and the legal profession. This paper attempts to address the issue of whether the meaning of misconduct is to be defined in the Legal Profession Act 1976.

## 2.0 Literature Review

### 2.1 Responsibilities of advocate and solicitor towards the client

The primary obligation of the advocate and solicitor is to give advice on or accept any brief, as can be seen in rule 2 of the Legal Profession (Practice and Etiquette) Rules 1978. Nevertheless, an advocate and solicitor shall not accept a brief if he is or would be embarrassed (rule 3 of the Legal Profession (Practice and Etiquette) Rules 1978), or where he has reason to believe that his professional conduct is likely to be impugned (rule 4 of the Legal Profession (Practice and Etiquette) Rules 1978).

The advocate and solicitor assigned as counsel in any civil or criminal matter shall not ask to be excused for any trivial reason and shall always exert his best effort in that assignment (rule 8 of the Legal Profession (Practice and Etiquette) Rules 1978). For example, in a criminal matter, he shall undertake defence with fair and honourable (rule 9 of the Legal Profession (Practice and Etiquette) Rules 1978). In addition, the advocate and solicitor shall not delay the proceedings (rule 12 of the Legal Profession (Practice and Etiquette) Rules 1978).

It must be noted that the advocate and solicitor is under a duty to uphold client's interest fearlessly, justice and dignity of the profession while acting with all due courtesy to the tribunal before which he appears (rule 16 of the Legal Profession (Practice and Etiquette) Rules 1978). Besides, he has the responsibility to disclose all circumstances to a client (rule 25 of the Legal Profession (Practice and Etiquette) Rules 1978), and he shall not testify in any court on behalf of his client (rule 29 of the Legal Profession (Practice and Etiquette) Rules 1978). Without a doubt, the advocate and solicitor did not abuse confidence reposed in him by the client (rule 35 of the Legal Profession (Practice and Etiquette) Rules 1978).

### 2.2 Responsibilities of advocate and solicitor towards the court

Rule 6 of the Legal Profession (Practice and Etiquette) Rules 1978 provides that an advocate and solicitor shall not accept any brief unless he is reasonably sure to appear in court and represent the client on a required day. He shall maintain a respectful attitude towards the court (rule 15 of the Legal Profession (Practice and Etiquette) Rules 1978) and shall not practice any deception on the court (rule 17 of the Legal Profession (Practice and Etiquette) Rules 1978). As such, it is pertinent for an Advocate and Solicitor to furnish the court any relevant binding decision he is aware of, whether it be for or against his contention (rule 20 of the Legal Profession (Practice and Etiquette) Rules 1978).

Regarding handling cases and arguments in court, it is improper for an advocate and solicitor to misquote or assert a fact that has not proven or misled the opponent (rule 21 of the Legal Profession (Practice and Etiquette) Rules 1978). An advocate and solicitor shall bring the court's attention to any proposition of law (rule 22 of the Legal Profession (Practice and Etiquette) Rules 1978). An advocate and solicitor shall supply to court all information (rule 23 of the Legal Profession (Practice and Etiquette) Rules 1978) and to be ready for the day fixed for trial (rule 24 of the Legal Profession (Practice and Etiquette) Rules 1978).

### 2.3 Responsibility of advocate and solicitor towards society and the legal profession

Rule 31 of the Legal Profession (Practice and Etiquette) Rules 1978 provides that advocate and solicitor is to always uphold the dignity of the profession. He shall not stand as surety (rule 40 of the Legal Profession (Practice and Etiquette) Rules 1978). Also, rule 44 provides that advocate and solicitor not to actively carry on any trade declared by the Bar Council as unsuitable. In addition, he shall not be touting (rule 51 of the Legal Profession (Practice and Etiquette) Rules 1978). Most important, he shall not divide or agree to divide either cost received or the profits of his business with an unqualified person (rule 52 of the Legal Profession (Practice and Etiquette) Rules 1978).

Accordingly, there are many obligations imposed to advocate and solicitor. According to s. 77 of the Legal profession Act 1976, the Bar Council can make rules regulating professional practice, etiquette, conduct, and discipline of advocates, solicitors, and clerks.

### 2.4 Problem Statement

There is no clear interpretation of "misconduct" in section 3 of the Legal Profession Act 1976. Nevertheless, the meaning of the term "misconduct" can be found in subsection (3) (a), (b), (c), (d), (e), (f), (g), (h), (i), (k), (l), (m), (n) and (o) of s. 94 of the Legal Profession Act 1976. As such, it is obvious that the interpretation of misconduct is extensive and complicated. This article aims to examine the meaning and implication of the term "misconduct" in the context of the legal profession.

## 3.0 Objectives and Research Methodology

### 3.1 Research Objectives

The research objectives in this study are:

- (1) To examine the meaning and the implication of the term "misconduct",
- (2) To explore the responsibilities of an advocate and solicitor in Malaysia.

### 3.2 Research Questions

The research questions in this study are:

- (1) What is the implication of committing misconduct?
- (2) What are the responsibilities of an advocate and solicitor in Malaysia?

### 3.2 Research Methodology

This paper adopts a qualitative research methodology which provides a deeper understanding of the meaning of misconduct and responsibilities of an advocate and solicitor (Silverman, D., 2013). The primary source of this paper is the Legal Profession Act 1976. The secondary sources include cases, journal articles and online sources. For data analysis purposes, the doctrinal approach is adopted, employing a literature review on the meaning of misconduct and responsibilities of an advocate and solicitor in Malaysia.

## 4.0 Analysis and Findings

### 4.1 Analysis of study

Section 41 of the Legal Profession Act 1976 provides that there is established a body corporate to be called "Malaysian Bar". This function of this Body is to manage the affairs of the Malaysian Bar and to perform the duties as prescribed under the Legal Profession Act 1976. S.47 of the Legal Profession Act 1976 provides this Body is known as the "Bar Council". The specific powers of the Bar Council are provided in s. 57 of the Legal Profession Act 1976. The Bar Council shall have the ability to answer questions affecting the practice and etiquette of the profession and the conduct of members (subsection (b) of s. 57 of the Legal Profession Act 1976. Besides that, with the approval of the Attorney General, the Bar Council is empowered to make rules for the purpose of regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors in Malaysia (subsection (1) of s. 77 of the Legal Profession Act 1976). The effect for non-compliance of the of the Legal Profession Act 1976 is prescribed in s.77(3) of the Legal Profession Act 1976, where he shall be liable for a disciplinary proceeding be taken against him. Meanwhile, the Disciplinary Board has been established for disciplinary proceedings (subsection (1) of s. 93 of the Legal Profession Act 1976). An Advocate and Solicitor shall be brought before the Disciplinary Board for the disciplinary proceedings as per (subsection (1) of s. 94 of the Legal Profession Act 1976). An Advocate and Solicitor if found guilty of any misconduct shall be liable to one or more of the following penalties or punishments namely: (a) to be struck off the Roll; (b) a suspension from practice for any period and a maximum of five years; (c) a fine not exceeding fifty thousand ringgits; or (d) to be reprimanded or censured (subsection 2 of s. 94 of the Legal Profession Act 1976).

### 4.2 The term-misconduct" and responsibilities of advocate and solicitor

Subsection (3) of s. 94 provides that if an advocate and solicitor has behaved in a grave impropriety, it amounts to a "misconduct." Details of the meaning of "misconduct" were listed under subsection (3) of s. 94 (a), (b), (c), (d), (e), (f), (g), (h), (i), (k), (l), (m), (n) and (o) of s. 94 of the Legal Profession Act 1976, and therefore, provides further the meaning of "misconduct". The meaning of misconduct are: (a) conviction of a criminal offence, (b) breach of duty to a court, (c) dishonest or fraudulent conduct, (d) breach of any rule of practice and etiquette of the profession, (e) being adjudicated bankrupt, (f) giving gratification, (g) attempting to procure employment of himself, (h) attempting employment in any legal business through a tout, (i) allowing any other third party who is not qualified or unauthorized person to use his name in setting up a legal firm, (j) carry on business which is incompatible with the legal profession, (k) breach of any provision of the Legal profession Act 1976, (l) the disbarment or suspension in performing his duty as an Advocate and Solicitor in other jurisdiction, (m) charging fees which are grossly excessive, (n) gross disregard of his client's interest and being guilty of conduct which is unbefitting of an advocate and solicitor or (o) to bring the legal profession into disrepute. It seems to suggest that the meaning of the term "misconduct" is very important and too wide. As such, it is clear that the responsibilities of advocate and solicitor include duties towards the client, duties towards court and duties towards the legal profession. However, it should be reminded that s. 88A of the Legal profession 1976 provides the power for the Bar Council to decide on the suspension of advocate and solicitor if he has been found to be guilty.

It was decided in few cases that the court also has the inherent jurisdiction to remove lawyers from the record when they failed to act in accordance with code of conduct (See: *RS Muthiah v. Pembinaan Fiba Sdn Bhd* [2004] 1 MLRH 169; [2004] 4 MLJ 78; [2004] 2 CLJ 917). In *Vijayalakshmi Devi Nadchathiram v. Saraswathy Devi Nadchatiram* [2000] 1 MLRA 718; [2000] 4 CLJ 870; [1996] 2 AMR 2712. With regards to the issue of conflict of interest, Abu Mansor Ali FCJ, speaking for the Federal Court at page 880, stated: "In this regard, we would apply the decision of *Black v. Taylor* [1993] 3 NZLR 403 where the Court of Appeal in New Zealand held that court may prevent a barrister acting as counsel in a matter which he had a conflict of interest, or in which he appeared to have a conflict of interest such that justice would not be seen to be done." (See *Rhb Bank Berhad v. Gula Perak Berhad* [2013] 1 MLRHU 1).

The researcher chose a few decided cases to illustrate the seriousness of duties of an advocate and solicitor towards the court. It is to be noted that scandalizing a judge by criticizing his conduct is considered contempt of court.

Advocates and solicitors are under a duty to maintain professional independence. The issue of whether counsel contravened r. 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978 was raised in the case of *Che Ahmad Hj Che Daud & Ors v. DCB Bank Bhd* ([2001] 5 CLJ 333). The court decided that r. 5(a) of the Rules 1978 prohibits counsel from acting for all parties in a case. The court stressed that it is clear that the rule prohibits a counsel from acting for all the parties in a case. Similarly, this issue was determined in the case of *Aw*

*Sing Moey & Ors v. Melombong & Perumahan Sdn Bhd* [1998] 3 MLRH 691; [1998] 7 MLJ 239; [1999] 4 CLJ 721. In this case, it was held that the lawyer or his firm is not qualified from representing the Plaintiff in the suit as he has given advice the other parties whilst in his previous firm.

With regards to responsibilities, rule 31 of the Legal Profession Practice and Etiquette Rules 1978 provides that every advocate and solicitor shall be always responsible to uphold the dignity and high standing of his profession. To illustrate the responsibility of advocate and solicitor, it was decided in the case of *Chin Hein Chong v. Tey Sin Sze & Anor* [2016] MLRHU 1 that advocate and solicitor is under a duty to communicate with his client.

It was decided that it is trite law that a counsel has three duties. The first duty which a counsel owes is to the court. A counsel must assist the court in the expeditious, just and economical administration of justice, which encompasses the compliance with all directions given by the court unless there is good reason shown (rule 12 of the Legal Profession (Practice and Etiquette) Rules 1978). The court decided further that the second duty which a counsel owes is to his profession. It means that the advocate and solicitor must conduct himself appropriately when handling a case before the court to uphold the dignity and high standing of his profession. This is provided in r 31 of the Legal Profession (Practice and Etiquette) Rules 1978. The third duty which a counsel owes is to his client. It means that a counsel must fearlessly uphold the interest of his client. The court stressed that the advocate and solicitor must present his client's case in the best possible light before the court with all due courtesy to the court. This is expressly provided in r 16 of the Legal Profession (Practice and Etiquette) Rules 1978 (See *Tan Sri Datuk Diong Hiew King @ Tiong Hiew King v. [2012] MLRHU Lau Swee Nguong @ Lau Sui Guang* [2012] MLRHU 1). With regards to a committal proceeding, it was decided that committal proceeding is a grave matter. The courts must proceed very carefully before they make an order to commit to prison (See *In re B (JA) (An Infant)* [1965] 1 Ch 1112). In addition to that, the rule is clear that an advocate and solicitor in Malaysia is prohibited from publishing his photograph as a member of the Bar in the press or any periodical (rule 48 of the Legal Profession (Practice and Etiquette) Rules 1978).

## 5.0 Summary

Based on all the research, it can be summarized that advocates and solicitors have responsibilities to discover law; to embody law in the nation's social structure by the demonstration of laws before the courts (Abbott, L. 1982). It may not be overemphasized that every advocate and solicitor have 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 in the administration of justice, he has an overriding duty to the court, to the standards of his profession and the public (see *Rondel v Worsley*) [1969] 1 A.C. 191). Sears highlights that a lawyer stands in a fiduciary relationship towards his client, and it is the duty imposed by law on a lawyer (Sears, 2020). As a result, advocate and solicitor must put his client's interest above the concerns of others (Wilson, 2020).

## 6.0 Conclusion and Recommendation

### 6.1 Conclusion

Through this study, researchers have observed and concluded that advocates and solicitors must comply with all rules provided under the Legal Profession (Practice and Etiquette) Rules 1978 and Legal Profession (Publicity) Rules 2001. To conclude, disobeying the rules shall cause losses to an advocate and solicitor if he is found guilty of any misconduct.

### 6.2 Recommendation

The research recommends that the interpretation of the term "misconduct" should be included in s. 3 of the Legal Profession Act 1976. By doing so, advocates and solicitors may get a vital notification to avoid impropriety misconduct.

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