

LAA 3064
MOOT/MOCK AND
PLACEMENT



PROFESSIONAL
MISCONDUCT



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Introduction

- A law confers the greatest good upon the greatest number.
- Salus populi supreme lex- the welfare of the people is the supreme law.
- The lawyers are not immune from disciplinary action.
- The lawyer should not involve in professional misconduct because it will lower the dignity of the profession and weaken the sense of confidence of the public to the administration of justice.
- Public faith in courts-paramount consideration.

Definition.

- Professional-Duty of care (Fiduciary duties)- Solicitor client relationship.
- Section 94 (3)- misconduct means conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety.
- Professional Misconduct- It is misconduct arising to the solicitor's professional business. Eg grossly betrays his client's confidence.
- Grossly improper conduct- Negligence must be inexcusable. Mere negligence will not suffice.

Cont...

- Islamic perspective- any conduct or action which is contrary to Islamic law whether codified under any statutory legislation or not.
- Syarie lawyer should preserve a good ethics and avoid any misconduct since they are not only subjected to the PSR but also accountable to Allah SWT.
- Professional misconduct may amount to disciplinary action.

Consequences

- Section 94 of the LPA-
- 1) Struck off 2) suspend
- Section 19 of PSR 1991-
- 1) Struck off or suspend 2) warning or any other order deems fit and reasonable.
- Therefore every lawyer should maintain at all times the highest standard of integrity inside and outside court

Conviction of Criminal Offence

- S 16 (2) (1) PSR 1991- the committee may take disciplinary action if peguam syarie has been convicted of a criminal offence under any written law which make him unfit to be a member of his profession.
- S 94 (3) (1) LPA 1976- All A&S are subject to disciplinary actions if guilty of any misconduct-conviction of a criminal offence which makes him unfit to be a member of his profession.
- Case-Sydney Augustine- Convicted for drug trafficking in Southern Thailand.

Cont...

- The misconduct is constituted by conviction of an offence, looks at the capacity in which he was convicted of the offence.
- Section 100 (1)- in his professional capacity.
- Test- The conviction must be of such a character that is expedient for the protection of the public and profession. Eg Assaults, dishonestly and fraud.
- Offence against administration of justice also implies a defect of character unfitting the lawyer to be a member of the profession. Eg- falsely representing that an injunction had been granted.

Breach of duty with regards to undertaking

- S 94 (3) (2) LPA 1976- breach of duty to a court including any failure by him to a court.
- There is no provision under PSR but since the list is non-exhaustive such misconduct may be applicable to syarie lawyer.
- To ensure smooth and efficient administration of justice.
- Undertaking in non-contentious matter- the court has power to enforce an undertaking given by a lawyer to his client. The court has jurisdiction to compel the lawyer to carry out his undertaking.

Cont...

- Eg Lee Chee & Ors v Allen Gledhill- Undertaking that the land was transferred to the Defendant.
- Au Keng Wong v Bar Committee- Undertaking to fellow solicitor to pay the full sum of the judgment debt in consideration of the lifting execution but he failed to do so.

Dishonest and fraudulent conduct in the discharge of his duties

- LPA S 94 (3) (3)- dishonest conduct or 2) fraudulent conduct in the discharge of his professional duty
- PSR-Rules 16 (2) (b)-1) dishonest conduct in the discharge of his professional duty
- 2) fraudulent conduct
- 3) conduct otherwise unbecoming of syarie lawyer.

Conduct unbefitting a solicitors

- PSR-Rules 16 (2) (b)- LPA S94 (3) (16).
- Eg Re An Advocate- A solicitor in Singapore took an active part in the business of selling ladies underwear from his hotel room when in the course of carrying on law practice and when visiting kuching.
- In Malaysia- we add “ bringing the profession into disrepute” .
- Eg negligence coupled with an attempt to misrepresent the true facts.

Breach of any rules of practice and etiquette

- LPA Rule 94 (d)- Advocate and solicitor should not breach any provision in LPPER 1978.
- Eg- not to advertise, not to appear for party represented by another lawyer, shall acting with ail due courtesy, fearlessly uphold the interest of his client, the interest of justice and dignity of the profession

Has been adjudicated bankrupt

- PSR Rule 16 (c)- and LPA Rule 94 (e)-
- Or omission mentioned in para a-1 of s 33 (6) Bankruptcy Act 1967.
- Eg- failure to keep book of accounts disclose his business transaction within 3 years, continuing business even knowing himself to be insolvent.
- Rationale-the lawyer may sacrificing of his client's interest in his attempts to avert bankruptcy or insolvency.Undue preference to his creditor.

The tendering or giving of any gratification to any person

- LPA Rule 94 (f) or PSR Rule 16 (2) d).
- The need to promote, maintain and ensure fair professional practice.
- Eg- solicitor contracts with his managing clerks for the remuneration on a commission basis for introducing the clients.

Employment of Soliciting Agents

- Section 94 (3) (7) and section 16 (2) (e).
- Directly or indirectly procured the employment of himself by the instruction of any person to whom any remuneration for obtaining such employment has been given.
- Eg- vendor's solicitors secure the vendor's agreement to pay the purchaser's cost if the purchaser will employ him as solicitor.
- Eg. Clerk commission on business introduced.

Touting

- S 94 (3) (8) AND s 16 (2) (F).
- Touting for clients is like advertising. It is inconsistent with the interest of the public and honour of the profession.
- The function of a solicitor is to advise or negotiate or fight for a client but only if retained. The client may seek him but he must not seek the client.
- Normally in running down cases.

Permitting Unauthorized Person to Practice Law

- S 16 (2) (g) and s 94 (3) (9).
- Rationale- the trust and confidence of the client should not be allowed to be delegated.
- It is prohibited to set up a firm with unqualified person as a partner.
- Eg-Allowing clerk to undertake and carry on legal business in the solicitor's name.
- Eg- authorizing an unauthorized person from operating any bank account in the name of the solicitors of his firm.

Carrying on incompatible business

- S 16 (2) (h) and s 94 (3) (10).
- Liable to disciplinary action if the lawyer carry on in his employment any trade, business that detracts from the profession of law.
- Eg Re An Advocate-selling underwear.
- Eg Estate agent, auctioneer, money lender.
- Lawyer who has PC may not involve in business. If he is not practicing he may do so.

Contravened or failed to comply with any provision of the Act/Enactment.

- S 16 (2) (i) and S 94 (3) (11).
- The scope is very wide.
- 1) Against LPPER 1978.
- 2) Against the account rules.
- 3) Against any act or enactment.
- 3) Against any rulings or directions issued by Bar Council or authorized body.
- In PSR 1991-The contravention will be determined by Majlis.

Disbarment elsewhere

- S 94 (3) 12)-disbarment, being struck off, suspended from practice or censured as a legal practitioner in any other country.
- There is no such provision in the PSR 1991.

Whether the list is exhaustive

- It is submitted that the list is non-exhaustive.
- In Singapore the list is exhaustive to the power of suspension and striking the roll. But the list is non exhaustive to the power of fine.
- PSR 1991- The list is non exhaustive.

Disciplinary Proceedings....

- Sections 93 (1) A DB is set up for the purpose of disciplinary proceedings.
- Section 93 (2)-DB has the same power as Bar council.
- S 94 (1)- a&s shall subject to the control of DB.
- S 94 (2)- 1)Struck off 2) suspend
- For breach of any rule of practice and etiquette of the profession.

Cont...

- Five stages:-
- 1) Commencement of Process (S99)
- 2) Investigating Tribunal proceedings (S101)
- 3) Deliberations by DB (S102-103)
- 4) Disciplinary Committee proceedings (S 103C)
- 5) Deliberation by the DB (S 103D)

Commencement of Process

- Complaint against A&S can be made by anyone.
- 1) Private complaint- any person whether in his professional capacity or other than that.
- Complainant is protected by qualified privilege.
- Must be made in writing-
- Must contain full name, ic no. address of the complainant, signature, documents,SD and etc.
- Non refundable fee.
- 2) Judge or the AG
- 3) Bar Council or State Bar Committee.

Investigating Tribunal

- Any complaints go to the disciplinary secretary. He will ensure the complaint in proper term and sworn fee has been paid.
- Where a DB (headed by a judge and its members are consist of lay person and lawyers) considers that there is a merit in a complaint it shall forthwith constitute an IT from IT Panel (appointed by the Board-60 members-40 lawyers and 20 lay person).
- IT - 2 lawyers from permanent body of lawyers who are at least 7 years standing and a lay person

Cont....

- The role of IT.
- 1) preliminary filter to determine whether a prima facie case for a formal investigation exists.
- 2) To do just and fair proceedings. Disciplinary process- threat as a means of commercial debt recovery.
- 3) to gather evidence and may compel production of documents and witnesses

Cont...

- IT will send notice to the solicitor to inform the matter together with affidavit, documents or SD.
- IT must commence investigation within 2 weeks of appointment and the report is expected to be completed not later than 2 months.
- Notice of the hearing will be sent to the complainant and the solicitor concerned specifying the date, time and place of the hearing.
- If the complainant and the solicitor attends the hearing, IT may dismiss the complaints.

Cont...

- Report of Inquiry- IT obliged to report its finding to the DB. Deliberation of the DB
- 1) a formal investigation is not necessary 2) should pay penalty 3) there should be a formal investigation.
- There is no provision stated the confidentiality of the proceedings-Confidentiality is very important 1) may give impact to solicitor's practice 2) likened to a police investigation
- It is more like a trial and adversarial in nature which involve examination of witnesses and arguments. IT will make recommendations to DB.

Disciplinary Committee Proceedings

- DC-30 members 20 lawyers and 10 lay person.
- DB appoint DC to consider the report made by IT, to investigate and make recommendations to the Board.
- The DC must record its findings and determine all the foregoing and shall make recommendations as to the appropriate disciplinary actions.

Disciplinary Board's Deliberation

- The board may 1) affirming no action 2) reprimanded if insufficient for disciplinary actions 3) imposition of fine, 4) suspension 5) striking of the roll.
- The lawyer may appeal within 14 days of the DC's decision.
- A pupil also subject to the rules. The only sanction is that he is prohibited from submitting his paper for call.

Pegulam Syarie in Selangor

- Rule 16 of the PSR. The committee may take disciplinary action against any Pegulam Syarie.
- Committee- Chairman, the Chief Registrar of SCOA, CSP, pegulam syarie and person learned in Islamic law
- Rule 17 (1)-Any complaint as to the conduct of PS shall be made to majlis.
- Rule 17 (2)-The complaint shall be made in writing.

Cont....

- Rule 18- The Chairman of the Committee shall cause the Committee to hold an enquiry.
- The committee shall before an enquiry:-
- Post a written statement stating out the substance of the complaint.
- Notice inviting the PS to give the committee any written explanation
- Allow the time specified in the notice to elapse and to give the PS concerned reasonable opportunity to be heard.

Cont...

- When the enquiry is completed the Committee shall furnish to the Majlis a report and recommendations.
- If the recommendations found that the PS is guilty the Committee should make a recommendations as to the appropriate order.
- The Committee may regulate its own procedure

Cont....

- Section 19 of PSR 1991-Majlis may 1) Struck off 2) suspend 3) warning 4) any other order deems fit and reasonable
- The Majlis may take into account the past of conduct of the person concerned in order to determine what order should be made.

Issues

- Long Procedures were drawn up.
- Limited power of majlis and there is no special body to have control of lawyers.
- No standard disciplinary procedures to the peguam syarie. Each state has their own procedures.

Conclusion

- Peguam Syarie should not involve in professional misconduct because it will lower the dignity of the profession and weaken the sense of confidence of the public to the administration of justice.
- Long Procedures were drawn up for disciplinary proceedings for A&S while there is no standard procedure for peguam syarie.
- There should be a standard disciplinary procedure to peguam syarie.

Required Reading

- Justice Dato' Wan Yahya Pawan Teh. *The Conduct and Qualities of an Ideal Lawyer* [1980] 2 MLJ lxxxvi.
- Tan Yock Lin, *The Law of Advocates and Solicitors in Singapore and West Malaysia*, 1991 MLJ
- Ahmad Ibrahim, *Al Ahkam (PENGHAKIMAN dan KEPEGUAMAN)*, Dewan Bahasa dan Pustaka, 1997, Kuala Lumpur.
- Farid Sufian Shuaib, Tajul Aris Ahmad Bustami & Mohd Hisham Mohd Kamal, *Administration of Islamic Law in Malaysia Text and Materials*, 2001, MLJ.
- Relevant statutes such as LPA 1976, LPPER 1978, PSRS 1991 and etc