

Practice at the Malaysian Bar

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journal or publication title	The Malaysian Legal System, Legal Practice & Legal Education
volume	4
page range	64-77
year	2001
URL	http://hdl.handle.net/2344/00015210

Chapter 5

PRACTICE AT THE MALAYSIAN BAR

The Malaysian legal system is very much inherited from the British as Malaysia was once under British rule. The British system of administration of justice based on statute law and common law has been incorporated into the Malaysian system with modifications to suit local conditions. Since the attainment of independence in 1957, several changes have been made in Malaysia with regard to laws and procedures pertaining to civil jurisdiction, criminal jurisdiction and appellate jurisdiction, etc.

1. PRACTICE AS AN ADVOCATE AND SOLICITOR

To be admitted to practice law as an Advocate and Solicitor of Malaysia, one has to achieve academic qualifications in law from recognized universities and institutions either local or foreign.

Recognized legal qualifications include qualifications from universities in Malaysia such as University of Malaya, Universiti Teknologi MARA, International Islamic University and Universiti Kebangsaan Malaysia which also include passing of an examination, namely, the Certificate in Legal Practice (CLP) from the Legal Profession Qualifying Board of Malaysia.

Foreign degrees include degrees from 3 accredited universities from Singapore, 4 Barristers-at- Law degree from the United Kingdom and 1 from the Solicitors' examination of the Supreme Court of Judicature of England, the Barrister-at-Law degree from Ireland, several recognized law degrees from accredited universities of from Australia (14) and 5 recognized law degrees accredited universities from New Zealand.

Besides academic qualifications, and Advocate and Solicitor in Malaysia has to fulfill certain other conditions before he/she can be considered a "qualified person" under the Legal Profession Act, 1976 and this includes inter alia the following:

- (i) he/she has attained the age of 18 years;
- (ii) he/she is of good character;
- (iii) he/she is a Federal citizen or a permanent resident of Malaysia;
- (iv) he/she has satisfactorily completed the prescribed period of pupillage in Malaysia

In addition, pupils are required to attend a compulsory ethics lecture programme organized by the Bar Council. A certificate will be issued by the Bar Council to every pupil who has satisfactorily completed the course.

2. CERTIFICATE IN LEGAL PRACTICE COURSE

The Certificate in Legal Practice Course (CLP) conducted by the Legal Profession Qualifying Board of Malaysia is to enable students from foreign recognised universities to sit for this examination in the following subjects:

- (i) General Paper
- (ii) Civil Procedure
- (iii) Criminal Procedure
- (iv) Evidence and
- (v) Professional Practice.

A person who has passed this examination (CLP) or who possesses a degree where he/she is exempted from doing the CLP examination has to undergo a 9-month period of pupillage under a Master of more than 7 years standing as an Advocate and Solicitor and who has been in continuous active practice for that period of time. Upon completion of the pupillage, the pupil can apply for admission as an Advocate and Solicitor of the High Court of Malaysia.

Upon admission as an Advocate and Solicitor, the Registrar of the High Court keeps a Roll of all Advocates and Solicitors with their respective dates of admission.

3. DISCIPLINE AND ETIQUETTE OF ADVOCATES AND SOLICITORS

All Advocates and Solicitors in Malaya (West Malaysia) are governed by the Legal Profession Act, 1976 and other legislations inter alia:

- (i) Legal Profession (Practice and Etiquette) Rules 1978;
- (ii) Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and
- (iii) Disciplinary Committee) Rules 1994;
- (iv) Solicitors Remuneration Order 1991; and
- (v) Legal Profession (Professional Liability) (Insurance) Rules 1992.

The abovementioned legislations generally provide guidelines for the proper conduct, etiquette and discipline of lawyers.

At this point in time, end of January 2001, the legal profession in Malaysia has about 10,000 registered lawyers.

Most of the lawyers in active practice have their offices in major towns being involved in civil litigation, conveyancing practice, corporate practice and criminal practice whilst some others practice employment law, immigration law, customs law, international property law – copyright, patent and trademark law, etc.

4. LEGAL PROFESSION (DISCIPLINARY PROCEEDINGS)(INVESTIGATING TRIBUNAL AND DISCIPLINARY COMMITTEE) RULES 1994

The above Rules are made by the Disciplinary Board pursuant to the Legal Profession Act, 1976. There is a three-tier system with regard to disciplinary matters, namely:

- (i) Investigating Tribunal;
- (ii) Disciplinary Committee; and
- (iii) Disciplinary Board.

(1) Complaints

Upon a complaint made in writing by a complainant or his solicitor, the Director of Complaints shall register the complaint, and where necessary, seek further information and documents with regard to the complaint. If the complaint satisfies the necessary requirements, it is then forwarded to the Chairman of the Disciplinary Board

for his directions.

The Chairman then appoints an Investigating Tribunal to look into the merits of the complaint. The members of the Tribunal are appointed from an Investigating Tribunal Panel which comprises 60 members of whom 40 members shall be advocates and solicitors of not less than 7 years' standing and having valid practising certificate and 20 members who are lay persons. Every member of the Investigating Tribunal Panel shall serve for a term of 2 years provided that the Disciplinary Board may extend this term for a period not exceeding a further 2 years or reappoint him.

(2) Investigating Tribunal

The Investigating Tribunal appointed by the Disciplinary Board consists of 3 members of whom shall be:

- (i) 2 advocates and solicitors; and
- (ii) 1 lay person appointed from the Investigating Tribunal Panel.

(3) Investigation

- (i) An Investigating Tribunal shall within 2 weeks after its appointment commence its investigation into the complaint.
- (ii) It shall report its findings not later than 2 months after commencement of its investigation to the Disciplinary Board.

An advocate and solicitor who fails to produce to the Investigating Tribunal any information or documents shall be guilty of an offence and shall on conviction be liable to a fine not exceeding RM2,000/- or to a term of imprisonment not exceeding 3 months or both.

(4) Report of the Investigating Tribunal

The Investigating Tribunal shall determine and recommend to the Disciplinary Board one of the following recommendations:

- (i) that a formal investigation is not necessary;
- (ii) that there is no cause of sufficient gravity for a formal investigation but that the advocate and solicitor should be ordered to pay a penalty; or
- (iii) that there should be a formal investigation by the Disciplinary Committee.

If the Investigating Tribunal recommends that there should be a formal investigation or that a formal investigation is not necessary, then the Board can either constitute a Disciplinary Committee if it agrees or otherwise the advocate and solicitor shall be informed accordingly in writing.

(5) Disciplinary Committee

The Disciplinary Committee consists of 3 members of whom shall be:

- (i) 2 advocates and solicitors; and
- (ii) 1 lay person appointed by the Disciplinary Committee Panel.

The Disciplinary Committee Panel comprises 30 members of whom 20 members shall be advocates and solicitors of not less than 10 years' standing and have a valid practising certificate and 10 members who are lay persons. Every member of the Disciplinary Committee Panel shall serve for 2 years provided the Disciplinary Board may extend his term for a period not exceeding a further 2 years or re-appoint him.

The findings of the Disciplinary Committee with recommendations are forwarded to the Disciplinary Board. The recommendations may include:

- (i) imposition of a fine upon the advocate and solicitor for such sum as the Disciplinary Committee deems just;
- (ii) suspension of the advocate and solicitor concerned from practice as the Disciplinary Committee deems appropriate; and
- (iii) striking off the Roll the advocate and solicitor concerned.

(6) Disciplinary Board

The Disciplinary Board consists of:

- (i) the Chairman who is appointed by the Chief Justice who shall be a Judge of the High Court, Supreme Court or a retired Judge from the High Court or Supreme Court or any other person qualified to be a Judge of the High Court or Supreme Court.
- (ii) the President of the Bar Council with the Vice-President as his alternate; and
- (iii) 15 practitioner members of not less than 15 years' standing appointed by the Chief Justice for a period of 2 years provided the Chief Justice may extend their term for a period not exceeding a further 2 years or re-appoint

them.

Note: The Supreme Court now refers to the Federal Court;

(7) Powers of the Disciplinary Board

The Disciplinary Board has the power to strike off the Roll, suspend from practice for any period not exceeding 5 years, any advocate and solicitor found guilty of misconduct.

Misconduct comes in various forms, which include:

- (i) grave impropriety such as conviction of a criminal offence which makes him unfit to be a member of the profession;
- (ii) breach of duty to the Court including any failure by him to comply with an undertaking given to the Court;
- (iii) dishonest or fraudulent conduct in the discharge of his duties;
breach of any rules of practice and etiquette of the profession made by the Bar Council;
- (iv) being adjudicated a bankrupt;
- (v) breach of any provision of the Legal Profession Act of any rules made there under or any directions or ruling of the Bar Council;
- (vi) gross disregard of his client's interest; and
- (vii) being guilty of any conduct that is unbecoming of an advocate and solicitor which brings or is calculated to bring the legal profession into disrepute.

ADVOCATES AND SOLICITORS, MALAYSIA

Year	Admissions	Practising	Female	Male
1995	1052	957	447	510
1996	1159	1057	544	513
1997	1155	1018	509	509
1998	1190	1019	523	496
1999	1134	1027	564	463
2000	1155	934	502	432

Year	Members As of to date
1995	5968
1996	6796
1997	7300
1998	8124
1999	8879
2000	9595

Source: Bar Council

5. LEGAL PROFESSION (PROFESSIONAL LIABILITY)(INSURANCE) RULES 1992

Under these Rules which came into force in 1992, the Bar Council shall take out an insurance policy in the name of the Malaysian Bar and shall maintain a Master Policy to provide indemnity against classes of professional liability as may be determined by the Bar Council.

6. OBLIGATION OF AN ADVOCATE AND SOLICITOR

Every advocate and solicitor shall be obliged as follows:

- (i) to be insured under the Master Policy;
- (ii) to comply with the terms of the Master Policy with any certificate of insurance in connection therewith;
- (iii) to produce together with any application for a Sijil Annual (annual certificate) a certificate issued by the brokers certifying that the applicant is insured under the Master Policy for a period of 12 months with effect from such date that the Bar Council may determine.

7. SOLICITORS' REMUNERATION ORDER 1991

The remuneration of an advocate and solicitor in respect of his business other than contentious business is specified in the Schedule.

Fees for conveyancing for the sale and transfer of properties are stipulated in the First Schedule.

No discount on scale fees is permissible unless expressly provided by the Schedules.

An advocate and solicitor may charge interest at 8% per annum on his disbursements and costs whether by scale or otherwise after expiration of one month from demand from his client.

8. LEGAL PROFESSION (PRACTICE AND ETIQUETTE) RULES 1978

(1) Obligation of advocate and solicitor to give advice or accept any brief

An advocate and solicitor is obliged to give advice or accept any brief with regard to his practice in the Courts for which he can demand proper professional fee but special circumstances may justify his refusal, at his discretion, to accept a particular brief.

(2) Advocate and solicitor not to accept brief if embarrassed

An advocate and solicitor shall not accept a brief if he is embarrassed in circumstances where:

- (i) he finds he is in possession of confidential information as a result of having previously advised another person as regards to the same matter; and
- (ii) there is some personal relationship between him and a party or a witness in the proceedings.

(3) No advocate and solicitor to accept brief if professional conduct is likely to be impugned

No advocate and solicitor shall accept a brief in a case where he knows or has reason to believe that his own professional conduct is likely to be impugned.

(4) Circumstances where an advocate and solicitor shall not accept a brief

- (i) An advocate and solicitor shall not accept a brief unless he is reasonably certain of being able to appear and represent the client on the required day; and
- (ii) he shall not ordinarily withdraw from an engagement once accepted, without sufficient cause and unless reasonable and sufficient notice is given to the client.

(5) Undertaking with regard to a defence

- (i) An advocate and solicitor who undertake the defence of a person in a criminal matter shall by all fair and honourable means present every defence that the law permits.
- (ii) An advocate and solicitor shall undertake the defence of a person accused of an offence regardless of his personal opinion as to the guilt or otherwise of the accused.

(6) Fees of an advocate and solicitor

In determining the amount of fee for litigious or contentious matters involving representation of a client in Court, consideration shall be given to the following:

- (i) time, labour and skill required;
- (ii) the novelty and difficulty of the question involved;
- (iii) the customary charges of the profession for similar services;
- (iv) the amount in issue; and
- (v) the special position or seniority of the particularly advocate and solicitor.

(7) Advocate and solicitors to uphold interest of client, justice and dignity of profession

An advocate and solicitor shall act with all due courtesy, fearlessly uphold the interest of his client, the interest of justice and dignity of the profession without regard to any unpleasant consequences either to himself or any other person.

(8) Binding position to be put before Court

- (i) An advocate and solicitor shall put before the Court any relevant binding decision of which he is aware which is immediately in point, whether it be

for or against his contention.

- (ii) An advocate and solicitor shall not appear in Court on a matter in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact before the Court.

(9) Advocate and solicitor to uphold dignity of profession

Every advocate and solicitor shall at all times uphold the dignity and high standing of his profession.

(10) Advocate and solicitor to prevent client from wrongful conduct towards Courts, etc.

An advocate and solicitor shall use his best efforts to prevent his client from doing things, which the advocate and solicitor himself ought not to do, particularly with reference to his conduct towards Courts, witnesses and parties, etc. Where a client persists in such wrongdoing, the advocate and solicitor shall terminate the relationship.

(11) Advocate and solicitor not to stand surety

An advocate and solicitor shall not stand as a surety or bailor for his client required for the purpose of any legal proceedings.

(12) Advocate and solicitor not to stir up strife and litigation

No advocate and solicitor shall volunteer advice to bring an action or to stir up strife and litigation.

(13) Advocate and solicitor not to actively carry on any trade

- (i) An advocate and solicitor shall not actively carry on any trade which is unsuitable for an advocate and solicitor to engage in; and
- (ii) He shall not be a full-time salaried employee of any person or corporation so long as he continues to practice.

(14) Advocate and solicitor not to advertise

- (i) An advocate and solicitor shall not solicit work or advertise either directly or indirectly procuring his photographs to be published in connection with cases in which he has been engaged or concerned.

- (ii) It is contrary to etiquette for an advocate and solicitor to:
 - (a) advertise his address or the address of his firm in any book, pamphlet, newspaper, periodical or other publication; and
 - (b) sanction the publication either in the press or elsewhere of notices or articles referring to his professional qualifications or merits with certain exceptions, e.g. particulars appearing in approved publications.

(15) Judgment by Default

No advocate and solicitor shall enter judgment by default against the client or another advocate and solicitor where there is a delay in filing documents unless notice of his intention to do so has been given to the other advocate and solicitor in writing and seven days have elapsed after the delivery of such notice to the other advocate and solicitor.

(16) Advocate and solicitor's branch office

- (i) No advocate and solicitor shall maintain a branch office unless the same is:
 - (a) in the name of his firm; and
 - (b) continuously manned by the advocate and solicitor himself or any of the partners of his firm or by an advocate and solicitor wholly employed by him or his firm.
- (ii) The branch office shall not be in the same office as that of any other firm of advocates and solicitors.
- (iii) No advocate and solicitor shall practise his profession in the States of Malaya in or as a partner of more than one firm at any time without the consent of the Bar Council.
 - (iv) No advocate and solicitor shall practice his profession unless he maintains an office within the States of Malaya.

9. THE ROLE OF THE MALAYSIAN BAR

Under the Legal Profession Act 1976, the Malaysian Bar is a body corporate and the management of the Malaysian bar is governed by a Council known as the Bar Council. The Bar Council consists of 36 members who are elected by the entire practicing members of the Bar throughout the country.

The Council consists of the President, Vice-President, Secretary, Treasurer, the immediate past President, past Vice-President, the Chairman of each State Bar Committee and a Representative of each State Bar Committee. The members of the Bar Council hold office for 1 year but are eligible for re-election.

Under the objects and powers of the Malaysian Bar, the Malaysian Bar *inter alia* is to:

- (i) to uphold the cause of justice without regard to its own interest or that of its members, uninfluenced by fear or favour;
- (ii) to maintain and improve the standards of conduct and learning of the legal profession in Malaysia;
- (iii) to express its view on matters affecting legislation and the administration and practice of the law in Malaysia where so requested to do;
- (iv) to represent, protect and assist members or of the legal profession in Malaysia and to promote in any proper manner the interests of the legal profession in Malaysia;
- (v) to protect and assist the public in all matters touching ancillary or incidental to the law;
- (vi) to encourage, establish and maintain good relations with professional bodies of the legal profession in other countries and to participate in the activities of any local or international association and become a member thereto or, etc.

10. EXTERNAL RELATIONS

The Malaysian Bar through the Bar Council is affiliated and is a member of several international legal bodies and law associations. They include:

- (i) Commonwealth Law Association (CLA);

- (ii) The Presidents of Law Associations in Asia (POLA);
- (iii) The International Union of Advocates (UIA) ;
- (iv) Lawasia; and
- (v) Inter-Pacific Bar Association (IPBA).

11. LEGAL AID PROGRAMME

The Bar Council has a very active legal aid programme for the poor and for those litigants who cannot afford to pay legal fees to engage a lawyer of their own.

Legal Aid Centres are located in almost all the cities and towns of Peninsular Malaysia. The Legal Aid Centres provide representations in criminal matters except offences punishable by death and life sentences. The Centres also provide representations legal assistance in civil matters.

The legal aid provided by the Bar Council supplements a programme of legal aid by the government under the Government Legal Aid Bureau.

The qualification for legal aid under the Bar Council Legal Aid Scheme is that a person in order to obtain legal aid must pass a "Means Test " .

Criteria for disqualification will be any of the following

- (i) House (exclude low cost house and "squatter" or settlement house) > RM25,000
- (ii) Car > RM7,000
- (iii) Motorcycle > RM4,500
- (iv) Cash and/or securities value together at more than RM5,000.00 (e.g. cash in bank, stocks, etc. savings in Tabung Haji not taken into consideration) > RM5,000
- (v) Disposable income more than RM500 for single person and RM800 for married couple. Couple are allowed fixed deductions of RM250 for themselves and RM150 per dependent. Then they are allowed further deductions for the items stated in the new form.

12. LANGUAGE USED IN THE COURTS

The official language used in the courts is Bahasa Malaysia and all documents are filed in Bahasa Malaysia. English can be used after application is made to the court for use of the English language. English is still used extensively in the Superior Courts, namely, the Federal Court and Court of Appeal.

13. LEGAL PRACTICE IN SABAH AND SARAWAK (EAST MALAYSIA)

Sabah and Sarawak have a similar judicial system as West Malaysia and have Magistrate, Sessions and High Courts. Appeals are heard in the common Court of Appeal and Federal Court of Malaysia.

Lawyers in Sabah and Sarawak are governed by their respective Solicitors' Ordinance. In Sabah, the lawyers belong to the Sabah Law Association. In Sarawak, the lawyers belong to the Advocates' Association of Sarawak.