



Risk Management Newsletter

JURISK!

A publication of Professional Indemnity Insurance Committee, Bar Council Malaysia

Volume

16

Issue 2

June 2021

CONFIDENTIALITY
AND PRIVACY

OPEN
COMMUNICATION

**Alternative
Dispute Resolution**

OFFER
SOLUTION

TIME
EFFECTIVE

COST
EFFICIENT



CO-CHAIRPERSONS' MESSAGE

Dear Members of the Malaysian Bar,

Half of the year 2021 has passed and the pandemic is still affecting our livelihood. As we grapple with the pandemic and its effects, we have to stay optimistic and continue to provide quality legal services in the best way possible.

We hope Members are much more prepared and have adopted some form of technology and innovation to continue providing legal services in this current situation. Slowly but surely, we will get through this.

In this issue of *Jurisk!*...

As we look to expand ourselves as providers of legal services, you may want to consider expanding your services as a qualified and registered alternative dispute resolution practitioner (if you haven't done so). In this issue of *Jurisk!*, we feature mediation service as a possible addition to your scope of work. As you will read in this issue, there are courses that you can attend to get professionally certified, and the different ways that you can benefit as a mediator or involvement in a mediation matter. As an alternative dispute resolution practitioner, you are still covered under the Professional Indemnity Insurance ("PII") Scheme.

Frauds and scams are still rampant, and the perpetrators find new ways to infiltrate law practices to cause losses. They do it through fake identities, bogus transactions and taking advantage of the law practice's weaknesses – to say the least. In this day and age where we rely a lot on computers and the internet, keeping information safe and secure is extremely important. At the start of the pandemic last year, there were many reports around the world of data breaches. The PII Scheme had a notification where a perpetrator managed to intercept an email communication which saw the Purchaser's solicitor releasing stakeholder money to an unknown individual. The Bar Council had issued a circular to inform members of the matter and to take heed (Circular No 159/2020 ALERT: Members Must Be

Vigilant to Avoid being a Victim of Cybercrimes dated 18 May 2020). We hope that Members will take time to read the article on Frauds and Scams – Increasing Awareness as the article will expose Members on the importance of safeguarding client's information and how to do it.

There is also an article to guide you on managing clients' expectations. Not forgetting as well, an article on the importance of putting instructions in writing. Read the pointers given as it will benefit you, especially during these trying times.

Self-indemnity Fund Scheme

Since 2020, the PII Committee have been actively engaging with the Attorney General's Drafting Division to finalise the draft Malaysian Bar Professional Indemnity Fund ("MBPIF") Rules. We have yet to receive confirmation whether the MBPIF Rules will be gazetted in time for 2022 indemnity renewal, which is expected to start in September 2021.

The tender exercise to appoint a Manager for the Malaysian Bar Self-indemnity Fund ("SIF") Scheme 2022 has completed. The Bar Council has appointed Marsh Insurance Brokers (M) Sdn Bhd ("Marsh") for a duration of 2+1 years. However, if the draft MBPIF Rules is not gazetted in time for 2022 indemnity renewal, Marsh's appointment will then be as the Insurance Broker for the Malaysian Bar PII Scheme. The appointment as the insurance broker is dependent until such time that the Bar Council can implement an SIF Scheme within their appointment period.

While we wait for the implementation of the SIF Scheme, we encourage Members to continue practising good risk management. It is one of the things that can help Members to avoid getting sued for negligence.

Risk Management Initiatives

The PII Committee strives to provide informative risk management materials to benefit Members. The initiative is to increase awareness on and support for risk management.

We have recently introduced a new initiative, a monthly indemnity and risk management newsletter, I-RiskSpot. Since January 2021, the monthly newsletter features 2 articles a month as a 5-minutes light reading material amidst your busy schedule.

Risk management talks have been rebranded to give focus on specific areas or interests, and to adapt to an online webinar as the mode of delivery. Members will find a list of risk management webinars at the back page of this newsletter. The webinars are either free of charge or a small fee is applicable. We encourage Members to attend these talks to keep up with the latest information or as a means to improve your risk management.

On that note, we welcome feedback on our risk management initiatives. Let us know what else we can bring to you, or if you would like to contribute to the risk management initiative, feel free to email us at pirm@malaysianbar.org.my.

If you have issues with your claim, the services of the insurance broker or the insurer, or if you need assistance on risk management and information on PII, do reach out to us at pirm@malaysianbar.org.my.

In the meantime, continue to stay safe and be vigilant.

Thank you.

**Burhanudeen b Abd Wahid
& Kuthubul Zaman b Bukhari**

Co-Chairpersons

PII Committee 2021/2022

Bar Council Malaysia

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Dear Members,

Jurisk! June 2021 | Alternative Dispute Resolution

In this issue...we highlight mediation as an alternative dispute resolution for advocates and solicitors to consider providing as part of their legal services.

Read about the experience of a senior mediator and how Professional Indemnity Insurance ("PII") works for arbitrators, adjudicators, and mediators. Explore the benefits of mediation and how it can benefit your legal practice.

The newsletter also includes other articles on the following topics:

- Protecting information security;
- Dealing with clients' expectations;
- The importance of maintaining records; and
- How to start running virtually.

Also included in this issue is a diagram of how to make a notification to the PII Scheme Insurer.

We encourage you to attend our risk management webinars. A list of the scheduled webinars is available on the last page of the newsletter.

Happy reading!
The *Jurisk!* Team



MALAYSIAN MEDIATION CENTRE

MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION

*By Norashikin Kamaruddin, Officer, Malaysian Mediation Centre and Mysahra Shawkat,
Assistant Director, Bar Council Professional Indemnity Insurance and Risk Management Department*

Mediation is a form of alternative dispute resolution that is gaining attention. The benefits of mediation are:

- a. **Less time-consuming:** quick, efficient and easy (most mediations can be concluded within a working day);
- b. **Costs less:** inexpensive and costs less than litigation or arbitration (it does not involve court process);
- c. **Provides confidentiality and privacy:** provides a safe environment for resolution as the process is confidential, conducted in private and matters disclosed in mediation may not be raised or revisited in other proceedings (conducted in a neutral, private and safe environment);
- d. **Open communication:** acknowledges, addresses and deals with real and practical concerns of parties which may otherwise be considered irrelevant (a chance for parties to understand issues);



- e. **Mend relationships:** enables parties to 'mend fences' (restores and/or preserves amicable relationships);
- f. **Offer control and support:** empowers parties to reach a mutually satisfactory resolution of their disputes (a chance for parties to find possible solutions to their disputes);
- g. **Offer solution:** enables resolutions which are in the best interest of the respective parties (allow parties to come to a compromise to end the disputes).

Mediation involves the mediator who is a third party, finding the best solution to the dispute between two (or more) parties. The mediation process is carried out on a voluntary basis and out of court.

For a mediator, the process of mediation involves listening and facilitating the communication between parties, and driving towards a resolution to the dispute. The mediation process is conducted in a safe, private and confidential manner. At the end of a mediation process, the outcome is formalised in a written agreement as agreed between parties.

Under the auspices of the Bar Council of Malaysia, the Malaysian Mediation Centre ("MMC") was established with objectives that include promoting mediation as an alternative dispute resolution process and also to provide a proper avenue for successful dispute resolutions. The MMC practices a facilitative form of Mediation and offers a comprehensive range of services which include:

- a. Professional Mediation services by trained Mediators who have been accredited and appointed to the MMC's Panel of Mediators;
- b. Public talks on Mediation and alternative dispute resolution;
- c. Assistance and advice on how parties may best look after their interests in using mediation as an alternative dispute resolution process;
- d. Training in Mediation techniques, procedures and skills;

- e. Assessment and accreditation on MMC's panel of Mediators;
- f. Consultancy services in dispute management and conflict avoidance;
- g. Administrative and secretarial support;
- h. Provide a venue for Mediation sessions.

Since its establishment, MMC has assigned a number of disputes to its certified mediators when parties cannot appoint a Mediator. Disputes mediated by the MMC include family matters, contractual matters, construction matters and medical negligence.

For those who wish to become a certified mediator, MMC conducts a Mediation Skills Training Course. The course requires you to attend 40 hours of training and pass a practical assessment carried out during the training session. There is no specific requirement to attend the course other than an individual's ability to communicate effectively as well as a good command and understanding of language. A good mediator must be able to remain impartial and non-judgmental at all times.

For more information about the Mediation Skills Training Course, please visit Malaysian Mediation Centre's website at www.malaysianmediationcentre.org or email mmc@malaysianbar.org.my.



MUSINGS OF A MEDIATOR

By Shanti Abraham, Advocate & Solicitor, Certified Mediator



Shanti Abraham is member of the Malaysian Bar, a mediator with the Malaysian Mediation Centre, a mediator with SIDREC, and on the panel of AIAC. She is a Principal Mediator with the Singapore Mediation Centre and the Chair of the International Mediation Institute Investor State Mediation Taskforce as well as a Mediator with the Global Mediation Panel at the Office of the Ombudsman of the UN Funds and Programmes. She is also an IMI and SIMI Certified Mediator with a mediator profile at <https://www.simi.org.sg/profile/mediator/Shanti-Abraham>.



I first trained as a mediator under the Malaysian Mediation Centre in 2010. I was immediately drawn to the concept of strategic resolution of disputes which is the goal in any mediation. I followed my Malaysian training with a mediation training programme in Singapore which was based on the Harvard 7-Elements principles and the journey to sharpening my problem-solving skills really kicked in. In the following 10 years, I have trained at the Harvard Law School Programme on Negotiation & Mediation and later the Harvard Law School Programme on Negotiation for Advanced Mediation – Mediating Complex Disputes – where I learnt about designing a mediation process for complex disputes. I was later fortunate to be selected for sponsorship to be trained as an Investor-State Mediator by the Department of Justice Hong Kong – trained by the Centre of Dispute Resolution (“CEDR UK”) and ICSID. That last experience opened my

mind to how far and wide mediation was being discussed internationally. It was and is indeed an extraordinary world!

Why Mediation?

Mediation has been skirting on the edges of problem-solving for more than two decades. Cloaked with an uncertain value proposition, mediation has been a welcomed concept in theory but not the first touchstone for most advisors given that there is no apparent reward for swift solutions, at least in this part of the world.

As the consequences of the devastating ripple effects of the Covid-19 crisis take root, the wisdom switch has flicked on for many. The prospect of a swift, sensible cost-effective solution via mediation has been pushed front and centre.

How and Why Does Mediation Work?

The mediation process is a flexible one and the mediator is privileged to speak with parties privately as well as jointly. The entire process is protected by confidentiality and there is an additional layer of confidentiality for parties in private sessions where they can be assured that what is shared in private sessions remain confidential unless the party authorises the mediator to disclose or communicate the same. There are of course, some limitations to confidentiality and these would include matters relating to any illegal activity, eg admission to criminal conduct.

The final decision belongs entirely to the parties and when a solution is reached, it means that the parties have come to accept (through the process of mediation) why the solution they are agreeing to is to be preferred over keeping the problem alive.

One notable feature noted in the mediation landscape is that the rate of compliance of final mediated agreements is anecdotally high. This is despite nothing being imposed. This phenomenon happens for a few reasons, which are explained below.

- The mediator uses various techniques to understand the facts which have brought the parties into dispute, to explore why earlier attempts to resolve were not successful (invariably parties would have tried to resolve the problems on their own) and to understand the issues that continue to affect the parties in dispute.
- The engagement between the mediator and parties serves to build rapport, and mediators are trained to actively listen to what the real issues in dispute are.
- The next step would be to help the parties put the issues into context and to recognise their own key interests. This is where the real work of a mediator takes place. A mediator has to remain the most positive and optimistic person in the mediation space with more patience and stamina than anyone else to plough through the

invariable impasses that will be presented by the parties.

- Mediators are most crucially, neutral option explorers. Mediators take the parties on the journey on how they got to the room, what the problem really is and where the parties want to head to.
- Mediation requires the marshalling of every ounce of one's temperament – ability to deal with impasses, stamina, alertness, creativity and conflict management skills – every single time one is invited to 'hold the room'. There is no break or letting up as all eyes and ears are on the mediator for guidance and impasse – overcoming strategies.

One of the key challenges in the mediation landscape is the perception that mediation is a soft and easy process.

It is not. A good mediator makes it look soft. But it is never easy.

Why hasn't mediation been used more?

Even though formal mediation has been a known process for the last two decades, it really has only surfaced as a utilised form of dispute resolution in the last decade.

One of the key reasons is that the usual gatekeepers of disputes (lawyers) previously were not given a respected place at the mediation table – especially by mediators who ostensibly mediate for free.

Lawyers who are excluded in mediation invariably rejected the use of mediation in response – for how could they demonstrate their value to their client if the problem was resolved in their absence.

The previous disrespectful treatment of lawyers/ advisors in mediation has been a decade long problem. But it is a solvable one, as trained private mediators are all aware of how to handle the professionals in the room.

This begs the next question...

Are lawyers helpful in a mediation?

As a mediator who has had the privilege (and a preference) of having lawyers assisting parties in a mediation – I will vouch that lawyers who are properly included in a mediation process are incredibly useful to the process.

A party has no power to change the representation of their counterparty whether in mediation, litigation or arbitration. Invariably there will be lawyers who scuttle mediation for their own intentions. To round up this point, the conduct of lawyers in ad hoc mediations where clients have properly invested in the process (ie not free mediation), has been sterling, and both sides clients were clearly very fortunate to choose such legal representations.

In these post Covid-19 times, parties in a failed negotiation can still extol upon each other to find advisors who know how to assist them in a mediation as a next step and to avoid the temptation of protracted litigation. Egregious legal battles make no sense if parties are genuinely cash-strapped. Surely, mountains of liquidations and bankruptcies are not reflective of effective problem solving.

What are the hazards of being a mediator?

I thought this was an intriguing question and took awhile to reflect on it.

The main occupational hazard of being a mediator is that one presumes you are soft and nice all the time, offering good coffee and tasty snacks to inspire good decision making. Parties may then get startled when they realise that most professional mediators are in fact 'Iron Fists in Velvet Gloves'.

What would be the best approach to solve a dispute?

From a Lawyer's perspective – devise a clever strategy that takes a client to a solution/ negotiated solution in the shortest possible time. The lawyer should be paid an agreed fee and not an hourly rate as the hourly rate structure does not reward cleverness but instead rewards delay.

From a Mediators' perspective – Ask the question: Why is there a dispute in the first place? What underlying interest needs attention?

Conflict is a part of life but all conflicts do not need to evolve into disputes. A dispute suggests parties have anchored to their respective views and are hopeful for redemption of some form, to justify why they believed they were right to begin with.

Do you think being a mediator is a good career?

I love being a mediator and I find a deep sense of fulfilment and personal satisfaction when I carry out a successful mediation.

I am fortunate to have entered the mediation market early enough when mediation was just changing gears and I embraced all opportunities including mediating in Malaysia and Singapore, and strategizing mediation-based solutions for clients. I am now a Principal Mediator in Singapore and a Certified Mediator under the Singapore credentialing body SIMI which is recognized by the International Mediation Institute. A large part of my practice includes dispute resolution strategy where I weave in a mediative approach to try to resolve disputes swiftly and creatively.

Having said the above, I will say that mediation cannot be a full time career in Malaysia yet (unlike in USA, Italy, India, China, Australia, Singapore and even Peru where I have met sufficiently busy full time mediators).

The challenge in Malaysia is that mediation has not yet mainstreamed in the minds of lawyers and boards of directors sufficiently.

What are the qualities of a good mediator?

Patience, persistence and a good sense of pause.

Why do some mediations succeed and some don't?

Parties must make the first choice to walk into the Mediation Chamber with their problem. It is entirely up to the parties if they choose to walk out of the

Mediation Chamber with a solution. More precisely, a solution they can live with.

All parties have an idea of what they want and why they want it. A Mediator's role is to discover the 'why' and to respectfully explore alternatives.

Mediations which do not result in resolution may be as a result of many reasons. In some cases, there is insufficient data for the parties to decide or the parties require more time to consider the issues. Alternatively, the parties may find themselves hemmed in by personal fears or rigid mandates or policies (which may make no sense from a time and cost expense perspective but are built on notions of 'matter of principle'). In such situations, the parties are hopeful that the other side will bend or back off. If this does not happen, then an adversarial process needs to be used to break the impasse by calling out a winner and declaring a loser.

How is it that parties will voluntarily agree to something when negotiations have failed?

In a negotiation, parties argue passionately from their own self-interest (and fears).

Facts, law and merits are used as weapons to demonstrate who is more right than the other. But no one is actually listening to the other side. Parties may be listening to prepare a rebuttal but not really listening to the root of the problem.

A mediator is trained to change the dynamics of unproductive posturing. Mediation helps parties consider options without pressure of penalty. This flexibility often leads parties into workable solutions.

Why is there a generally high compliance rate with final mediated settlement agreements?

In an adversarial process, both parties are inflicted with an outcome which invariably ends with one declared a winner and the other, the loser. In these post Covid-19 times, the important question ought to be – and then what? Will there be compliance?

Would the winning party simply be left with a paper judgement? Enforcement is always the consoling option but often parties have not done a "time-cost-actual outcome" analysis on the enforcement process involved.

And what happens if the party reneges on the final mediated settlement agreement?

The question is why it happened. With no known history of any of the parties reneging on the final mediated settlement agreements I have assisted with, my response is framed in theory.

The answer may be found back in the mediation itself (party felt bullied into submission or mediator strong-armed an unworkable solution onto the party) or may lie in original poor intentions of the parties (eg delay tactics, no intention to really resolve). Having said this, I would see this as a peril of free/volunteer mediation as parties would not have invested anything in the mediation process and therefore have no skin in the game. In that sense, one would be getting what one paid for.

In any event, it is prudent that all final mediated settlement agreements build in a future mediation clause should parties face any issues with compliance.

Conclusion

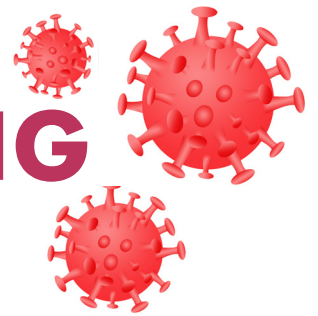
The last year was a watershed year for mediation. The Government rolled out a Covid-19 Mediation Programme. A 'Mediate First Policy' opportunity will be rolled out for lawyers and law firms soon as well. We hopefully will see robust changes in our Malaysian Mediation Act 2012 and the relevant regulations, thereby strengthening this mode of problem solving. Mediation continues to be available as a pre-action option as we are one of the few countries in the world which has a Mediation Act.

With the scourge of Covid-19 tipping lives upside down, parties will have to consider and prepare themselves for a possible tsunami of disputes. If so, pre-action mediation would be an excellent place to start.



The **COVID-19** pandemic has disrupted all aspects of the economy in ways we never imagined and law firms are not exempted from the brunt. While most economic sectors have resumed to its usual business and is gradually recovering from the aftermath of 2020 lockdown not long time ago (and the recent 2021 lockdown), it is without a doubt that there are still challenges and uncertainties posed by the pandemic that require law firms to adapt and respond accordingly. One of the areas is managing clients' expectations.

MANAGING CLIENTS' EXPECTATIONS DURING THE PANDEMIC



By Shafiq Sobri

Some clients would assume that with the recovery from the pandemic, which sees the reopening of most economic and service sectors as well as the courts, would mean that business is back as usual. As such, their expectations on law firms to get work done in time with less or no disruption would remain as how it would have been pre-pandemic. Therefore, it is pertinent for law firms to manage clients' expectations while navigating the challenges and risks brought by the pandemic.

Building relationships with clients, keeping clients informed, being proactive, and enhancing client service with technology are all effective ways to manage clients' expectations during the pandemic. With the situation changing daily, law firms must act accordingly to manage clients' expectations while navigating the current challenges and retain clients when the crisis ends. KPMG's 'The Six Pillar Framework'¹ which identifies the characteristic of an

exceptional client experience may be useful for law firms to adopt in meeting clients' expectations during this unprecedented time. The Six Pillars are:

Empathy

Show that you care, choose the right emotional response to resonate with a client's circumstances.

Business disruption and challenges to meet contractual obligations are the common issues faced by a majority of businesses and organisations as a result of the pandemic. During this testing and taxing time for clients, law firms need to show empathy. While law firms may have its own set of challenges to meet a client's demands or limitations, lawyers should also empathise with the client's situation. And where possible, assist them through this hard time.

¹ Julio Hernandez, A customer first approach during unprecedented times <<https://assets.kpmg/content/dam/kpmg/xx/pdf/2020/04/a-customer-first-approach-during-unprecedented-times.pdf>>

Personalisation

Understand the client's circumstances, prioritise effectively, putting the client back in control.

Understanding clients' circumstances, challenges and limitations is crucial to ensure that they receive the best solution or assistance as expected. With all the challenges and risks that come along with the pandemic, a personalised solution for each client will give an edge to law firms which will generally result in the client's retention and loyalty. Law firms have to be prepared to be flexible to the needs of different groups of clients.

Time and Effort

Make it easy for the client to access information.

It is of paramount for law firms to maintain the solicitor-client relationship and the trust arising out of it despite the limitation of physical meetings. This is especially important as interstate travel restrictions are still in force and physical meetings are currently limited to ensure compliance with COVID-19 laws. Now more than ever, clients need regular updates from law firms and they need to know that they can reach out to their lawyers with questions and concerns. The utilisation of technology comes in handy during this time. While clients embrace the change that technology has brought about, lawyers should also step up their game by utilising technology to provide legal services. Apart from the usual phone calls and emails, video conferencing is a great way to keep clients updated and to replace the usual face-to-face meetings or discussions.

Expectations

Set, manage and meet clients' expectations accurately in this difficult time.

It is important for law firms to have a discussion with clients on the way forward if dealings are affected by COVID-19. Proper discussions ensure that clients are well-informed of the challenges and limitations of transactions and the courts systems or unavoidable delays. Setting clients' expectation every time there is a change of strategy or challenges which would hamper the delivery of services as promised will ensure that clients' expectations are managed proactively.

Resolution

Respond rapidly to the client's needs and find solutions to new problems and accelerate innovation.

In times of crisis when a client's anxiety is high and the demand for work to be completed expeditiously is the utmost priority, efficient and effective solutions for a clients would be essential. As such, it is important for lawyers to keep abreast with the latest legal developments and technological innovations during this time to ensure that clients will receive the best advice or solutions for their problems.

Integrity

Do the right thing ensuring the needs of the client is met, prioritise and act fairly in the client's best interest.

Law firm's ability to create a trusting relationship with clients during this challenging time is key in ensuring that clients' expectations are met as expected. When offering advice or solutions, always prioritise the client's best interest and needs above everything else although the client may not perceive it as the most viable solution for their matter. Clients need to understand that it is the lawyer's responsibility to advise them properly especially on risks and challenges that may impact their matter due to the pandemic.

Managing clients' expectations in the time of a pandemic proves to be challenging as clients' expectations and demands have shifted in response to the changing legal and economic landscape. However, it is important for law firms to proactively respond and adapt to this change in order to manage and meet clients' expectation. Hence, it is pertinent that law firms keep clients in mind, communicate frequently, and be flexible.





FRAUDS AND SCAMS — INCREASING AWARENESS

There are various terms used around information security. Cyber security, for example, may sound like the stuff of science fiction or, to some, the stuff of scaremongering or sales pitches. Whatever terms are used, the objectives are essentially the same — keeping information safe and secure and preventing it getting in to the wrong hands or being interfered with or compromised.

There is a clear link between information security and exposure to external frauds and scams. This is an additional critical reason why protecting information, whether held electronically or as hard copy, is essential for solicitors.

What is “information security”?

It is about protecting:

- The confidentiality of information — and preventing its misuse; and
- The accuracy of that information, and preventing unauthorised alteration of data or documentation.

Why is it particularly relevant to solicitors?

It is a critical issue for solicitors because confidentiality of client information and integrity of data are at the heart of the solicitor-client relationship. The external frauds and scams scenarios we have considered have involved situations where fraudsters have acquired and misused information about:

- Transactions on solicitors’ client bank accounts;
- Solicitor-client relationships including transaction details and email correspondence; and
- Colleague names, roles, and responsibilities.

Fraudsters have managed to acquire such information that has assisted them to commit confidence tricks and access firms' systems or online banking. Perhaps some of this information has been elicited by eavesdropping conversations, shoulder-surfing on public transport, gaining entry to office premises, using malware to access computer systems or by harvesting personal details on social media.

Preventing fraudsters accessing information is at least a partial obstacle in their way. Observing good information security practices is at least part of the solution.

Is it really critical for all solicitors?

Information security is relevant not just for solicitors working on high-profile corporate deals or big-name clients. It's equally relevant to all solicitors. Clients instructing solicitors in relation to wills, house purchases, or matrimonial matters are entrusting their solicitors with confidential information which requires to be appropriately safeguarded. Any breach of information security could result in exposure to a claim against the firm as well as potential regulatory action.

What other information is at risk?

In addition to information relating to the particular instruction, client verification information (for example, bank details, addresses, and passport numbers) stored as part of the firm's anti-money laundering procedures could be very valuable to criminals. Our identity is important and valuable, and, as we have already seen, fraudsters are increasingly using the identities of others for the purposes of committing frauds.



Information security in practice

Information security is not just an IT issue, it is a business risk, IT is an important factor to be considered in ensuring effective information security. Consider the following facts from CompTIA's 2012 Annual Trends in Information Security study:

- 10% of information security lapses are caused by technology problems;
- 30% are the result of inadequate procedures; and
- 60% are caused by human error.

What risk control measures are appropriate?

All firms are likely to have policies/procedures to address key risk priorities. These will typically include:

- Physical office security measures;
- Clear desk policies;
- Password disciplines; and
- Policies on the use of internet, memory sticks etc.

Information security — Actions

Each colleague is responsible to ensure their actions are not leaving them or the firm exposed to an information security lapse, by:

- Complying with the firm's policies and procedures;
- Not having identification passes in view when out of the office;
- Locking computers/other electronic devices with passwords, use encryption technology if possible;
- Not leaving items containing confidential information in public view or unattended;
- Ensuring that conversations in public places about confidential matters cannot be overheard;
- Ensuring, while travelling, information being accessed by laptops/tablets cannot be read by others;
- Maintaining awareness of key risks and risk controls by reading risk management articles and risk alerts; and
- Consider undertaking e-learning module Cyber Security for Legal and Accountancy Professionals.

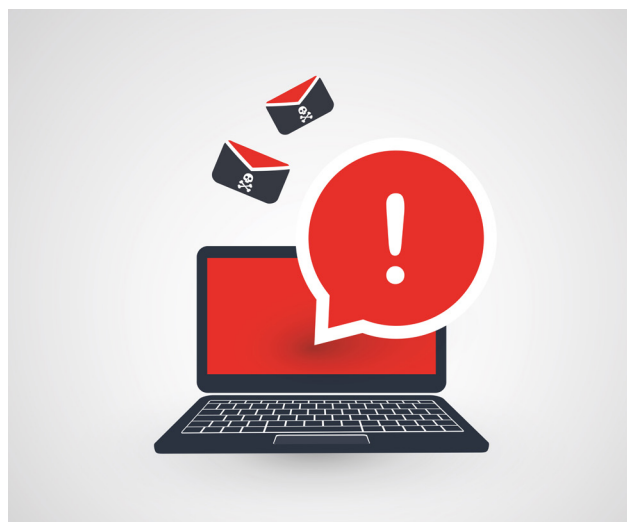
share of his late aunt's estate. At intervals thereafter, there were email exchanges between the solicitors and the beneficiary regarding progress with the estate and the beneficiary's prospective entitlement.

When the solicitors emailed the beneficiary in connection with an interim payment to account, the beneficiary responded with details of his bank account. However, it transpired that this email wasn't from the beneficiary; it was from a fraudster who had intercepted the email correspondence. The bank details were for the fraudster's bank account.

Fortunately, the solicitor handling the estate was suspicious of the email and contacted the beneficiary (not by email) to establish whether it was genuine. The solicitor's vigilance meant the fraudster's attempted fraud was thwarted. A fraudster can easily intercept email correspondence between solicitors and their clients, where clients at some point provide their bank details to the solicitor for remittance of funds or any other type of payment arrangement.

Case study 2

In another case, the finance team in a small law firm acted on an internal email instruction to make an immediate bank transfer of a significant sum of the law firm's own funds. This email instruction appeared to have been sent by the law firm's senior partner.



Interception of email correspondence

Case study 1

Solicitors handling the administration of an estate contacted a beneficiary overseas to notify him of his entitlement to a quarter

The emails in both cases were sent by fraudsters masquerading as the selling solicitors and senior partner respectively. The bank account details in the emails related to the fraudster's bank account.

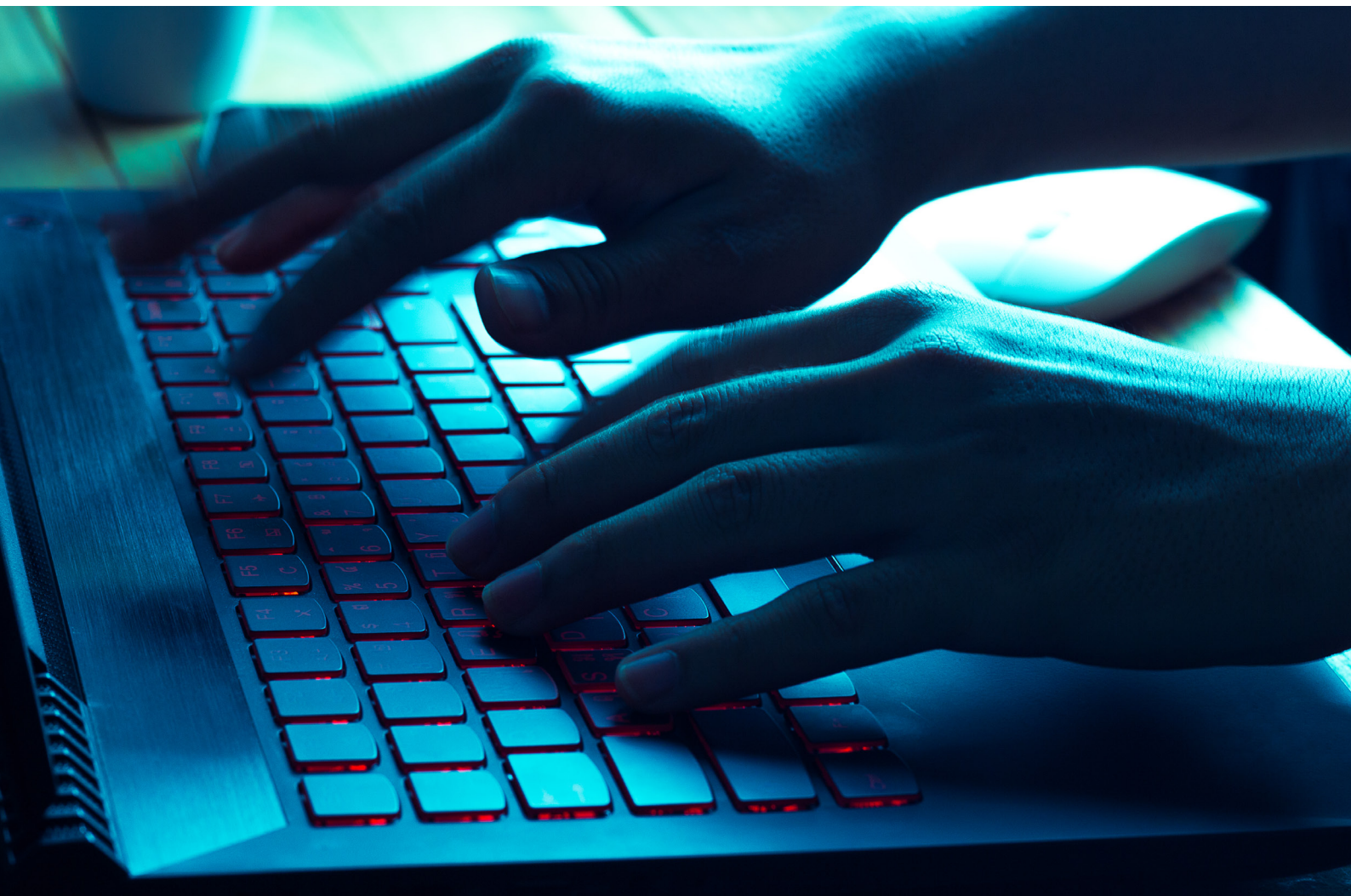
As always, awareness is a crucial element of a solicitor's risk controls – ensuring all colleagues, including cash room/finance team, are aware of the risks and potential exposure to this type of fraud. However, other items should be considered too, such as:

- Validation/verification of client bank account details – Whenever a client provides bank account details/instructions for the first time (or any changes), it's essential that these are verified;
- If the client has provided the (new) details/instructions by email, when contacting the client

for confirmation be sure to do this by a different form of communication, eg by telephone or by letter. This minimises the risk that a fraudster who provided a fraudulent payment instruction, eg by email, is also in a position to provide false validation by intercepting your email request for confirmation;

- Perhaps bank account details should only be provided by email if the email is encrypted; and
- Watch out for any changes to your client's email address. It may be a subtle change, designed to deceive. For example: - the original Joe.bloggs@hotmail.com becomes Joe.bloggz@hotmail.com.

To cater for Malaysian lawyers, this article was adapted and amended from the original article authored and written by John Kunzler, Marsh Placement Specialist.



SMALL STEPS CAN GO A LONG WAY

By Philip Lee Abdullah, Manager,
Marsh Insurance Brokers (M) Sdn Bhd



We are always too busy with 'the big stuff' that we seldom pay attention to 'the small stuff'. But it is the small stuff that can save us – some of the time. If a client sues you alleging negligence for failing to follow instructions, you will need evidence to prove that you have advised your client appropriately.

Lawyers should always maintain a written record of each advice given to and each instruction received from clients. This is a simple and good advice for any organisation and employees to follow. Ensure that all advice and instructions are confirmed in writing, by letter or email. If they were communicated via WhatsApp, save those messages as well. If you or your law firm is blamed for any loss suffered later, you can refer to the written communication to rebut such allegations.

Consider the following common circumstances.



A borrower who already has an existing loan with Bank A, then applied for a larger loan from Bank B. Bank B appointed a lawyer to ensure that their

charge would have priority over the borrower's properties secured for the earlier loan from Bank A. However, Bank A only agreed to give Bank B priority over some of the borrower's minor properties (machineries and chattels only). Bank B's loan was approved and released.

When the borrower later defaulted on the loan repayments, Bank B suffered a loss due to insufficient security. Bank B now sues the lawyer for negligence in advising Bank B.

Thankfully the lawyer had complete records to prove that prior to the loan approval, the lawyer had fully advised Bank B in writing that Bank A did not agree to grant full priority to Bank A over the borrower's properties.



A purchaser terminated an SPA due to a breach of the conditions, after discovering that the vendor had previously made illegal renovations to the property. The purchaser then sues the vendor for refund of the deposit and liquidated damages. The

vendor then brings his solicitor as a party to the suit alleging negligence for failing to advise the vendor appropriately.

Fortunately, the vendor's solicitor kept records of all letters, correspondences and communications that proved the vendor's solicitor had in fact properly advised the vendor.



A lawyer acted for a bank in a loan documentation. When the borrower defaulted on the loan repayments, the bank sues the lawyer for negligence alleging failure to advise the bank on certain documents and agreements which would have been key for the due diligence prior to approving the loan.

The lawyer was fortunate in having kept a full set of proper documents on the file including legal opinions/advice and correspondences with the bank.

Obviously sometimes this may be easier said than done, particularly perhaps when you have too much on your plate. But like all best practices, they are

only good if you ensure that it is practiced every day on every file and by everyone in the firm, ie partners and employees.

We have all heard the phrases, prevention is always better, better safe than sorry and better late than never. It applies equally to your everyday work.

It's never too late to start keeping good communication record. No matter how busy, you should make an effort – starting now! As partners or the sole proprietor, this weekend, grab a few clients' files and review them for any mistakes or weaknesses. Look out not only for whether a particular task/duty has been done or done well, but also whether you have made the required communication or advice to the client. Flag these and note them down. Come Monday, set aside some time to discuss the findings with your partners and employees. Agree on a set of best practices and guidelines for everyone to follow. The to-do list can be improved over time. But, you need to ensure that it is implemented properly by everyone – meaning that the partners or the sole proprietor needs to set aside some time to conduct a random internal audit of their files, perhaps once a month.

Taking precautions from the beginning (or starting now), will go a long way into avoiding unnecessary long legal battles.



Coverage Is Provided To Members Appointed As Arbitrators, Adjudicators And Mediators

In general, the PII Scheme insures its members against civil liability for claims arising out of the legal practice and work performed by lawyers in Malaysia; and of course, the claim must be made against a member during the period covered by PII¹. The definition of Legal Practice² means the provision of such services including pro bono and all professional services as provided in the normal course of carrying on the profession as a legal practitioner in an approved private practice anywhere in Malaysia as governed by and in accordance with the Legal Profession Act 1976 ("LPA").

Therefore, the policy wording covers members' civil liability in the course of conducting their legal practice in accordance with the LPA. Let's explore the policy further.

Serving in the capacity as an Arbitrator

Arbitration, as one of the most utilised method of alternative dispute resolution ("ADR") around the world, and is not novel in the legal fraternity here in Malaysia. Many senior legal practitioners, retired judges as well as aspiring young practitioners are now increasingly fond of wearing the hat of an arbitrator, as opposed to sitting and representing clients as counsels. No doubt the attractive remuneration often associated with arbitration has played a role, both in ad hoc as well as in institutional arbitrations.

Section 47 of the Arbitration Act 2005 articulates the liability of arbitrators, where it is provided that *"an arbitrator shall not be liable for any act or omission in respect of anything done or omitted to be done in the discharge of his functions as an arbitrator unless the act or omission is shown to have been in bad faith"*. Proving bad faith on the part of an arbitrator undoubtedly carries a high burden of proof.

In Spain, to act as arbitrators, one must have liability insurance, subject to certain terms and exemptions, as introduced in the 2011 amendments to the Spanish Arbitration Act³. However, to the author's knowledge, no other legislations have introduced similar legislations.

Serving in the capacity as an Adjudicator

The statutory construction adjudication regime in Malaysia is governed by the Construction Industry Payment and Adjudication Act 2012 ("CIPAA 2012"), where it was introduced to provide a speedy and cost-efficient dispute resolution mechanism for payment dispute in the construction sector, specifically in respect of work done and services rendered. Under the CIPAA 2012, the Asian International Arbitration Centre ("AIAC") is designated as the administrative authority, in charge of rendering administrative support for the conduct of adjudication proceedings as well as setting the competency standard and criteria of an adjudicator, amongst others.

¹ Clause 2 of the Certificate of Insurance 2021.

² Clause 35 (k) of the Certificate of Insurance 2021.

³ Spanish Arbitration Act 60/2003 of 23 Dec 2003, as amended by Acts 5/2011 and 11/2011 of 20 May 2011.

Since its enactment, many legal practitioners, especially those focusing on construction law practice, has taken up the necessary training and certification to sit as adjudicators in these adjudication proceedings. The AIAC maintains a list of qualified adjudicators in their panel and a quick glance would reveal that a large number of AIAC's adjudicators are active legal practitioners attached to legal firms. In sitting as an adjudicator, one would have control over the proceedings in accordance with the powers of the adjudicator as enumerated under Section 25 of the CIPAA. Ultimately, the adjudicator will be the one deciding the outcome of the matter through the Adjudication Decision.

What would then be the liability attached to a person sitting as an adjudicator? Section 34 of the CIPAA provides that *"no action or suit shall be instituted or maintained in any court against an adjudicator ... for any act or omission done in good faith in the performance of his or its functions under this Act"*. Additionally, sub-section (b) provides that *"an adjudicator who has adjudicated a dispute under this Act cannot be compelled to give evidence in any arbitration or court proceedings in connection with the dispute that he has adjudicated"*. The provision makes it clear that where actions are done in good faith, no legal proceedings are to be brought as against a person who has sat as an adjudicator. However, case laws seem to suggest that an adjudicator is not entirely immune from being unwittingly involved in legal proceedings, especially so in setting aside proceedings where one party is challenging the adjudication decision based on the grounds set forth under Section 15 of the CIPAA.



Serving in the capacity as a Mediator

A discussion on the liability of legal practitioners serving as neutrals in ADR proceedings would be incomplete without discussing mediation. Although mediation has been around in Malaysia since long ago, it has only in the past few years gained more attention following the adoption of the Singapore Mediation Convention. Since the outbreak of the COVID-19 pandemic, more and more initiatives have been introduced to promote the usage of mediation, due to its cost-effectiveness and efficiency in assisting disputing parties reach amicable settlement.

Amongst others, the Malaysian Government established the *Pusat Mediasi COVID-19* ("PMC-19") to assist the public in resolving their dispute in respect of any inability to perform contractual obligation arising from any of the categories of contracts specified under the Schedule of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) 2020, where the disputed sum does not exceed RM500,000.00. Similarly, the AIAC has



also introduced its AIAC Pro Bono Mediation Initiative, aimed at providing mediation services on a completely pro bono basis, subject to the satisfaction of the applicable criterions. Both the Malaysian Mediation Centre ("MMC") and the AIAC also maintains a list of qualified mediators who may be considered and/or approached by disputing parties to serve as neutrals. Interestingly, a number of these qualified mediators are also members of the Malaysian Bar who are in active legal practice.

The mediation framework in Malaysia is governed by the Mediation Act 2012. Section 19 of the Mediation Act 2012 stipulates the liability of a mediator, in which it is provided that *"a mediator shall not be liable for any act or omission in respect of anything done or omitted to be done in the discharge of his functions as a mediator unless the act or omission is proved to have been fraudulent or involves wilful misconduct."*

Conclusion

Members' civil liability as an arbitrator, adjudicator or mediator (if any) or as counsel in such arbitration, adjudication or mediation, will fall within the coverage of the Mandatory PII Scheme, provided it qualifies as services provided in the normal course of carrying on the legal profession as governed by and in accordance with the LPA.

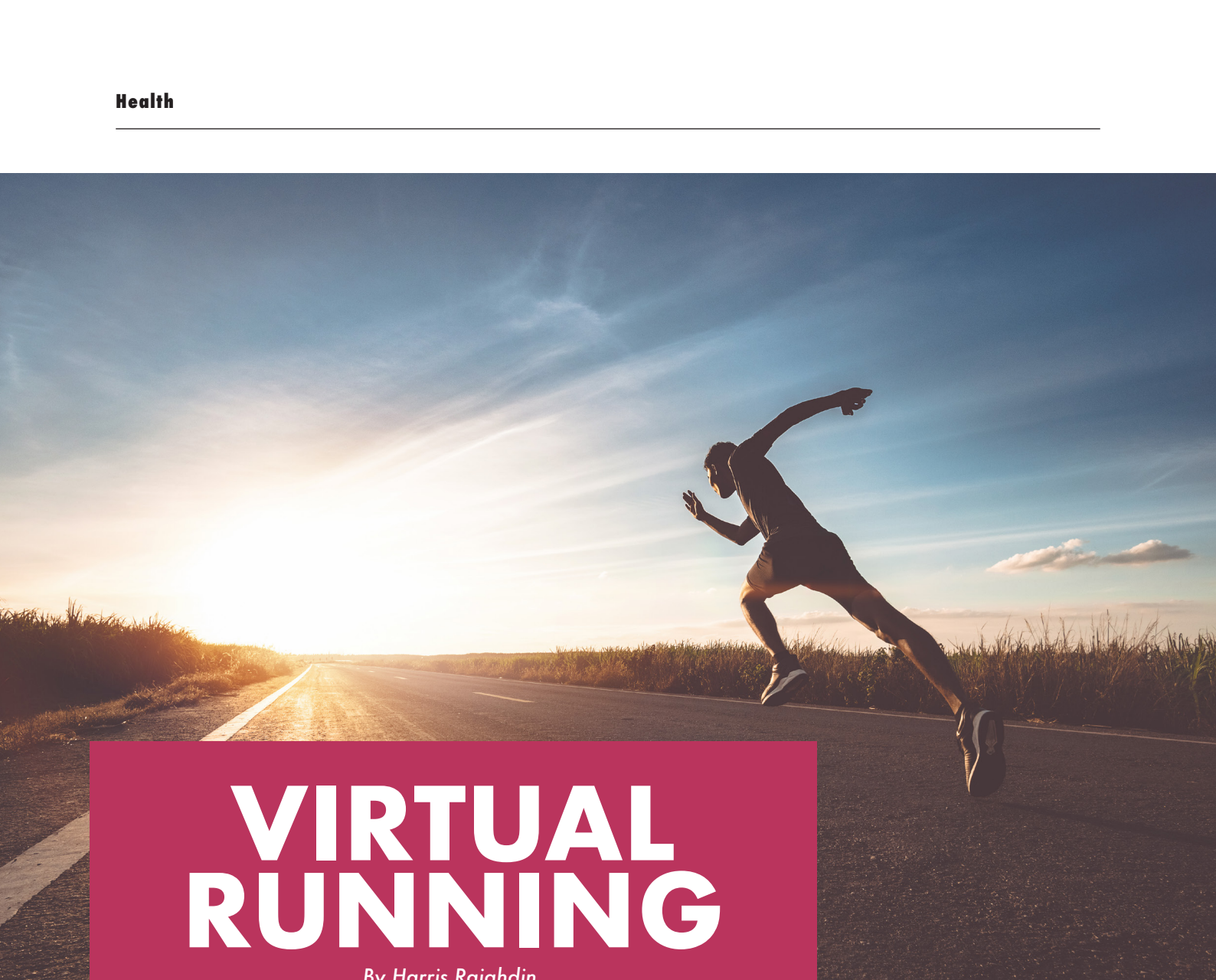
If a member is appointed as an arbitrator, adjudicator or mediator or as counsel, in his/her personal capacity, then the PII Scheme provides a further requirement to qualify for coverage. Clause 4 of the 2021 Certificate of Insurance that provides *"professional appointments and assignment assumed and undertaken by member in personal capacity shall be regarded as part of your legal practice provided that any fees or other income accruing therefrom inure to the benefit of the firm"*.

Note: Under the Mandatory PII Scheme, cover is always subject to terms, exclusions, limitations and conditions of the relevant Certificate of Insurance.

The Bahasa Malaysia translation on page 41 relating to the Master Policy, Certificate of Insurance and illustrative examples are for guidance only. In the event of inconsistency between the English version and the Bahasa Malaysia version, the English version will prevail.

For further clarification and/or assistance, contact the PII Scheme Insurance Broker, Marsh Insurance Brokers (M) Sdn Bhd at 03-2723 3241 or email at mbar@marsh.com.





VIRTUAL RUNNING

*By Harris Rajahdin,
Officer, PII and Risk Management Department*

What is Virtual Running?

With the Movement Control Order ("MCO") limiting our choices of sporting activities, a lot of people have begun to take up running during the lockdown period.

During this period, virtual running ("VR") events have been sprouting up, with many taking the opportunity to run 'together' staying in touch with their fellow runners through the wonders of modern technology.

Even if you are just starting out, you need not worry, here we provide a few basic pointers on how to start your VR journey.

Virtual running or VR is an online running event held in place of open running events which have been cancelled or postponed due to the pandemic.

For VR, you can either join in individually or as a team, but as they say in running, "If you want to go fast, go alone. If you want to go far, go together."

Upon registration, runners will need to record their daily running/ walking mileage through a fitness tracker app within a specified period.

At the end of the period, the individual or team with the highest total mileage will be declared the winner and stands to bring home prizes and more importantly, a sense of pride at their accomplishments!

The essentials



A good pair of shoes

It goes without saying that a good pair of shoes is essential towards starting your VR journey.

Get a comfortable pair of running shoes to minimise the risk of injury in the long run. It doesn't mean that you have to go for an expensive model, what you need is a pair that will suit your feet type.

Everyone's feet are different, having an arch that is either normal, high or flat. With this in mind, head to a specialist sports outlet where they will perform an analysis for free and recommend a good pair that will suit your foot – if you have the budget.



Running and fitness tracker apps

The next step is to download any of these running and fitness tracker app such as Strava, MapMyRun and even our homegrown app, Biib. You might want to download all to ensure that all of your mileage is recorded. Every kilometre counts!

These apps will enable you to record your daily running (or walking) distance, pace and even monitor your heart rate. The accumulated mileage from these apps will then be transferred to your designated team captain's account with the total determining the team's overall mileage.

Up your game!

Use a smartwatch

If you want to keep ahead of the pack, consider investing in a smartwatch. Though a bit pricey, a good smart watch will enable you to record your mileage accurately and helps you analyse your performance over time.

Among other things, their innovative feature will track your running pace, distance, routes and elevation.

Not only will you feel great after your work out, you will also look good as these smartwatches are also stylish and comfortable to wear, eliminating the cumbersome need of carrying your mobile phone during your run.



MAKING A NOTIFICATION UNDER THE PII SCHEME



WHAT IS A CLAIM?

A claim is defined under Clause 35(d) (i) and (ii) of the 2021 Certificate of Insurance ("COI") as:

- ✓ a demand for or an assertion of a right; or
- ✓ an intimation of an intention to seek compensation, damages or such other remedies for civil liability which arises from your legal practice.

A claim can include:

- ✓ an outright claim made through a writ, summon or letter of demand; or
- ✓ a potential claim that leads to a claim, such as a threat to file a legal suit against you or discovering embezzlement in your law firm.



WHEN TO NOTIFY?

- ✓ When you become aware of or receive a claim or a potential claim.
- ✓ No later than 60 days from the date of awareness of the claim.
- ✓ The 2021 COI also states that you must provide full disclosure of a claim or a potential claim.



HOW TO NOTIFY?

Notify the PII Scheme Broker, appointed by the Bar Council, Marsh Insurance Brokers (M) Sdn Bhd ("Marsh"). Provide the following details:

- ✓ A brief description of the claim;
- ✓ Events leading up to the claim;
- ✓ Status of the claim;
- ✓ Contact details of the sole proprietor or partner in charge in the firm; and
- ✓ Relevant documents eg:
 - writ or summons and statement of claim; or
 - letter of demand or allegations against you.

Marsh's contact details:
Tel: 03-2723 3388 / 03-2723 3241
Email: mbar@marsh.com



KEEP CALM AND DON'T PANIC

- ✓ Don't take any steps to try to resolve any disputes yourself as you may risk admitting liability;
- ✓ Compile any other documents that may be of help to the panel solicitor; and
- ✓ Give full cooperation to the parties appointed by the Insurer, namely the Claims Manager, Echelon Claims Consultants ("Echelon") and the panel solicitor.

WHAT HAPPENS AFTER YOU NOTIFY?



- ✓ Marsh will forward your notification to Echelon;
- ✓ Echelon will contact you to follow up on your notification; and
- ✓ The Insurer will appoint a panel solicitor to handle your matter.



For enquiries on PII and risk management, or if you have an issue with a claim or the services of the PII Scheme's insurance broker, contact:

Mysahra Shawkat, Assistant Director | **Azwa Zulsamli**, Officer
Tel: 03-2050 2001 | Email: pirm@malaysianbar.org.my



MALAYSIAN MEDIATION CENTRE

MEDIASI SEBAGAI KAEDAH PENYELESAIAN PERTIKAIAN ALTERNATIF

Oleh Norashikin Kamaruddin, Pegawai, Pusat Mediasi Malaysia dan Mysahra Shawkat, Penolong Pengarah, Jabatan Insurans Indemniti Profesional dan Pengurusan Risiko, Majlis Peguam Malaysia

Mediasi adalah suatu bentuk kaedah penyelesaian yang semakin mendapat perhatian. Kebaikan mediasi adalah:

- Tidak mengambil masa yang panjang:** pantas, efisien dan mudah (kebanyakan mediasi boleh diselesaikan dalam satu hari bekerja);
- Kos yang rendah:** tidak mahal dan kos lebih murah berbanding litigasi atau timbang tara (ia tidak membabitkan urusan mahkamah);
- Ruang rahsia dan perlindungan:** mewujudkan persekitaran yang selamat untuk penyelesaian kerana prosesnya adalah dirahsiakan, dilakukan secara sulit dan perkara-perkara yang dibincangkan di dalam mediasi tidak mungkin ditimbulkan dalam perbicaraan lain (dilaksanakan dalam persekitaran neutral, kerahsiaan dan selamat);
- Komunikasi terbuka:** mengenal pasti, menyasarkan dan menangani kebimbangan praktikal kesemua pihak yang mungkin sebelum



ini dianggap tidak relevan (peluang untuk semua pihak memahami isu-isu);

- e. **Memperbaiki hubungan:** membolehkan kesemua pihak untuk berdamai (mengekalkan atau memperbaiki hubungan sebelum ini);
- f. **Menawarkan kawalan dan sokongan:** memberikan peluang kepada kesemua pihak untuk menemui penyelesaian yang adil dan saksama; dan
- g. **Menawarkan penyelesaian:** memberikan penyelesaian yang terbaik buat semua pihak (membenarkan kesemua pihak berkompromi untuk mengakhiri perbalahan).

Mediasi membabitkan mediator, iaitu pihak ketiga, untuk menemui penyelesaian terbaik bagi menyelesaikan pertikaian dua (atau lebih) pihak. Proses mediasi itu dilakukan secara sukarela dan di luar mahkamah.

Bagi seorang mediator, proses mediasi melibatkan seseorang itu untuk mendengar dan memudahkan cara komunikasi antara kesemua pihak, dan menuju ke arah suatu penyelesaian bagi pertikaian tersebut. Proses mediasi dilakukan dalam suasana selamat dan kerahsiaan. Pada akhir proses mediasi, keputusan dimuktamadkan secara bertulis seperti yang dipersetujui antara semua pihak.

Di bawah naungan Majlis Peguam Negara, Pusat Mediasi Negara ("MMC") ditubuhkan dengan objektif untuk mempromosikan mediasi sebagai satu bentuk proses penyelesaian pertikaian alternatif, dan juga menyediakan saluran bagi menyelesaikan pertikaian dengan jaya. MMC mengamalkan bentuk mediasi yang mengambil kira kepentingan kesemua pihak dan menawarkan pelbagai khidmat termasuklah:

- a. Khidmat Mediator Profesional yang dilatih oleh Mediator yang telah diakreditasi dan dilantik ke panel mediator MMC;
- b. Ceramah umum mengenai mediasi dan penyelesaian pertikaian alternatif;

- c. Bantuan dan khidmat nasihat tentang bagaimana pihak-pihak dapat menggunakan mediasi sebagai alternatif untuk menyelesaikan masalah di samping dapat menjaga kepentingan mereka;
- d. Latihan dalam teknik mediasi, prosedur dan kemahiran;
- e. Penilaian dan akreditasi sebagai panel mediator MMC;
- f. Perkhidmatan perundingan dalam mengurus pertikaian dan mengelakkan konflik;
- g. Sokongan pentadbiran dan hal ehwal pejabat; dan
- h. Menyediakan tempat bagi sesi mediasi.

Sejak penubuhannya, MMC sudah menugaskan beberapa pertikaian kepada mediator yang bertaualiah apabila ada pihak yang tidak dapat melantik seorang mediator. Pertikaian yang dimediasi oleh MMC termasuk hal ehwal keluarga, urusan kontrak, pembinaan dan kecuaiian perubahan.

Bagi mereka yang berminat menjadi mediator yang bertaualiah, MMC menganjurkan Kursus Latihan Kemahiran Mediator. Kursus ini memerlukan seseorang menghadiri 40 jam latihan dan lulus ujian penilaian praktikal sepanjang sesi kursus tersebut. Tiada sebarang syarat spesifik yang diperlukan untuk menghadiri kursus tersebut selain kemampuan individu untuk berkomunikasi secara efektif serta penguasaan bahasa yang baik. Seorang mediator yang baik mesti bersikap neutral sepanjang mengendalikan kes.

Untuk maklumat lanjut mengenai Kursus Latihan Kemahiran Mediator, sila layari laman web MMC di www.malaysianmediationcentre.org atau e-mel kepada mmc@malaysianbar.org.my.

KISAH 'ORANG TENGAH'

Oleh Shanti Abraham, Peguambela dan Peguamcara, Mediator Bertauliah



Shanti Abraham adalah seorang ahli Majlis Peguam Malaysia, mediator di Pusat Mediasi Malaysia dan SIDREC, dan juga menganggotai panel AIAC. Dia adalah mediator utama di Pusat Mediasi Singapura, Pengerusi di International Mediation Institute Investor State Mediation Taskforce dan juga mediator di Global Mediation Panel di Office of the Ombudsman of the UN Funds and Programmes. Dia juga adalah mediator bertauliah di IMI dan SIMI dengan profilnya boleh dilayari di <https://www.simi.org.sg/profile/mediator/Shanti-Abraham>.



Saya mendapat latihan sebagai mediator buat pertama kalinya di Pusat Mediasi Malaysia pada tahun 2010. Ketika itu, saya tertarik dengan konsep penyelesaian pertikaian strategik yang menjadi matlamat utama bagi mana-mana usaha untuk berdamai. Saya kemudiannya menyambung latihan saya di Malaysia dengan mengikuti program latihan mediasi di Singapura berdasarkan prinsip *Harvard 7-Elements* dan ini yang menjadi pencetus ke arah menajamkan kemahiran saya dalam penyelesaian masalah.

Sepuluh tahun kemudian, saya mengikuti latihan di *Harvard Law School Programme on Negotiation & Mediation* dan kemudiannya *Harvard Law School Programme on Negotiation for Advanced Mediation – Mediating Complex Disputes* – di mana saya mempelajari proses merangka pertikaian kompleks. Saya kemudiannya bernasib baik kerana dipilih

untuk menyertai program tajaan *Department of Justice Hong Kong* sebagai *Investor State Mediator* – di bawah kendalian *Centre of Dispute Resolution* ("CEDR UK") dan ICSID. Pengalaman itu membuka mata saya betapa jauh dan luasnya bidang mediasi yang diperkatakan di seluruh dunia. Pastinya, ia adalah satu dunia yang hebat dan menakjubkan!

Mengapa Mediasi?

Mediasi adalah bidang penyelesaian pertikaian yang dipinggirkan sejak lebih dua dekad lalu. Diselubungi dengan ketidakpastian mengenai nilai yang ditawarkan, mediasi menjadi konsep yang diterima pakai secara teori dan bukan menjadi pilihan utama buat kebanyakan penasihat kerana tidak melihat nilai dalam menemui penyelesaian awal, sekurang-kurangnya di rantau ini.

Disebabkan COVID-19 yang membawa pelbagai musibah, barulah timbul kesedaran berkenaan mediasi. Kini mediasi menjadi pilihan kerana mewujudkan peluang penyelesaian yang pantas dan tidak menelan belanja yang tinggi.

Mengapa dan Bagaimana Mediasi Berfungsi?

Proses mediasi adalah fleksibel dan mediator memiliki kelebihan untuk bercakap dengan kesemua pihak secara bersendirian atau bersama. Keseluruhan proses ini adalah sulit dan bagi sesi secara bersendirian terdapat lapisan tambahan kerahsiaan iaitu jaminan perkongsian yang di buat tidak akan dikongsi dengan sesiapa melainkan pihak berkenaan membenarkan mediator itu membuat pendedahan atau menyalurkan maklumat tersebut. Walau bagaimanapun, terdapat had terhadap hak kerahsiaan tersebut iaitu termasuk yang berkaitan dengan mana-mana kegiatan jenayah atau pengakuan terhadap kes jenayah.

Keputusan akhir bergantung sepenuhnya kepada kehendak kesemua pihak yang terlibat dan apabila suatu penyelesaian ditemui, ini bermakna kesemua pihak telah bersedia untuk menerima keputusan tersebut (melalui proses mediasi) daripada masalah itu berterusan tanpa sebarang kesudahan.

Salah satu ciri menarik yang dilihat melalui proses mediasi adalah kadar kepatuhan terhadap persetujuan yang di buat adalah tinggi, walaupun tidak dikenakan sebarang keperluan tambahan. Fenomena ini berlaku disebabkan beberapa perkara, yang dijelaskan di bawah:

- Mediator menggunakan pelbagai teknik untuk memahami fakta yang membawa kepada pertikaian, untuk memahami mengapa usaha penyelesaian sebelum ini tidak berjaya (pastinya kesemua pihak sudah berusaha untuk menyelesaikan masalah tersebut), dan cuba memahami isu yang terus membelenggu kesemua pihak dalam pertikaian tersebut.
- Pembabitan mediator dengan kesemua pihak adalah untuk mewujudkan hubungan baik, dan mediator dilatih untuk mendengar secara aktif tentang segala isu pertikaian yang sebenarnya.

- Peringkat seterusnya adalah untuk membantu kesemua pihak memahami konteks isu-isu dan untuk mengenal pasti kepentingan bersama semua pihak. Di sinilah tugas sebenar seorang mediator. Seorang mediator perlu kekal positif dan optimistik dengan tahap kesabaran dan stamina yang tinggi berbanding orang lain dalam proses mediasi ini untuk terus merungkai masalah dalam pertikaian tersebut.
- Adalah penting bagi mediator untuk mengkaji setiap pilihan secara neutral. Mediator membawa kesemua pihak dalam satu perjalanan untuk memahami bagaimana mereka tiba di bilik itu, apakah masalah sebenar dan hala tuju yang ingin dicapai.
- Mediator perlu mengatur kesemua pembawaan yang berbeza – kemampuan merungkai masalah yang tersimpul, stamina tinggi, ketajaman fikiran, pemikiran kreatif dan kebolehan mengurus konflik – pada setiap kali apabila keperluan itu timbul. Tiada masa untuk sambil lewa kerana semua mata dan telinga tertumpu kepada mediator untuk nasihat dan penyelesaian – mencari strategi.

Salah satu cabaran sukar dalam landskap mediasi adalah persepsi bahawa ianya merupakan proses mudah.

Ini tidak benar. Mediator yang bagus membuatnya kelihatan mudah. Tetapi ia sememangnya tidak semudah itu.



Mengapakah Mediasi Tidak Digunakan Secara Kerap?

Sungguhpun proses usaha damai formal sudah diterima pakai sejak dua dekad lalu, namun ia baru mula digunakan sebagai satu kaedah penyelesaian pertikaian hanya sedekad yang lalu.

Salah satu sebab utama adalah gatekeeper pertikaian (peguam) sebelum ini tidak diberikan tempat dalam proses mediasi – terutamanya oleh mediator yang melakukan mediasi secara percuma.

Peguam yang dipinggirkan daripada mediasi sememangnya akan menolak penggunaannya kerana ia tidak membuka ruang buat mereka untuk menonjolkan nilai mereka kepada klien jika masalah itu diselesaikan tanpa kehadiran mereka.

Layanan tidak adil terhadap peguam/ penasihat dalam mediasi adalah masalah yang berlaku sejak sedekad lalu. Tetapi ia adalah masalah yang boleh diselesaikan asalkan mediator swasta terlatih kesemuanya mengetahui bagaimana untuk berdepan golongan profesional.

Seterusnya, ini menimbulkan persoalan....

Adakah Peguam Diperlukan Dalam Mediasi?

Sebagai mediator yang telah melalui (dan memilih untuk) kehadiran peguam bagi membantu pihak-pihak dalam proses mediasi – saya jamin kehadiran peguam amat membantu proses mediasi tersebut.

Tiada pihak yang mampu untuk mengubah representasi pihak lawan sama ada dalam mediasi, litigasi atau timbang tara. Tidak dinafikan, pastinya terdapat peguam yang akan mensabotaj usaha mediasi bagi kepentingan sendiri. Namun begitu, tingkah laku peguam dalam mediasi *ad hoc* yang mana klien sudah melabur dengan banyak dalam proses tersebut (bukan mediasi percuma) adalah bagus dan kedua-dua klien bertuah memilih representasi undang-undang tersebut.

Dalam era pasca COVID-19 ini, pihak yang gagal dalam rundingan masih boleh mencari penasihat lain untuk membantu mereka dalam mediasi di peringkat seterusnya untuk mengelak daripada litigasi.

Pertikaian undang-undang yang berpanjangan tidak masuk akal sekiranya ia akan berakhir dengan kerugian buat kesemua pihak. Pembubaran dan kebangkrutan sebenarnya tidak membantu dalam menyelesaikan pertikaian.

Apakah Dugaan Dalam Menjadi Seorang Mediator?

Saya melihat perkara ini sebagai suatu persoalan menarik dan mengambil masa untuk menjawabnya.

Dugaan utama adalah apabila orang melihat mediator sebagai seorang yang lembut dan baik, menawarkan kopi dan makanan yang sedap untuk membolehkan kesemua pihak hadir bagi mendapatkan keputusan yang menguntungkan kesemua pihak. Kesemua pihak seterusnya akan terkejut apabila mendapati bahawa mediator profesional sebenarnya adalah sebenarnya 'Batu hitam tidak bersanding'.

Apakah Pendekatan Terbaik Untuk Menyelesaikan Satu Pertikaian?

Daripada perspektif peguam – anda seharusnya merangka strategi yang membolehkan klien anda mencapai penyelesaian/ penyelesaian rundingan dalam tempoh masa paling pendek. Peguam seharusnya dibayar dengan yuran yang dipersetujui dan bukannya dibayar mengikut jam kerana kadar bayaran itu tidak melibatkan kebijaksanaan, tetapi hanya melibatkan penangguhan masa.

Daripada perspektif mediator – Ajukan soalan ini: Sebenarnya, mengapakah terdapat pertikaian? Apakah kepentingan tersembunyi yang perlu diberi perhatian?

Konflik adalah sebahagian daripada kehidupan, tetapi tidak semua konflik akan menuju kepada pertikaian. Pertikaian hanya menggambarkan kesemua pihak kekal dengan pandangan masing-masing dan mengharapkan suatu keadaan yang dapat memulihkan keadaan bagi menjustifikasikan apa yang diperjuangkan selama ini.

Adakah Bagusnya Kerjaya Sebagai Seorang Mediator?

Saya suka menjadi mediator dan saya berasa sangat puas sekiranya mediasi saya berjaya.

Saya bernasib baik kerana menyertai bidang mediasi ketika ia baru mula berkembang dan saya memanfaatkan kesemua peluang termasuk mediasi di Malaysia dan Singapura, dan untuk merangka strategi mediasi buat klien saya. Sebahagian besar amalan saya menggunakan strategi resolusi pertikaian di mana saya gabungkan secara kreatif pendekatan mediasi untuk mempercepatkan penyelesaian konflik.

Walaupun begitu, saya akui bahawa mediasi masih belum mampu menjadi kerjaya sepenuh masa di Malaysia, buat masa ini (tidak seperti di Amerika Syarikat, Itali, China, Australia, Singapura dan Peru di mana saya pernah berjumpa dengan mediator sepenuh masa yang agak sibuk).

Cabaran di Malaysia adalah mediasi belum lagi menjadi sesuatu yang diterima pakai secara meluas oleh peguam dan lembaga pengarah syarikat di negara ini.

Apakah Kualiti Mediator Yang Bagus?

Kesabaran, kegigihan dan tahu bila untuk berhenti sejenak.



Mengapa Mediasi Berjaya Dalam Sesetengah Kes Dan Ada Yang Tidak Berjaya?

Pihak-pihak perlu membuat pilihan untuk membawa masalah mereka ke Kamar Mediasi. Ia bergantung kepada pihak-pihak jika mereka berniat untuk keluar daripada Kamar Mediasi dengan penyelesaian. Atau lebih tepat, penyelesaian yang boleh diterima semua.

Kesemua pihak memiliki idea apa yang mereka mahukan dan mengapa mereka mahukannya. Peranan seorang mediator adalah untuk merungkai 'mengapa' dan untuk melihat segala alternatif.

Mediasi yang tidak berakhir dengan resolusi mungkin disebabkan pelbagai faktor. Dalam beberapa kes, maklumat yang tidak mencukupi untuk kesemua pihak membuat keputusan atau mereka memerlukan lebih masa untuk membuat keputusan. Alternatifnya, kesemua pihak mungkin merasakan diri mereka dikekang kebimbangan peribadi atau polisi (yang tidak masuk akal daripada semasa ke semasa dan perspektif kos yang dibina atas prinsip). Dalam hal ini, pihak lain berharap pihak lawan akan mengaku kalah. Jika ini tidak berlaku, satu pihak perlu diisytiharkan sebagai pemenang, manakala satu lagi diisytiharkan kalah.

Bagaimanakah Pihak-Pihak Boleh Secara Sukarela Bersetuju Untuk Menerima Keputusan Mediasi?

Dalam sesebuah rundingan, kesemua pihak kebiasaannya akan mengemukakan hujah berdasarkan kepentingan peribadi (dan kebimbangan).

Fakta, undang-undang dan merit adalah senjata yang digunakan untuk membuktikan siapa yang salah dan siapa yang benar. Tetapi tiada sesiapa yang mendengar hujah oleh pihak yang lain. Kesemua pihak mungkin mendengar hujah balas tetapi tiada sesiapa yang betul-betul mengenal pasti akar umbi masalah tersebut.

Seorang mediator dilatih untuk mengubah dinamik pihak yang kekal tegar dengan pendirian mereka. Mediasi membantu kesemua pihak mengambil kira

kesemua kesudahan tanpa dibelenggu tekanan hukuman. Fleksibiliti ini membolehkan kesemua pihak menuju ke arah suatu penyelesaian yang mampu direalisasikan.

Mengapakah Terdapat Kepatuhan Tinggi Terhadap Penyelesaian Akhir Mediasi?

Dalam proses pertikaian, kedua-dua pihak dibelenggu dengan kesudahan salah satu pihak akan diisytiharkan sebagai pemenang, dan satu lagi kalah. Dalam zaman pasca COVID-19 ini, persoalan yang lebih penting adalah – apa seterusnya? Adakah akan ada pematuhan? Adakah pihak yang menang akan tinggal dengan keputusan di atas kertas? Penguatkuasaan adalah langkah seterusnya tetapi kebiasaannya kedua-dua pihak tidak melaksanakan analisis masa-keuntungan yang membabitkan proses penguatkuasaan tersebut.

Apakah Akan Terjadi Apabila Terdapat Pihak Yang Gagal Mematuhi Penyelesaian Yang Ditetapkan?

Persoalannya adalah mengapa ia terjadi sedemikian. Tanpa sebarang sejarah mengenai kes pihak yang melanggar perjanjian mediasi dalam kes kendalian saya, jawapan saya adalah berdasarkan teori.

Jawapannya mungkin berpunca daripada mediasi itu sendiri (salah satu pihak merasakan dirinya ditekan untuk menerima tawaran, atau mediator menggunakan taktik ugutan dalam rundingan tersebut), atau mungkin timbul daripada niat tidak baik salah satu pihak (taktik melengahkan rundingan dengan tiada niat ikhlas untuk menyelesaikan rundingan). Namun begitu, saya melihat ini adalah kesan daripada pihak yang tidak ingin mendapatkan khidmat profesional dalam proses mediasi dan justeru tidak mempunyai sebarang kepentingan.

Dalam apa-apa jua keadaan, ia adalah penting untuk perjanjian mediasi menetapkan klausa mediasi sekiranya terhadap mana-mana pihak berdepan masalah dengan ketidakpatuhan.

Kesimpulan

Tahun lalu adalah tahun yang penting buat mediasi. Kerajaan memperkenalkan Program Mediasi COVID-19. Polisi 'mediasi diutamakan' akan diperkenalkan buat peguam dan firma guaman pada masa akan datang. Dijangka kita akan melihat perubahan besar-besaran dalam Akta Mediasi Malaysia 2012 dan undang-undang berkaitan bagi memperkuatkan kaedah penyelesaian pertikaian secara alternatif ini. Mediasi akan terus ditawarkan sebagai pilihan sebelum tindakan mahkamah berikutan Malaysia antara negara-negara di dunia yang memiliki Akta Mediasi.

Dengan wabak COVID-19 mencelarukan kehidupan semua, setiap pihak perlu melihat segala kemungkinan dan mempersiapkan diri bagi menghadapi tsunami pertikaian sebaik wabak ini berakhir. Jika ya, mediasi adalah tempat yang baik untuk bermula.





Pandemik **COVID-19** telah melumpuhkan ekonomi dari segala aspek dengan cara yang tidak pernah kita bayangkan, dan firma guaman juga tidak terkecuali daripada permasalahan ini. Walaupun kebanyakan sektor ekonomi telah kembali beroperasi seperti biasa dan beransur pulih, kesan daripada sekatan pergerakan 2020 tidak lama dahulu (dan sekatan pergerakan 2021 baru-baru ini), tidak dinafikan masih ada cabaran dan keraguan berikutan pandemik ini yang memerlukan firma guaman untuk menyesuaikan diri dan bertindak sewajarnya. Satu daripadanya adalah dengan menguruskan harapan klien.

MENGURUSKAN HARAPAN KLIEN KETIKA PANDEMIK

Oleh Shafiq Sobri

Ada segelintir klien yang beranggapan bahawa pada fasa pemulihan pandemik ini, di mana dapat dilihat kebanyakan sektor ekonomi dan perkhidmatan serta mahkamah mula dibuka semula, semuanya sudah boleh beroperasi seperti sediakala. Disebabkan itu, mereka menjangkakan yang firma guaman dapat menyelesaikan semua kerja tepat pada waktunya dengan sedikit ataupun tiada halangan, seperti ketika sebelum berlakunya pandemik. Oleh itu, adalah wajar bagi firma guaman untuk menguruskan jangkaan klien sambil mengharungi cabaran dan risiko mereka sendiri akibat pandemik ini.

Wujudkan hubungan dengan klien, sentiasa mengemaskini status kepada klien, bersikap proaktif, dan meningkatkan perkhidmatan pelanggan menerusi teknologi adalah di antara cara-cara yang efektif untuk menguruskan harapan klien semasa pandemik. Dengan situasi yang berubah-ubah setiap hari, firma guaman perlu bertindak sewajarnya untuk menguruskan harapan klien dan mengharungi cabaran agar klien kekal sehingga krisis ini berakhir. *'The Six Pillar*

*Framework'*¹ oleh KPMG mengenal pasti ciri-ciri luar biasa pengalaman klien mungkin dapat digunapakai untuk membantu firma guaman menguruskan harapan klien ketika ini. *The Six Pillars* adalah:

Empati

Tunjukkan yang anda ambil peduli, pilih respons emosi yang tepat agar bersesuaian dengan keadaan klien.

Halangan dan cabaran dalam urusan kerja bagi memenuhi kewajiban kontrak adalah isu biasa yang dihadapi kebanyakan perniagaan dan organisasi kesan daripada pandemik ini. Jadi, pada masa yang sukar dan penuh rintangan untuk klien, firma guaman hendaklah menunjukkan empati. Walaupun firma guaman mungkin mempunyai halangan tersendiri atau halangan untuk memenuhi kehendak klien, peguam juga perlu berasa empati dengan situasi yang dihadapi klien. Dan sebaiknya, cuba membantu mereka mengharungi hari-hari yang sukar ini.

¹ Julio Hernandez, A customer first approach during unprecedented times <<https://assets.kpmg/content/dam/kpmg/xx/pdf/2020/04/a-customer-first-approach-during-unprecedented-times.pdf>>

‘Sentuhan/rekaan khas’

Fahami keadaan klien, letakkan keutamaan mereka secara efektif untuk mengembalikan keyakinan klien.

Memahami keadaan, halangan dan kesukaran klien adalah sangat penting bagi memastikan mereka menemui jalan penyelesaian dan mendapatkan bantuan terbaik seperti yang diharapkan. Dengan segala halangan dan risiko yang datang bersama pandemik ini, penyelesaian yang direka khas bagi setiap klien akan memberikan kelebihan kepada firma guaman dan secara tidak langsung akan membuatkan klien terus setia bersama firma. Firma guaman juga hendaklah bersedia untuk lebih fleksibel terhadap keperluan kelompok klien yang berlainan.

Masa dan Usaha

Permudahkan klien untuk mendapat maklumat.

Adalah perlu bagi firma guaman untuk menjaga hubungan baik peguam-klien dan kepercayaan yang wujud sungguhpun perjumpaan secara fizikal diterhadkan. Ini sangat penting kerana sekatan perjalanan merentas negeri masih berlangsung dan perjumpaan secara fizikal juga terbatas bagi mematuhi undang-undang berkaitan COVID-19. Berbanding dengan dulu, kini klien sentiasa inginkan laporan terkini daripada firma guaman dan jaminan yang mereka boleh menghubungi peguam untuk sebarang persoalan. Inilah masanya penggunaan teknologi menjadi sangat bermakna. Sementara klien membiasakan diri dengan perubahan yang dibawa oleh teknologi, peguam juga boleh mengambil kesempatan ini untuk menggunakan teknologi untuk perkhidmatan mereka. Selain daripada panggilan telefon dan e-mel, persidangan video juga merupakan cara terbaik untuk memastikan klien sentiasa mendapat status terkini dan menggantikan perjumpaan atau perbincangan secara bersemuka yang biasa dilakukan.

Jangkaan

Tetapkan dan urus jangkaan klien sebaiknya pada waktu yang sukar ini.

Adalah penting bagi firma guaman untuk berbincang bersama klien tentang hala tuju sekiranya urusan mereka terkesan dengan COVID-19. Perbincangan yang baik dapat memastikan klien mendapat maklumat yang betul tentang kesukaran dan halangan berkenaan urusan dan sistem mahkamah mahupun kelewatan

yang di luar kawalan. Mengurus jangkaan klien setiap kali berlakunya perubahan strategi ataupun halangan yang melambatkan perkhidmatan peguam, seperti yang dijanjikan, akan memastikan jangkaan klien dikendalikan secara proaktif.

Penyelesaian

Beri respons terhadap keperluan klien dengan pantas dan cari cara mengatasi masalah baru dan percepatkan inovasi.

Ketika krisis ini, di mana kegelisahan klien mula meningkat dan permintaan untuk kerja diselesaikan dengan cepat menjadi keutamaan, penyelesaian yang efisien dan efektif untuk klien adalah sangat penting. Oleh itu, adalah penting bagi peguam untuk mengikuti perkembangan undang-undang dan inovasi teknologi terkini bagi memastikan klien menerima nasihat mahupun penyelesaian terbaik untuk masalah mereka.

Integriti

Lakukan perkara yang tepat bagi memastikan keperluan pelanggan dipenuhi, berikan keutamaan dan bertindak secara adil demi kepentingan klien.

Keupayaan firma guaman untuk mewujudkan hubungan atas dasar kepercayaan bersama klien semasa waktu mencabar ini merupakan kunci dalam memastikan harapan klien dapat dipenuhi. Semasa memberikan nasihat atau penyelesaian, sentiasa utamakan kepentingan dan keperluan klien melebihi segalanya walaupun klien mungkin tidak menganggapnya sebagai penyelesaian terbaik bagi masalah mereka. Klien juga perlu faham bahawa adalah menjadi tanggungjawab peguam untuk memberi nasihat yang tepat kepada mereka, lebih-lebih lagi mengenai risiko dan halangan yang disebabkan oleh pandemik yang mungkin mempengaruhi urusan mereka.

Mengurus harapan klien ketika pandemik ini terbukti amat mencabar lebih-lebih lagi apabila harapan dan tuntutan klien telah berubah akibat daripada perubahan undang-undang dan landskap semasa. Adalah penting bagi firma guaman untuk memberi respons secara proaktif dan menyesuaikan diri dengan perubahan ini bagi mengurus dan memenuhi harapan klien. Oleh itu, adalah wajar bagi firma guaman untuk sentiasa memikirkan keadaan klien, berkomunikasi secara kerap dan lebih fleksibel.



PENIPUAN DAN SCAM - TINGKATKAN KESEDARAN

Terdapat pelbagai istilah yang digunakan untuk keselamatan maklumat. Keselamatan siber, misalnya, mungkin kedengaran seperti kisah dongeng sains atau, bagi sesetengah orang, cerita yang direka untuk menakut-nakutkan orang atau sebagai taktik pemasaran. Apa sahaja istilah yang digunakan, dasar objektifnya adalah sama – menjaga keselamatan maklumat dan mencegahnya daripada jatuh ke tangan yang salah atau diubah suai bagi tujuan penyelewengan.

Terdapat hubungan yang jelas antara keselamatan maklumat dan pendedahan kepada penipuan luaran dan scam. Justeru, melindungi maklumat, sama ada disimpan secara elektronik atau sebagai salinan cetak, adalah sangat penting bagi para peguam.

Apakah Itu ‘Keselamatan Maklumat’?

Ia merangkumi perlindungan:

- Kerahsiaan maklumat – dan mencegah penyalahgunaannya; dan
- Ketepatan maklumat itu, dan mencegah perubahan data atau dokumentasi yang tidak dibenarkan.

Apakah Hubung Kaitnya Dengan Peguam?

Ia dilihat sebagai isu kritikal bagi peguam kerana kerahsiaan maklumat klien dan integriti sesuatu data adalah asas kepada hubungan peguam-klien. Senario penipuan luaran dan scam yang sedia ada melibatkan penipu memperoleh dan menyalahgunakan maklumat mengenai:

- Urus niaga peguam pada akaun-akaun bank klien;
- Hubungan peguam-klien termasuklah butiran transaksi dan kiriman e-mel; dan
- Nama, jawatan, dan peranan rakan sekerja.

Penipu berjaya memperoleh maklumat sedemikian akan menggunakannya untuk melaksanakan tipu daya dan mengakses sistem firma atau perbankan dalam talian. Mungkin sebilangan maklumat ini diperoleh dengan cara 'pasang telinga', mencuri pandang maklumat penumpang lain dalam pengangkutan awam, mendapatkan akses masuk ke premis pejabat secara haram, menggunakan perisian *malware* untuk mengakses sistem komputer atau dengan mendapatkan maklumat bersifat peribadi di media sosial.

Mencegah penipu mengakses maklumat peribadi sedikit sebanyak dapat menyukarkan usaha mereka. Mengamalkan langkah perlindungan maklumat yang baik adalah sebahagian daripada penyelesaiannya.

Adakah Ia Sangat Kritikal Buat Para Peguam?

Keselamatan maklumat adalah relevan bukan hanya untuk peguam yang mengurus kes korporat berprofil tinggi atau klien yang berpengaruh. Ia adalah relevan buat semua peguam. Klien yang menggunakan khidmat peguam berkaitan dengan urusan wasiat, pembelian rumah, atau hal-hal perkahwinan mengamankan peguam mereka dengan maklumat sulit yang perlu dijaga sewajarnya. Sebarang penyalahgunaan maklumat boleh mengakibatkan tuntutan dikenakan terhadap firma, malahan juga berpotensi dikenakan tindakan undang-undang pengawalseliaan.

Apakah Maklumat Lain Yang Berisiko?

Tambahan kepada maklumat yang berkaitan dengan arahan tertentu, maklumat pengesahan

klien (misalnya butiran bank, alamat dan nombor pasport) yang disimpan sebagai sebahagian daripada prosedur anti pengubahan wang, boleh menjadi sangat berharga kepada penjenayah. Identiti kita adalah penting dan berharga, dan seperti yang telah kita lihat, penjenayah semakin bijak menggunakan identiti orang lain untuk tujuan penipuan.



Amalan Perlindungan Maklumat

Keselamatan maklumat bukan hanya masalah IT, ia adalah risiko perniagaan – IT adalah faktor penting yang harus dipertimbangkan dalam memastikan keselamatan maklumat yang berkesan. Pertimbangkan fakta-fakta berikut dari Kajian Tahunan Trend Keselamatan Maklumat CompTIA 2012:

- 10% kecuai sistem keselamatan maklumat disebabkan oleh masalah teknologi;
- 30% adalah disebabkan prosedur yang tidak mencukupi; dan
- 60% disebabkan oleh kesalahan manusia.



Apakah Langkah Pengendalian Risiko Yang Sesuai?

Semua firma cenderung mempunyai polisi/ prosedur untuk menangani risiko-risiko utama penyalahgunaan maklumat. Ia kebiasaannya merangkumi:

- Langkah keselamatan fizikal di pejabat;
- Polisi pejabat yang jelas;
- Menukar kata laluan dengan kerap; dan
- Dasar penggunaan Internet, pemacu kilat dsb.

Keselamatan Maklumat – Tindakan

Setiap rakan sepejabat bertanggungjawab untuk memastikan mereka tidak akan membiarkan rakan mereka atau firma terdedah kepada kebocoran keselamatan maklumat, dengan:

- Mematuhi polisi dan prosedur syarikat;
- Tidak menayangkan kad pekerja kepada orang luar semasa berada di luar pejabat;
- Mengunci komputer/ peranti elektronik lain dengan kata laluan, gunakan teknologi penyulitan jika boleh;
- Tidak meninggalkan barangan yang mengandungi maklumat sulit

pada pandangan umum atau tanpa pengawasan;

- Memastikan perbincangan mengenai perkara sulit sewaktu berada di dalam pengangkutan awam tidak dapat didengari oleh penumpang lain;
- Memastikan maklumat yang diakses oleh komputer riba/ tablet tidak dapat dibaca oleh orang lain ketika di dalam perjalanan;
- Mengekalkan kesedaran mengenai risiko utama dan kawalan risiko dengan membaca artikel pengurusan dan amaran risiko; dan
- Pertimbangkan untuk mengambil modul e-pembelajaran Keselamatan Siber bagi Pengamal Profesional Undang-Undang dan Perakaunan.

Pemintasan Komunikasi Emel

Kajian Kes 1

Peguam yang mengendalikan urusan pentadbiran harta pusaka telah menghubungi seorang pewaris di luar negara untuk memaklumkan kepadanya mengenai haknya dalam pembahagian harta arwah ibu saudaranya. Dalam tempoh berikutnya, peguam dan pewaris berhubung menerusi e-mel bagi memaklumkan perkembangan urusan pembahagian harta tersebut dan anggaran harta yang layak diterimanya.

Ketika peguam menghantar e-mel kepada pewaris berkenaan bayaran interim ke dalam akaunnya, pewaris itu membalas dengan memberikan butiran akaun banknya. Namun begitu, terbongkar bahawa e-mel itu bukan daripada pewaris tetapi daripada penipu yang memintas komunikasi e-mel mereka.

Butiran bank yang diberikan sebenarnya adalah milik si penipu tadi.

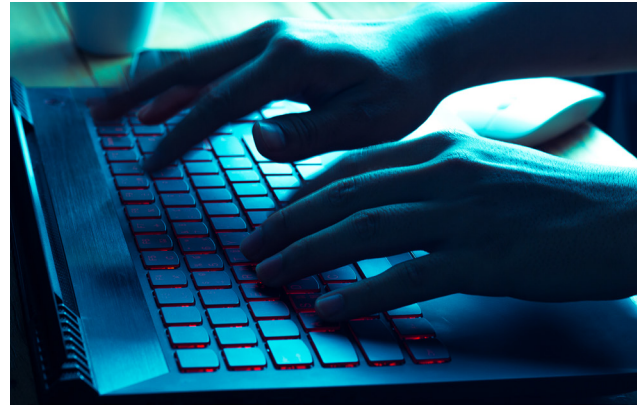
Mujur peguam yang mengendalikan urusan pewarisan harta itu berasa was-was terhadap e-mel tersebut dan menghubungi pewaris (bukan melalui e-mel) untuk memastikan sama ada komunikasi e-mel tersebut itu betul atau palsu. Gerak hati peguam tersebut telah berjaya menggagalkan percubaan penipuan dari terjadi.

Seorang penipu dengan mudahnya mampu untuk memintas komunikasi e-mel antara peguam dan klien hingga ke tahap di mana klien akan memberikan butiran bank kepada peguam bagi pemindahan dana atau sebarang urusan bayaran yang lain.

Kajian Kes 2

Dalam kes lain, bahagian kewangan sebuah firma guaman yang kecil bertindak atas arahan e-mel untuk membuat pemindahan bank untuk sejumlah dana yang besar milik firma tersebut. Arahan e-mel tersebut kelihatan seperti dihantar daripada rakan kongsi senior firma guaman tersebut.

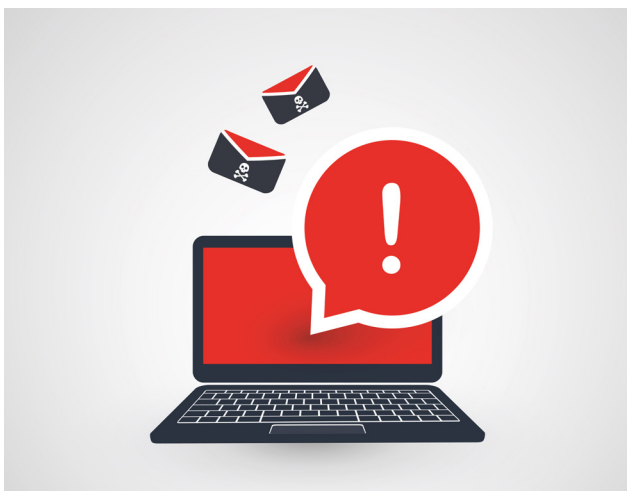
E-mel yang dihantar dalam kedua-dua kes tersebut sebenarnya dihantar oleh penipu yang menyamar sebagai peguam penjual dan rakan kongsi senior firma guaman tersebut. Butiran akaun bank yang diberikan melalui e-mel tersebut adalah berkaitan dengan akaun bank si penipu.



Lazimnya, kesedaran adalah unsur penting bagi mengawal risiko peguam – bagi memastikan rakan sekerja, termasuk mereka yang menguruskan wang tunai/ kewangan, menyedari risiko dan potensi pendedahan terhadap penipuan sebegini. Namun demikian, beberapa perkara juga perlu dipertimbangkan.

- Pengesahsahihan/ penentusahan butiran akaun bank klien – Apabila klien memberikan maklumat akaun/ arahan buat pertama kali (atau sebarang pertukaran), adalah penting untuk mengesahkan maklumat ini;
- Jika klien sudah memberikan arahan (baru)/ butiran secara e-mel, hubungi klien untuk melakukan penentusahan menerusi saluran lain, contohnya menerusi telefon atau surat. Ini meminimumkan risiko penipuan melibatkan pemberian arahan palsu menerusi e-mel, di mana penipu boleh memintas komunikasi e-mel anda sewaktu membuat pengesahan;
- Mungkin butiran akaun bank hanya boleh diberikan menerusi e-mel jika ia melalui penyulitan data; dan
- Pastikan anda peka terhadap perubahan maklumat e-mel klien. Ia mungkin perubahan yang sangat kecil bagi memperdayakan anda. Contohnya, Joe.bloggs@hotmail.com menjadi Joe.bloggz@hotmail.com.

Bagi memastikan maklumat ini relevan buat peguam di Malaysia, artikel ini diubah suai daripada artikel asal yang ditulis John Kunzler, Marsh Placement Specialist.



LANGKAH YANG KECIL MEMBAWA FAEDAH DI KEMUDIAN HARI

Oleh Philip Lee Abdullah,
Pengurus, Marsh Insurance Brokers (M) Sdn Bhd



Kita seringkali terleka dengan 'perkara-perkara besar' sehingga kita kurang mengambil perhatian terhadap 'perkara-perkara kecil'. Tetapi perkara-perkara kecil inilah yang sebenarnya mampu menyelamatkan kita – ada ketikanya. Jika seorang klien nyaman anda kerana kecuaiannya untuk mengikuti arahan, anda perlu memiliki bukti bertulis yang anda telah memberikan nasihat sewajarnya kepada klien tersebut.

Peguam sentiasa perlu menyimpan rekod bertulis setiap nasihat yang diberikan dan arahan yang diterima daripada klien. Ini adalah panduan yang baik dan mudah bagi sebarang organisasi dan pekerja untuk ikuti. Pastikan setiap nasihat dan panduan disahkan secara bertulis menerusi surat atau e-mel. Jika ia disampaikan menggunakan aplikasi WhatsApp, pastikan mesej-mesej tersebut disimpan. Jika anda atau firma guaman dipersalahkan atas apa-apa sebab, anda boleh merujuk kepada komunikasi bertulis tersebut untuk mempertahankan diri anda.

Pertimbangkan situasi-situasi berikut:



Seorang peminjam yang sudah memiliki pinjaman dengan Bank A, telah memohon pinjaman yang lebih tinggi daripada Bank B. Bank B melantik peguam untuk memastikan mereka akan memiliki keutamaan ke atas harta peminjam yang telah dicagarkan bagi pinjaman di Bank A. Walau bagaimanapun, Bank A hanya bersetuju untuk memberikan keutamaan kepada Bank B bagi mesin dan barang-barang/catel milik peminjam sahaja. Pinjaman dari Bank B diluluskan dan dilepaskan.

Apabila peminjam gagal membayar pinjamannya, Bank B mengalami kerugian kerana tidak memiliki cagaran yang mencukupi. Bank B kini nyaman peguam tersebut atas kecuaiannya dalam menasihati Bank B.

Mujur peguam tersebut menyimpan rekod lengkap untuk membuktikan bahawa sebelum pinjaman diluluskan, peguam sudah memberikan nasihat sewajarnya kepada Bank B secara bertulis bahawa Bank A tidak bersetuju memberikan keutamaan penuh kepada Bank A ke atas harta peminjam.



Pembeli menamatkan SPA kerana pelanggaran syarat selepas mendapati vendor membuat kerja pengubahsuaian haram pada hartanah. Pembeli kemudian menyaman vendor bagi mendapatkan deposit dan ganti rugi wang tunai. Vendor kemudiannya memasukkan peguamnya sebagai pihak yang bertanggungjawab dalam saman tersebut dengan dakwaan kecuai dan kegagalan untuk menasihati vendor dengan sewajarnya.

Mujur peguam tersebut menyimpan rekod surat-menyurat dan komunikasi untuk membuktikan bahawa peguam sebenarnya sudah menasihati vendor.



Peguam bertindak bagi sebuah bank untuk dokumentasi pinjaman. Apabila peminjam gagal membayar pinjaman bulanan, bank menyaman peguam kerana gagal menasihati bank berkenaan beberapa dokumen tertentu dan perjanjian yang seharusnya diperiksa dengan sewajarnya sebelum meluluskan pinjaman tersebut.

Mujur peguam tersebut menyimpan satu set dokumen termasuk nasihat dan nasihat undang-undang dan komunikasi dengan pihak bank.

ia kelihatan lebih mudah untuk diperkatakan daripada dilaksanakan, terutamanya jika anda mempunyai banyak urusan yang perlu dilakukan. Tetapi seperti amalan baik yang lain, ia berfaedah sekiranya dijadikan rutin harian anda untuk setiap fail, dan dilakukan oleh semua yang bekerja di firma itu, iaitu rakan kongsi dan staf.

Mencegah adalah lebih baik daripada merawat, lebih baik ia dilakukan sekarang daripada tiada langsung – perumpamaan yang biasa didengar. Ini seharusnya dijadikan amalan bekerja di firma anda.

Masih belum terlewat untuk mula menyimpan rekod komunikasi yang baik. Tidak kira sesibuk mana pun, anda harus tunjukkan inisiatif – mulakan sekarang! Sebagai rakan kongsi atau pemilik tunggal, pada hujung minggu ini, ambil beberapa fail klien dan lihat semula sekiranya terdapat kesilapan atau kelemahan. Teliti sama ada sesuatu tugas/tanggungjawab dilakukan dengan baik termasuk sama ada komunikasi yang tepat disampaikan kepada klien. Ambil maklum dan jangan lupa untuk meletakkan nota sebagai ingatan. Apabila tiba hari Isnin, ambil sedikit masa untuk membincangkan apa yang anda temui dengan rakan kongsi dan staf. Tetapkan amalan terbaik dan panduan kaedah untuk diikuti oleh semua. Senarai itu boleh ditambahbaik sekiranya perlu pada masa akan datang. Tetapi anda perlu memastikan bahawa ia menjadi ikutan setiap rakan kongsi atau pemilik tunggal. Lakukan audit dalaman fail, mungkin sebulan sekali.

Ambil langkah berjaga-jaga dari awal atau (dimulakan sekarang) supaya tidak perlu berdepan masalah undang-undang pada masa akan datang.



Perlindungan Diberikan Kepada Ahli Yang Dilantik Sebagai Penimbang Tara, Adjudikator Dan Perantara

Secara umum, Skim PII menyediakan perlindungan untuk ahlinya terhadap tuntutan liabiliti sivil yang timbul daripada amalan undang-undang dan kerja yang dilakukan oleh peguam di Malaysia; dan sudah tentu, tuntutan tersebut hendaklah di buat terhadap ahli berkenaan semasa dalam tempoh yang dilindungi oleh PII¹. Definasi Amalan Undang-Undang² bermaksud peruntukan untuk perkhidmatan termasuklah *pro bono* dan semua perkhidmatan profesional yang biasa diberikan semasa menjalankan profesion sebagai pengamal undang-undang di dalam amalan swasta yang disahkan di mana sahaja di Malaysia sebagaimana yang ditetapkan oleh Akta Profesion Undang-Undang 1976 ("LPA").

Oleh itu, pernyataan polisi jelas melindungi liabiliti sivil ahli semasa menjalankan amalan undang-undang mereka, sesuai dengan LPA. Mari kita teliti polisi tersebut dengan lebih mendalam.

Berkhidmat dalam kapasiti sebagai Penimbang Tara

Timbang tara merupakan salah satu kaedah penyelesaian pertikaian alternatif ("ADR") yang paling banyak digunakan di seluruh dunia dan bukan perkara baru bagi peguam-peguam di Malaysia. Kebanyakan pengamal undang-undang senior, hakim yang sudah bersara dan juga pengamal muda yang bercita-cita tinggi kini lebih cenderung untuk menceburi bidang sebagai penimbang tara, berbanding mewakili klien sebagai penasihat. Tidak dinafikan, ganjaran menarik yang sering dikaitkan dengan timbang tara telah memacu bidang ini, sama ada secara *ad hoc* mahupun institusi timbang tara.

Seksyen 47 Akta Timbang Tara 2005 menyatakan bahawa liabiliti arbitrator, seperti yang diperuntukkan *"seseorang penimbang tara bertanggungjawab bagi apa-apa perbuatan atau peninggalan berkenaan dengan apa-apa yang dilakukan atau tidak dilakukan dalam melaksanakan fungsinya sebagai seorang penimbang tara melainkan jika ditunjukkan perbuatan atau peninggalan itu adalah dengan niat jahat"*. Ini menunjukkan niat tidak baik seorang penimbang tara semestinya memerlukan bukti yang sangat kukuh.

Di Sepanyol, untuk menjadi seorang penimbang tara, seseorang itu hendaklah mempunyai insurans liabiliti, tertakluk kepada syarat dan pengecualian tertentu, sepertimana yang diperkenalkan dalam pindaan pada 2011 Akta Timbang Tara Sepanyol³. Namun, setakat yang diketahui penulis, tidak ada undang-undang lain yang memperkenalkan undang-undang yang sama.

Berkhidmat dalam kapasiti sebagai seorang Adjudikator

Sistem adjudikasi pembinaan berkanun di Malaysia adalah ditadbir oleh Akta Pembayaran dan Adjudikasi Industri P pembinaan 2012 ("CIPAA 2012"), di mana ia

¹ Fasal 2 Sijil Insurans 2021.

² Fasal 35(k) Sijil Insurans 2021.

³ Akta Timbang Tara Spain 60/2003 bertarikh 23 Disember 2003, seperti yang dipinda melalui Akta 5/2011 dan 11/2011 bertarikh 20 Mei 2011.

diperkenalkan untuk menyediakan mekanisme penyelesaian pertikaian dengan cepat dan menjimatkan kos bagi pertikaian pembayaran di sektor pembinaan, khususnya berkenaan dengan pekerjaan yang dilakukan dan perkhidmatan yang diberikan. Di bawah CIPAA 2012, Pusat Timbang Tara Antarabangsa Asia ("AIAC") diwujudkan sebagai pihak berkuasa pentadbiran, yang bertanggungjawab antara lain untuk memberikan sokongan pentadbiran untuk menjalankan prosiding pengadilan serta menetapkan standard kompetensi dan kriteria seseorang adjudikator.

Semenjak enakmen, ramai pengamal undang-undang, terutama yang memberi fokus kepada amalan undang-undang pembinaan, telah mengikuti latihan dan perakuan yang diperlukan untuk menjadi adjudikator dalam proses adjudikasi ini. AIAC menyimpan senarai adjudikator yang diperakui di panel mereka dan sekilas pandang, ia menunjukkan bahawa sebilangan besar adjudikator AIAC adalah pengamal undang-undang yang bertugas secara aktif di firma guaman. Ketika menjalankan tugas sebagai adjudikator, seseorang itu akan mengawal prosiding sesuai dengan kuasa adjudikator sebagaimana yang disebutkan di bawah Seksyen 25 CIPAA. Di akhir prosiding, adjudikator yang akan menentukan keputusan pertikaian tersebut melalui Keputusan Adjudikasi.

Apakah tanggungjawab yang diletakkan kepada seseorang yang menjalankan tugas sebagai adjudikator? Seksyen 34 CIPAA memperuntukkan bahawa *"tiada tindakan atau guaman boleh dimulakan atau dikekalkan dalam mana-mana mahkamah terhadap adjudikator ... bagi apa-apa perbuatan atau peninggalan yang dibuat dengan suci hati dalam pelaksanaan fungsinya di bawah Akta ini"*. Selain itu, sub-seksyen (b) memperuntukkan bahawa *"seseorang adjudicator yang telah mengadjudikasikan statu pertikaian di bawah Akta ini tyda boleh dipanggil Untuk memberikan keterangan dalam mana-mana prosiding timbang tara tau mahkamah yang berkaitan denna pertikaina yang telah diadjudikasi olehnya"*. Peruntukkan tersebut menjelaskan bahawa jika perbuatan itu dilakukan dengan niat baik, tidak ada prosiding undang-undang yang boleh dikenakan terhadap individu yang telah menjalankan tugas sebagai adjudikator. Namun begitu, undang-undang kes seakan menunjukkan bahawa seorang adjudikator tidak boleh mengelak sepenuhnya daripada terlibat secara tidak sengaja dalam prosiding undang-undang, terutama mengetepikan prosiding di mana satu pihak mencabar keputusan adjudikator berdasarkan alasan yang dinyatakan di bawah Seksyen 15 CIPAA.

Berkhidmat dalam kapasiti sebagai seorang Mediator

Perbincangan tentang liabiliti pengamal undang-undang yang berkhidmat secara neutral di dalam prosiding ADR tidak akan lengkap tanpa membincangkan tentang mediasi. Walaupun mediasi telah lama berada di Malaysia, namun ia hanya mendapat perhatian sejak beberapa tahun kebelakangan ini, setelah penerimaannya di Konvensyen Mediasi Singapura. Semenjak tercetusnya wabak COVID-19, semakin banyak inisiatif telah diperkenalkan untuk mempromosikan mediasi, berikutan keberkesanan dan kecekapan kosnya dalam membantu pihak-pihak yang mempunyai pertikaian mencapai penyelesaian damai.

Antaranya, Kerajaan Malaysia telah menubuhkan Pusat Mediasi COVID-19 ("PMC-19") untuk membantu orang ramai menyelesaikan pertikaian mereka tentang ketidakmampuan untuk melaksanakan kewajipan kontrak yang wujud dari mana-mana kategori kontrak yang dinyatakan di bawah Jadual Langkah-Langkah Sementara bagi Mengurangkan Kesan Penyakit Koronavirus 2019 (COVID-19) 2020, di mana jumlah pertikaian tidak melebihi RM500,000.00. AIAC juga telah memperkenalkan AIAC Pro Bono Mediation Initiative, yang bertujuan untuk



menyediakan perkhidmatan mediasi secara *pro bono* sepenuhnya, tertakluk kepada kriteria-kriteria yang perlu dipenuhi. Kedua-dua Pusat Mediasi Malaysia ("MMC") dan AIAC juga menyimpan senarai mediator yang bertauliah, yang mungkin boleh dipertimbangkan dan/atau didekati oleh pihak yang mempunyai pertikaian untuk mendapat perkhidmatan secara neutral. Menariknya, sebilangan mediator yang bertauliah ini juga merupakan ahli Badan Peguam Malaysia yang aktif sebagai pengamal undang-undang.

Bidang kerja mediator di Malaysia ditadbir oleh Akta Mediasi 2012. Seksyen 19 Akta Mediasi 2012 menetapkan tanggungjawab mediator, di mana diperuntukkan bahawa *"pengantara tidaklah bertanggungjawab bagi apa-apa perbuatan atau peninggalan berkenaan dengan apa-apa yang dilakukan atau yang ditinggalkan daripada dilakukan dalam menunaikan fungsinya sebagai pengantara melainkan jika perbuatan atau peninggalan itu telah dibuktikan sebagai fraud atau melibatkan salah laku secara sengaja."*

Kesimpulan

Liabiliti sivil ahli sebagai penimbang tara, adjudikator atau mediator (jika ada) atau sebagai peguam pembela di dalam penimbang taraan, adjudikasi atau mediasi, adalah dilindungi di bawah Skim Mandatori PII, asalkan ia memenuhi syarat sebagai perkhidmatan yang diberikan secara umumnya oleh profesion undang-undang sebagaimana yang ditetapkan dan bersesuaian dengan LPA.

Sekiranya seorang ahli dilantik sebagai penimbang tara, adjudikator atau mediator atau sebagai peguam pembela, atas kapasiti peribadinya, maka Skim Mandatori PII menetapkan syarat lebih terperinci bagi memperolehi perlindungan. Klausula 4 Sijil Insurans 2021 menyatakan *"perlantikan dan penugasan profesional yang dijangkakan dan dilakukan oleh ahli dalam kapasiti peribadi akan dianggap sebagai sebahagian daripada amalan undang-undang anda dengan syarat apa jua bayaran atau pendapatan lain yang wujud daripadanya adalah untuk faedah firma"*.

Nota: Di bawah Skim Mandatori PII, perlindungan adalah sentiasa tertakluk kepada terma, pengecualian, dan syarat yang dinyatakan di dalam Sijil Insurans yang berkaitan.

Alih Bahasa ini adalah sebagai rujukan sahaja. Sekiranya terdapat perbezaan antara versi Bahasa Inggeris dan Bahasa Malaysia, versi Bahasa Inggeris di mukasurat 21 hendaklah digunakan.

Untuk maklumat dan/atau bantuan lanjut, sila hubungi Broker Insurans Skim Mandatori PII, Marsh Insurance Brokers (M) Sdn Bhd di talian 03-2723 3241 atau emel kepada mbar@marsh.com.



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Look out for our **#riskmanagement** curated webinar series brought to you by Bar Council Professional Indemnity Insurance Committee. The topics in our webinar sessions are aimed at nurturing professional ethics, advocating awareness and providing guidance to the legal community.



Webinar Calendar 2021

First quarter 2021 (January to March)

- ✓ RiskTalk: Managing Mental Health Issues During the COVID-19 Pandemic
- ✓ I-RiskTalk: Keberkesanan Pengurusan Masa Dalam Firma Guaman

Second quarter 2021 (April to June)

- ✓ My Professional Indemnity Insurance

Third quarter 2021 (July to September)

- ✓ Getting Started! Focus: Accounting and Taxation
- ✓ Getting Started! Focus: Billing & Collections
- ✓ Getting Started! Focus: Conveyancing in a Competitive Climate
- ✓ Getting Started! Focus: Should we be Partners?
- ✓ Getting Started! Focus: The Fundamentals of Legal Practice
- ✓ How Not to be a Statistic? The Conveyancing Scam
- ✓ I-RiskTalk: Diet & Fitness
- ✓ I-RiskTalk: Edisi Syariah

Fourth quarter 2021 (October to December)

- ✓ I-RiskTalk: Deadlines and More Time
- ✓ I-RiskTalk: Edisi Syariah
- ✓ I-RiskTalk: Mental Health
- ✓ My Professional Indemnity Insurance
- ✓ RM4Staff Focus: Connecting People
- ✓ RM4Staff Focus: Law Firm Accounting 101
- ✓ RM4Staff Focus: Office Administration. Ace It!

Look out for circulars to register for the webinars. If you would like the Bar Council PII and Risk Management Department to send you an email informing you of the confirmed dates, email us at pirm@malaysianbar.org.my.