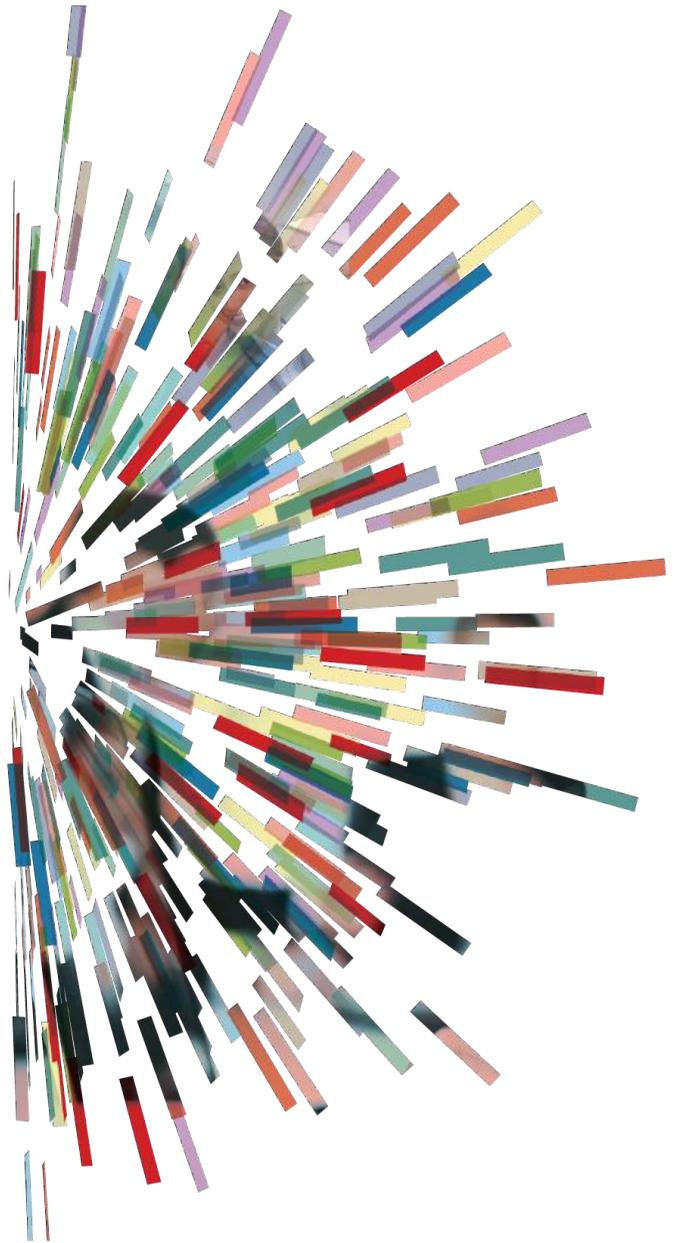




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Ethics Of Discounting By Law Firms In Malaysia



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ETHICS OF DISCOUNTING BY LAW FIRMS IN MALAYSIA

It is mid-morning. The law office of Sharifah and Company is experiencing its usual mid-morning lull; with a cup of coffee and a plate of biscuits. The telephone rings and the secretary picks it up. The conversation that ensues is like a repetition of other conversations, nothing extraordinary. Because it is a telephone conversation, we hear only one side of the exchange from the comfortable interior of the law office.

The secretary picks up the phone and says brightly, "Hello, Sharifah and Company."

The unknown caller responds by mumbling on the phone, which can barely be heard.

"Yes, we do sale and purchase agreements. We can help you." The secretary is bright and chatty.

With that response, the unknown caller grows more interested and pursues his line of query: the legal fees.

The secretary explains, "Oh, the charges will depend on the rates fixed by the Bar Council. We have rules, you see. The Bar Council fixes the rates for our legal fees and our disbursements are charged as per our expenses incurred. How much did you say the house is going for?"

The unknown caller states the price which he is buying the property for.

The secretary politely makes a calculation and lets him know, "Ah, hang on, let me calculate it. OK, the legal fees will be about *RM4,000 for that transaction."

Then, the unknown caller asks another question and the secretary is displeased.

She says, "I'm sorry sir, we cannot give you a discount. But we can give you a quote for our services. If you could drop by our office, we could explain ... "

* RM is Ringgit Malaysia

Suddenly, the unknown caller hangs up. But his actions are perfectly understandable. He is shopping around, looking for another lawyer.

“Another telephone query!” the secretary remarks. “Looking for the cheapest lawyer in town!” she says to nobody in particular, but she is fuming.

Her office colleagues chuckle at this outburst.

“Just another inquiry, shopping around for the best rates. You know, I’d do the same, if I didn’t work in a law office,” said a well-dressed lady.

“Yes boss, you would,” said the secretary. “But who would pay my salary then?”

They both laughed. It was just another day at Sharifah and Company, a boutique law firm that focuses on conveyancing matters.

“Boss,” says the secretary innocently, “you know we get a lot of these calls. Why don’t we give them a discount? At least give it a try.”

Sharifah, the boss, looks at her secretary amusingly. “You haven’t learned much about clients, have you?” she says. “The clients want the cheapest lawyer in town but they also want first rate services. We can’t afford to give them first-rate services if we do not turn a profit!”

“Yes boss, I see but if it’s a big transaction we’re talking about, then the fees will also be quite considerable. So boss, can we give a discount if the transaction is big? We may be able to get more business that way.”

Sharifah pauses for a minute. “That’s a tough question. The Solicitors Remuneration Order sets the legal fees according to the transaction value: on a scale of up to RM10 million, after which we have the discretion whether or not to charge, and what percentage to charge. But why make less when we can make more?”

“Err, because we can attract more clients?” suggests the secretary.

“Yes, I see your point, but then when word gets out that you are giving a discount on legal fees, do you know what will happen? Do you?”

"Everybody who hears about it, will want a discount, I suppose."

"That's right. You will spoil the market. The other lawyers will eventually have to follow suit as well. Because when every client expects a discount, those lawyers who don't give it won't get the business."

The secretary was a bit confused. "That means that while everybody else is giving discounts, we aren't giving discounts, because ... ?"

"Because *not* everybody is giving discounts, " says Sharifah. "Some of us are senior enough to command the confidence of the client because we are known for our mastery and skills in the job."

"Ah yes, that's true," says the secretary.

"And therefore we do not need to give a discount to attract our clients," continues Sharifah, "We are good at what we do. Why would they want to take a chance with a new law firm that may be unfamiliar with complex transactions? Transactions in the millions of ringgit! Why would they want to take a chance?"

"But boss," protests the secretary, "there is professional indemnity insurance. If law firms mess up, insurance will cover it."

"Insurance? Insurance? Insurance comes in after the damage is done! No, clients who can afford it want a lawyer who will handle the work properly and take them from point A to point B. They want someone who can perform the job without messing up. Think about it, would you feel proud to continue working for this firm if my good name has been dragged through the mud?"

"OK boss, I get it. Clients are paying for 'expertise' and 'reputation'."

"That's right. At the same time you also know that it's an offence to give discounts. Our firm could be suspended by the Disciplinary Board for flouting the rules: the time-hallowed Solicitors Remuneration Order 2005. You know it simply as the SRO."

"In existence since 2005, boss? But I thought that it was older than that."

“The rates were revised in 2005 but the SRO was in existence a long time before that. You weren’t around when I first started this firm twenty years ago, but the SRO was in existence then too. There was, and still is, a Disciplinary Board that enforces the rules. As you know, you sometimes see notices in the Bar Council’s newsletter about certain lawyers getting suspended for Disciplinary Orders. An SRO enforcement committee has been going around checking on law firms, to see if they are giving discounts.”

“Ooh, Disciplinary Orders: that’s a scary thought!” said the secretary. “So *that’s* why we don’t offer discounts?”

“That’s another reason why. The moment you start giving discounts, people expect you to continue giving discounts. If you later refuse to give them a discount then they’ll go elsewhere, because they feel cheated that you don’t live up to your fabulous reputation for giving discounts, when in fact all you wanted was to collect your full legal fees,— which you are perfectly entitled to! So it’s better not to start. But I’m sure you’ve heard of people in other firms that offer discounts to their clients....”

The secretary nodded her head vigorously. Indeed she had heard, and it was her sister who had informed her. Her sister worked in another legal firm in the same building.

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In the same building, at another floor, at another legal firm, a firm that gives discounts, the telephone rings.

“Hello, Lim Ah Kow and Associates,” says the clerk. She is new at the job, fresh out of college. She is tackling her job with zest and aplomb. She is the sister of the secretary at Sharifah and Company.

It is the same person who was making an inquiry earlier. He inquires about sale and purchase agreements and if they handle transactions of that sort.

The clerk at this other firm is cheerful, just like her sister, “Of course sir. We do sale and purchase agreements. You can bring it over and we’ll handle it for you.”

The caller makes his inquiry about the cost of legal fees for his transaction.

“Well sir, our fees follow the Bar Council rates. But don’t worry sir, we’ll give you a discount on the fees.” The clerk at Lim Ah Kow and Associates is matter-of-fact about it, “If your transaction is big, we can give you a bigger discount. If it is small, maybe the discount will be smaller. But there is a discount. Don’t worry! But,” she adds, “the discount is only for the legal fees . Disbursements can’t be discounted.”

Our invisible caller is happy with the answer. He says a few words to confirm that he will drop by the offices of Lim Ah Kow and Associates soon.

“Excellent. See you soon!” says the clerk. She hangs up.

“Success! Another business for the company!” she announces triumphantly.

Her colleague at the next table is happy to hear the news. “Sounds good all right. What was it about?”

“A sale and purchase agreement, and a loan to go along with it. We get to make double legal fees on a single transaction!”

Her colleague, an old member of the staff, pauses to reflect. She is the senior clerk. “Yes we do, but not really. We get two-in-one transactions but sometimes in the end, we make the same amount as if we handled one.”

The young clerk was nonplussed. "Eh! What do you mean?"

The senior clerk smiled, "When we handle a sale and purchase agreement, we earn a certain amount. Then there's a discount on that and you know, sometimes it's 30%, sometimes 40%, sometimes it even goes up to 50%. So we handle the loan agreement as well whenever we can to earn a little bit more from the same transaction but clients also expect a discount on it."

"Oh." Realisation creeps over the face of the young clerk. "But why do we give a discount then?"

"Because we may not get the deal otherwise!" says the old clerk gruffly. "When we give a discount, customers who are sensitive to the price of legal services will favour us over the firm that doesn't. Take for example your sister's employer, Ms Sharifah: I hear that she doesn't discount ..."

The young clerk nods. It was true that Sharifah was known to have told off clients who asked for a discount.

"Actually," said the young clerk to her senior, "I heard from my sister that Ms Sharifah is suffering from some form of anemia and so she refuses to give a discount. Because of her physical condition, she can't afford to handle so many cases. It might be too taxing for her, she picks her clients selectively."

"Really? That may be a good thing for her. By taking on only those clients who are willing to pay full fees, she can afford to take less clients. You know what? She may be making twice as much as us on comparable conveyancing transactions. Of course, our firm makes more money through bulk work."

"Why doesn't our boss Mr Lim think of following the Bar Council rates?"

"He already does – all our bills follow the Bar Council's rates! But our discounts are given to clients as cash refunds. You know, they pay our bills in full then we pay them back a portion of it in cash, as a discount. That's how we can avoid getting caught by the Bar Council's Disciplinary Board for discounting on fees."

"Clever Mr Lim. Are most firms that discount, like ours?"

“Unfortunately, yes. So most clients know about the cashback arrangement but it’s the best case scenario so far. Some firms give them shopping vouchers.”

“Why don’t we follow Ms Sharifah’s style? You know, just leave off discounting entirely? After all, it’s not like we are a new firm without clients. We have many clients. I’m sure that they know what we do, and that we do it well!”

The senior clerk chuckled. The young clerk’s naivety seemed to shine through. “When you’ve been around as long as I have, you’ll know that customer loyalty is a thing of the past. Today most clients believe that most, if not all conveyancing lawyers are the same. Are we really alike? Not really! But our clients’ actions tell us they think we are, because they go where the discount is biggest. I’m sure you’ve seen some property developer’s billboard that says, *Free Legal Fees for Sale and Purchase Agreement and Loan Agreement*. So here’s the question: if it’s free, who pays the lawyers?”

The young clerk did not know the answer. She blinked.

The senior clerk said, “Someone pays the bill, make no mistake about it. But the bill is heavily discounted! Yes we have our official rates, but to get these kind of deals; for entire housing projects, which can go to hundreds of units, we offer some kind of discount to the developers and the banks.”

“Is it worth it?”

“It might be!” said the wise old clerk. “Agreements for new housing development projects follow a template fixed by law. So the lawyer who prepares the agreement for a new project photocopies the schedule G or schedule H agreement from the Act and changes only the details. So sure, it’s worth it! But if you’re talking about sub-sale transactions, there is no fixed template. Every agreement is different. So if you have to vet through and make sure the terms are OK. Unless the transaction is worth our time, there’s no point in doing sub-sales *and* offering discounts. Low cost houses are an example of this. Low cost houses are problematic: they require special permissions, this and that and everything adds up. So when we send our bill, our clients jump and complain! They ask: why charge so much for a low cost housing transaction?”

“Oh yes, low cost houses ...” The young clerk flinched as she recalled some bad experiences.

The senior clerk chuckled. "You remember, don't you? So for a house that's about RM80,000, our legal fees are only RM800. Add in the CKHT, the tax forms, we make a few hundred ringgit more. But what's that? Just a pittance, especially after giving the discount to them."

"But if we don't give these poor folks any discount, they won't come back when they have the money, when they are rich ..." said the young clerk to nobody in particular.

"There is no customer loyalty nowadays!" reminded her senior. "How often do you think people buy houses? Do you think that we have customers who come back week after week with new sale and purchase agreements? Don't make the mistake of assuming that people buy houses like they a mobile phone.

"Our boss Mr Lim is working on volume. We need many files to make ends meet, and our boss is out there doing the marketing. That's why I have been appointed as the chief clerk for the conveyancing department in this office, coordinating all of you junior clerks, so that we can get the work done with minimal supervision from him."

The young clerk was concerned. "Doesn't having *more* files increase the chances of mistakes happening? I mean, especially when the junior clerks handle the files without lawyers guiding us. A slip up could happen at any time."

"That's why I am here, so don't worry," said the senior clerk. "Now, back to work; we've spent enough time talking about our work but not enough time doing it."

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At the coffee shop at the ground floor. Sharifah has come down for a coffee break. She looks around the counter and makes her order: mocha latte. Soon, she has it. For some lawyers, coffee is a much needed fuel to face the challenges of a busy day. Sharifah is one of those lawyers. Holding her cup of steaming hot coffee, she scanned the tables and soon spotted Mr Lim.

Sharifah walked over. "Good morning Mr Lim! How are you?" she called.

Mr Lim looked up from his pile of documents that he was reading, "I'm all right Sharifah. Would you like to join me for a while?"

"Why not?" She sat down. "So, how's life?"

"Life is good," said Mr Lim. "Lots of tension, mostly from work: clients, bankers, developers, but I wouldn't trade it for anything! The money is good, but there is stress..."

"Wow. The big lawyer is talking," marvelled Sharifah in good humour. "Of course you should be fine. I'm getting along, not getting rich anytime soon, but I'm fine as well."

They both smiled.

Then Sharifah said, "Did you hear about that case of *Abdul Razak* recently? He challenged the Bar Council's Disciplinary Order because he had given a discount for his legal fees."

Mr Lim nodded his head. "Yes I did. That was in response to the SRO Enforcement Committee visiting and conducting various spot checks at members' offices. I recall that he challenged the legality of the Solicitors Remuneration Order: what happened to that case?"

"Basically, it's a mixed bag. On the one hand, the Solicitors Remuneration Order is still valid. But on the other hand, the SRO Enforcement Committee can't come to our offices to investigate our files."

Mr Lim's eyes lit up, "Does it mean that we can now give discounts freely?"

“Eh, no Mr Lim. It’s still against the SRO for us lawyers to give discounts on non-contentious matters. But now, the Bar Council’s SRO Enforcement Committee can’t come knocking on our doors. It’s when people complain about us not following the SRO that the SRO Enforcement Committee comes knocking ...”

“I see...” Mr Lim said. “Well, I know where you stand but personally, I believe that we should be allowed to give discounts.”

Sharifah asked, “I have to ask – why? For me, I can’t afford to take on too many clients because I’m suffering from anemia. I only take clients who will pay my full legal fees. If I was forced to discount, I don’t know what would happen to my small firm. I have only one secretary, and the two of us handle everything. I’m not like you, with your litigation partner and your many clerks.”

Mr Lim began to propound his ideology. “Because, Sharifah, if you discount, you will get more business! Everybody knows that I give discount but I can afford to because I have the manpower. I think the SRO is also inefficient: why not let the market forces determine what people are willing to pay? If firms can’t deliver, then maybe they should think of doing other things. Conveyancing law firms need to be competitive in today’s world.”

“I know what you’re driving at Mr Lim. You’re talking about the new ‘Competition Act’ aren’t you?”

“Exactly!” said Mr Lim, “So, the SRO actually encourages market inefficiencies because everybody is forced to charge the same rate. But if the laws of demand and supply were at play, prices for legal services would fluctuate in response to market forces and eventually, only those law firms that can perform will survive and continue serving the markets.”

“But surely you need a guideline for legal fees, don’t you? I mean, how would you know how to charge for a certain transaction?” pleaded Sharifah with Mr Lim. “If you follow the market forces, one day you’ll be charging flat rates for all conveyancing transactions that you handle. But our liability can’t be reduced, while our profits go down, down, down ... ”

“Sharifah,” said Mr Lim patiently, “the times are changing. With the Competition Act, practices like the Solicitors Remuneration Order are going to be viewed as ‘price-

fixing' and maybe, just maybe, the Bar Council might get referred to as a 'cartel'. I mean, all of us lawyers getting together to charge the clients agreed fees: how is that going to help the averageguy, the man who can't afford to pay full fees? We have a duty to help him too. But if we obey the SRO, we would have indirectly punished him. Poor him! He won't be getting his Sale and Purchase Agreement if he can't afford our fees. Don't you think it's too cruel?"

"Err .. you're right Mr Lim. You are right about the regular man on the street. But I think, your rich clients who spend millions of ringgit on property investments can afford to pay your legal fees in full. What is happening is that you get more business because people like me decide to follow the SRO rates. If we all competed on discounts, I think eventually the discounts you and I give have to become bigger and bigger. Then what? Would it really help you out?"

"Well Sharifah," said Mr Lim with a smile, "the Competition Act is an Act of Parliament whereas the SRO is only a regulation set up by a body for its members. So the Act of Parliament will eventually rule over the SRO."

Sharifah was flabbergasted, "Mr Lim! You really have an answer for everything! But think about what I just said. If everybody has to resort to discounting to get the business in, then we all have to start giving bigger and bigger discounts. And eventually your costs go up because you have to get more files just to earn the same amount of profit."

"Yes, you're right," conceded Mr Lim. "I'm banking on there being enough people like you in the marketplace: people that don't discount. Then the contrast is more visible; 'some discount' versus 'no discount'. But if we all start to discount, let's say you offer 30%, then my 30% is nothing special. I'll need to increase it to 50%. And let's say you follow suit, we'd be competing for the same customers but our profit margins would keep going down."

"Ah, now you're seeing the big picture!" said Sharifah. "Like petrol stations, selling petrol at a fixed price. And cigarettes, sold all over this country at the same prices. That's why we have price controls. So why should we offer discounts? Let's uphold the dignity of our profession, Mr Lim. There's a proper price for everything so let's keep it that way! After all, if your clerk screws up the transaction, your client will sue you for the full extent of your liability. The client won't say, *'Hey, you gave me a*

discount so I'll sue you for less'. So why receive less than your entitled fees and bear the full liability? Besides, if you take less cases, you can spend more time overseeing your them."

"Unfortunately, I can't do that.. I have a large team of support staff and we need to make enough profit to keep the firm going. Otherwise how can we pay the salaries for all the staff? And the overheads? So we sometimes take on unprofitable files just to keep the firm going."

Mr Lim sighed, "Well, that might happen in the future but for now, everything is fine. I try not to think too much about it. Cheers Sharifah, let me wish you success in your business!"

"Best wishes to you as well. Bye!"



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