



## Malpractice Advocate Profession in Indonesia

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### **Abstract**

Juridically, there is no clear and firm regulation related to the understanding and qualifications of malpractice advocates in Indonesia (there is a legal vacuum), but theoretically there have been many concepts and doctrines relating to legal malpractice, especially advocacy malpractice. In a sociological perspective, there have been many cases of advocacy malpractice that have emerged in the implementation of advocate practices in Indonesia. Meanwhile, in the perspective of legal philosophy, advocates as a noble legal profession (*officium nobile*) have no fair and certain formula for handling and settlement, both for clients who receive bad service from advocates and for advocates themselves as law enforcement officers. Based on the juridical, sociological, theoretical and philosophical reasons above, it is considered important to discuss the qualifications of an act including the malpractice of the Advocate profession and the forms of accountability of the advocate profession for advocacy malpractice cases. Therefore, this research uses normative legal research. Based on the results of the discussion, this study has the conclusion that the qualifications or parameters of the malpractice act of an advocate, if it meets the following requirements: (1) The existence of legal services provided by an advocate (rights and obligations); (2) Legal services are provided in: (a) below the applicable professional standards; (b) awarded in violation of the "fiduciary" obligation of the advocate; (c) defaults on contracts for providing legal services, or; (d) provided in a manner contrary to applicable law and code of conduct; (3) The advocate's actions take the form of acts against the law (intentional or negligence); (4) There are losses to the client; and (5) The loss is caused by the act of providing legal services by the advocate. There are three forms of advocacy accountability, namely ethical responsibility, juridical responsibility and disciplinary responsibility.

**Keywords:** *Advocate Malpractice; Ethical Responsibility; Juridical Responsibility*

### **Introduction**

The position of Advocates as a profession that is free, independent and responsible is equated or equalized with judicial institutions and law enforcement agencies such as the police and prosecutors.

Even explicitly stated in Article 5 paragraph (1) of the Advocate Law that; "Advocates have the status of free and independent law enforcers guaranteed by laws and regulations". In the Elucidation of Article 5 paragraph (1) it is explained that: "What is meant by an Advocate with the status as a law enforcer is an Advocate as one of the instruments in the judicial process that has an equal position with other law enforcement agencies in upholding law and justice. The word "free" in Article 5 paragraph (1) of the Advocate Law is given an Explanation as formulated in the Elucidation of Article 14 Paragraph (2), while the sound of Elucidation of Article 14 Paragraph (2) is "without pressure, threats, obstacles, without fear, or degrading treatment for the profession's dignity. This freedom is carried out in accordance with the professional code of ethics and laws and regulations."

The Advocate profession is a respected profession (*officium nobile*). To carry out the noble profession or *officium nobile*, according to Franz Magnis Suseno, "is demanded to have high morality from the culprit." Three characteristics of high morality are:

- a. dare to act with determination to act according to the demands of the profession;
- b. aware of their obligations and
- c. have high idealism.<sup>1</sup>

As a respected profession (*officium nobile*),<sup>2</sup> advocates in carrying out their profession are under the protection of the law, the Law and the Code of Ethics. This is stated in the Opening of the Indonesian Advocate Code of Ethics (KEAI). Article 3 letter (g) of KEAI states that "Advocates must always uphold the Advocate profession as an honorable profession (*officium nobile*)." Then in Article 8 letter (a) it is reiterated that. " The Advocate profession is a noble honorable profession (*officium nobile*) and therefore in carrying out the profession as a law enforcer in the court is in line with the Prosecutors and Judges, who in carrying out their profession are under the protection of the law,<sup>3</sup> This Law and Code of Ethics. The Indonesian Advocate Code of Ethics becomes the highest law that guarantees and protects Advocates, but also imposes an obligation on every Advocate to be honest and responsible in carrying out his profession, both to clients, courts, the state or the community and especially to himself. Any advocate who violates the Code of Ethics can be reported and subjected to administrative action or sanctions.<sup>4</sup>

It is not uncommon for advocates to violate professional professions or malpractice advocates, both because they violate the law, professional standards, and Indonesian advocate's code of ethics. There are two cases of malpractice advocates that are of public concern, namely the "FY" advocate is considered to have violated the law hampering the investigation of corruption in the case of the suspect Setyo Novanto. The second case dragged the Law Firm Ali Budiarjo, Nugroho, Reksodiputro (ABNR) related to (*legal opinions*) which were considered to have harmed Sumatra Partners LLC.

The term "malpractice" is commonly used in medicine. The 'malpractice' vocabulary is not in the legislation of the advocate profession (malpractice advocate). However, in various literatures the term malpractice does not only apply in the world of medical practice, but also applies to the accounting profession, economics, physicists, engineers, dentists, veterinarians, and advocates. Based on Caughlin's

<sup>1</sup> Tinjauan Febri and others, 'Tinjauan Yuridis Terhadap Peranan Advokat Dalam Mendampingi Klien Dalam Perkara Perceraian Di Pengadilan Agama Kota Pekanbaru', *Hukum Islam*, 2015.

<sup>2</sup> R. Hendra, 'Tanggung Jawab Notaris Terhadap Akta Otentik Yang Penghadapnya Mempergunakan Identitas Palsu', *Jurnal Ilmu Hukum Riau*, 2012.

<sup>3</sup> Mathias Dewatripont and Jean Tirole, 'Advocates', *Journal of Political Economy*, 1999 <<https://doi.org/10.1086/250049>>.

<sup>4</sup> Hartono Hartono, 'Penerapan Sanksi Hukum Bagi Para Advokat Pelaku Tindak Pidana Suap Dalam Sistem Hukum Positif Di Indonesia', *JCH (Jurnal Cendekia Hukum)*, 2019 <<https://doi.org/10.33760/jch.v5i1.181>>.

Dictionary of Law malpractice implies "*Professional misconduct on the part of a professional person, such as physician, engineer, lawyer, accountant, dentist, veterinarian*".<sup>5</sup>

Juridically<sup>6</sup>, there is no clear and firm regulation related to the understanding and qualifications of malpractice advocates in Indonesia resulting in a legal vacuum. However, theoretically there have been many concepts and doctrines related to legal malpractice, especially advocacy malpractice. In the sociological perspective, there are many cases of advocacy malpractice that have emerged in the implementation of advocate practices in Indonesia, such as the two cases above. Meanwhile, in the perspective of legal philosophy, advocates as a noble legal profession (*officium nobile*), there is no formula for handling and resolving justice and certainty, both for clients who receive bad service advocates and for advocates themselves as law enforcement officers. Based on this description, it is important to analyze and find the qualifications of an action including malpractice of the Advocate profession. In addition, it is also important to analyze and find forms of accountability of the Advocate profession in the case of advocacy malpractice.

## Method

This research is a normative legal research that focuses on studying the statutory regulations and professional code of ethics related to the malpractice of the advocate profession and the accountability of malpractice advocates in Indonesia.<sup>7</sup> This study uses 5 (five) kinds of approaches including, regulatory, conceptual, philosophical, comparative, and historical approaches. The *statutory approach*, especially the 1945 Constitution of the Republic of Indonesia, Law No. 18 of 2003 concerning Advocates and other relevant laws.

## Discussion

### Qualification for Advocate Malpractice

Soerjono Soekanto stated that *malpractice* can be divided into several categories according to the midwife's legal system, for example according to criminal, civil and administrative law. The use of the term malpractice is now widespread in various disciplines. Malpractice or *malpractice* in the dictionary is interpreted as wrong action. If drawn in the realm of law, malpractice elements include: 1) legal obligations in a professional relationship; 2) breach of duty for not complying with professional standards; 3) the causal relationship between professional duties and losses to clients; 4) sustainable losses that allow the existing legal system to provide compensation.<sup>8</sup>

Malpractice committed by professionals in the field of law is often referred to as "*misconduct*". Based on *An Almanac of Contemporary and Comparative Judicial Restatements* the term "*misconduct*" is a legal term for wrongdoing, improper or unlawful motivated by goals that were desirable or planned from the beginning, or by severe indifference to the consequences arising from such actions. *Misconducts* can generally be divided into two categories.<sup>9</sup> Small *misconducts* are seen as unacceptable, but not criminal offenses. Large *misconducts* can result in immediate dismissals because they are already serious

<sup>5</sup> Nalini Ambady and others, 'Surgeons' Tone of Voice: A Clue to Malpractice History', *Surgery*, 2002 <<https://doi.org/10.1067/msy.2002.124733>>.

<sup>6</sup> Tomy Michael, 'Humanity in the Enforcement of Anti-Corruption Laws', *Jurnal Hukum Bisnis Bonum Commune*, 2.2(2019), 211.

<sup>7</sup> Tomy Michael, 'RIGHT TO HAVE RIGHTS', *Mimbar Keadilan*, 2017, 106 <<https://doi.org/10.30996/mk.v0i0.2203>>.

<sup>8</sup> Irma Lusiana Khajjani Ritonga, 'Kebijakan Hukum Pidana Terhadap Tindak Pidana Di Bidang Medis', *Universitas Muhammadiyah Malang*, 2011.

<sup>9</sup> Sheila A. French and Paul Gendreau, 'Reducing Prison Misconducts: What Works!', *Criminal Justice and Behavior*, 2006 <<https://doi.org/10.1177/0093854805284406>>.

enough and may include criminal acts. Both of these categories depart from the understanding that work that is categorized as a profession is required to have certain qualification standards. As for what is meant by qualification standards are standard provisions that must be taken at least by the profession in carrying out their work. Then in certain professions can be translated with standard terms of the profession.

Professional standards are the minimum ability limits that must be mastered by an individual to be able to carry out their professional activities in society independently created by professional organizations. The form governed by professional qualification standards does not always have to take the form of physical actions, but also is psychological, usually accommodated in a professional code of ethics.<sup>10</sup>

Every profession including the advocate profession applies ethical norms and legal norms. Therefore, if there is any suspicion of a practice error, it should be measured or seen from the point of view of the two norms. Mistakes from an ethical point of view are called "*ethical malpractice*" and from a legal point of view called "*juridical malpractice*". This needs to be understood considering that in the profession of advocates the ethical norms and legal norms apply, so that if there are errors of practice it is necessary to see what domains are violated.<sup>11</sup> Ethics and law have fundamental differences regarding substance, authority, goals and sanctions, so the normative measures used to determine the existence of "*ethical malpractice*" or "*juridical malpractice*" are also different. What is clear is that not every "*ethical malpractice*" is a "*legal malpractice*" but all forms of "*legal malpractice*" must be an "*ethical malpractice*".<sup>12</sup>

Legal malpractice<sup>13</sup> is divided into 3 categories according to the area of law violated, namely *criminal malpractice*, *civil malpractice*, and *administrative malpractice*. *Criminal malpractice* is an act that fulfills the formulation of criminal offense. This act is like a violation of Article 6 letter e of Law No. 18 of 2003, opening secret positions (Article 332 of the Criminal Code), making a false statement (Article 263 of the Criminal Code), carelessness (*recklessness*), or negligence (*negligence*) and even fraud (*bedrog*).

Second, *civil malpractice* occurs because it does not carry out its obligations or does not provide its achievements as agreed (broken promise). Accountability "*civil malpractice*" can be individual or corporate and can also be transferred by other parties based on the "*principle of vicarius liability*". With this principle, the body / organization that provides services can be held accountable for the mistakes made by the Advocate as long as the person is carrying out their obligations. Advocate organizations supervise and take action against any advocate who violates "*civil malpractice*", the provisions and procedures for supervision are governed by the Advocate Organization Decree.

Advocates have carried out "*administrative malpractice*" when they have violated administrative law. If the rules regarding the limits of authority are violated, the advocate concerned can be blamed for violating the administrative law. Advocate organizations have the authority to issue various provisions in the field of administrative provisions of advocates, for example the requirements of various advocates to carry out their profession (letter of appointment for advocates, and license to practice), limits of authority and obligations of an advocate.

<sup>10</sup> Tomy Michael, 'Memaknai Frasa " Dengan Rahmat Tuhan Yang Maha Esa " Dalam Undang-Undang Republik Indonesia Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan', 12, 2011, 1–10.

<sup>11</sup> Grant Lamond, 'The Rule of Law', in *The Routledge Companion to Philosophy of Law*, 2012. <<https://doi.org/10.4324/9780203124352>>.

<sup>12</sup> Julie Zetler and Rod Bonello, 'Essentials of Law, Ethics and Professional Issues for CAM', *Elsevier Australia*, 2012 <<https://doi.org/10.1016/B978-0-7295-3970-8.00010-1>>.

<sup>13</sup> Hufron Hufron and Hajjatulloh Hajjatulloh, 'Aktualisasi Negara Hukum Pancasila Dalam Memberantas Komunisme Di Indonesia', *Mimbar Keadilan*, 13.1 (2020), 60–71 <<https://doi.org/10.30996/mk.v13i1.2949>>.

When compared with other countries, there are differences in principles in regulating malpractice advocates. In the United States, legal malpractice *is the term for negligence, breach of fiduciary duty, or breach of contract by a lawyer during the provision of legal services that causes harm to a client*. The concept of legal malpractice is used for (*negligence*), breach of (*fiduciary duty*), or breach of contract by lawyers during the provision of legal services that cause harm to clients. Under United States law the elements causing actions for legal malpractice can vary by state, according to law the four elements of legal malpractice are:

1. Lawyer-client relationship;
2. Negligence;
3. Loss or damage;
4. Financial loss.

Basically advocates in Japan based on Article 22 *the Attorney Act* must comply with JFBA Articles and Article 29 requires all lawyers to comply with JFBA rules and regulations, including the code of ethics in *Bengoshi Shokumu Kihon Kitei*. However, not all provisions in *Bengoshi Shokumu Kihon Kitei* are mandatory. Article 82 paragraph (2) *Bengoshi Shokumu Kihon Kitei* stipulates a number of articles to be "*shall be construed and applied as the provisions that state the standard of conduct or provide an aspiration of duties of attorneys*". This provision requires as guidelines for the best practices of an advocate and on the other hand it becomes aspirational. According to Article 56 paragraph (1) of the *Attorney Act* violations of the "non-mandatory" provisions in *Bengoshi Shokumu Kihon Kitei* can be categorized as ethical violations if their actions fulfill the element of "*misbehaves in a manner impairing his / her or its own integrity, whether in the conduct of his / her professional activities or not*." In the Netherlands, advocates must comply with the code of ethics established by the *Dutch National Bar Association (DNBA)* or the *Nederlandse Order van Advocaten (NOvA)* and the *Dutch Counsel Act (DCA)*. Advocates in the Netherlands must be independent and therefore are not influenced by the Dutch Government (including the police and the justice department). Advocates in the Netherlands must always take sides, meaning that they only serve the interests of clients. Advocates are obliged to support the client in good times and bad and may never represent the opposite party of the client. Violation of ethical standards in the Netherlands can be regarded as a legal malpractice. Legal malpractice occurs when an error or failure of an advocate to use an adequate level of concern, skill, or diligence in carrying out a task causes damage to the case to the client.<sup>14</sup> Based on the description of the concept of violation of the previous code of ethics, legal malpractice arises from legal services by poor or substandard advocates. Malpractice advocates can be categorized as follows:<sup>15</sup>

1. Lack of legal skills: Failure to know and apply the law properly. The failure of advocates to know the legal principles applied, or advocates have analyzed but failed to ascertain the exact principles, legal implications of the facts. This also causes errors in organizing plans and strategies so that the assessment of a case is damaged.
2. Negligence: lost documents, evidence, or files can be included in advocacy negligence. Or leaked client information.
3. Conflict of interest: advocate is suspected of having conflicting interests with clients.

<sup>14</sup> M. Gino Brogdon, Ritu Bahri, and Jann H. Adams, 'Psychology and the Law', in *Handbook of Forensic Psychology: Resource for Mental Health and Legal Professionals*, 2004 <<https://doi.org/10.1016/B978-012524196-0/50002-4>>.

<sup>15</sup> Joanna C. Schwartz, 'A Dose of Reality for Medical Malpractice Reform', *New York University Law Review*, 2013.

4. The emergence of losses: the existence of cause and effect of legal services advocates that are below standard against the client's loss.

### Professional Advocate's Accountability Regarding Advocate Malpractice Cases

There is a reciprocal relationship between responsibility and freedom.<sup>16</sup> It is impossible for freedom without responsibility and it is also impossible for responsibility without freedom. Excessive freedom causes arbitrariness while responsibility without freedom is like a restraint. The concept is like that of Hans Kelsen's view which states that "man is free, because of that freedom he can be held accountable for his actions."

Likewise in interpreting the freedom and independence<sup>17</sup> of advocates, there will be responsibility for each of his actions both in terms of ethical norms and legal norms. Advocates as a profession have an ethical basis that binds to the position they hold, while the code of ethics is a moral order that is compiled solely by professional groups or professional organizations that bind internally its members.

Through a code of ethics to form trust in the community so that community rights can be fulfilled when using the services of a professional advocate. The urgency of the code of ethics is then adopted in law so that ethical violations are also violations of the law.<sup>18</sup> Sanctions will not be separated from the responsibilities of advocates as professionals who are expected to work professionally. If the advocate when carrying out his duties to do various things that harm the interests of his clients or harm the interests of others, there is a possibility that the advocate in question has committed an act called malpractice. Of this action certainly causes an effect.

### Conclusion

Qualifications or parameters of malpractice by lawyers, if they meet the following requirements: (1) The provision of legal services by lawyers (rights and obligations); (2) Legal services are provided in: (a) below the applicable professional standards; (b) awarded in violation of the "fiduciary" obligation of the advocate; (c) defaults on contracts for providing legal services, or; (d) is given in a manner contrary to applicable law and code of conduct; (3) The advocate's actions take the form of acts against the law (intentional or negligence); (4) There are losses to the client; and (5) The loss is caused by the act of providing legal services by the advocate.

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<sup>16</sup> Randolph Clarke, 'Freedom and Responsibility', in *The Routledge Companion to Ethics*, 2010. <<https://doi.org/10.2307/j.ctv6cfpjj.9>>.

<sup>17</sup> Christian List and Laura Valentini, 'Freedom as Independence', *Ethics*, 2016 <<https://doi.org/10.1086/686006>>.

<sup>18</sup> Tomy Michael, 'Mencermati Tuhan Dalam Pasal 2 Huruf a Undang-Undang Republik Indonesia Nomor 33 Tahun 2009 Tentang Perfilman (The Truthness of God in Article 2 Letter a the Act of Republic of Indonesia Number 33 of 2009 Concerning Film)', *Jurnal Filsafat Hukum Fakultas Hukum Universitas 17 Agustus 1945 Jakarta*, Volume I, (2014).

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