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RISKALERT

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LEGAL PRACTITIONERS' FIDELITY FUND
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Your Champion in the Legal Profession Since 1941

RISK MANAGEMENT COLUMN

THE ATTORNEY-CLIENT RELATIONSHIP: DOES THE PERSON WHO PAYS THE PIPER EXCLUSIVELY CALL THE TUNE?

Introduction

"*He who pays the piper calls the tune*", according to an old proverb.

This raises the question whether attorneys, in the execution of their mandates, are solely required to consider the interests if their fee-paying clients to the exclusion of those of any third parties?

This article attempts to show that the proverb is misplaced in the context of the contemporary relationship between attorneys and their clients. In the first part of the article, the intention is to demonstrate that the professional duties of an attorney are not exclusively owed to their clients. The second part gives a brief overview of the jurisprudence on the liability of attorneys to non-clients.

The attorney-client relationship is unique. There are, for example, consequences flowing from that relationship that may not find application in any other relationship between a professional service provider and a client. Attorney-client privilege is one example. The attorney-client relationship is an important spoke in accessing justice. It is trite that an attorney has a legal and eth-

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ical duty to perform the lawful instructions of the client, subject to the ethical considerations (the *boni mores*) of the legal practitioner.

Expressions such as an attorney "being a creature of instruction" are used in the context of explaining that the attorney "was merely carry out the client's instructions" without regard to what the wider implications and consequences of those instructions are. There are several potential risks that flow from this narrow view of the professional duties of the attorney.

It has long been established that there are several duties owed by the attorney to the client and that a breach of these duties attracts liability for the attorney on various fronts. Depending on the nature of the breach, the attorney may face disciplinary action by the Legal Practice Council (LPC), civil action or, where the breach also amounts to a criminal offence, prosecution. The attorney's duties to the client arise from the relationship entered into between the parties, and that relationship is also the source of liability to the client. A professional indemnity claim against the attorney will either be framed in contract (a breach of the terms of the mandate agreed between the parties) or in delict (a breach of a duty of care). Similarly, disciplinary action against a legal practitioner will be based on the failure by the practitioner concerned to meet the prescribed high standard of ethical conduct.

Another preliminary point needs to be made to correct some common misconceptions. A breach of a professional duty will not on its own be a basis for a sustainable professional indemnity claim against an attorney. The party bringing the claim will have to prove the contractual or delictual claim by establishing all the elements of liability under the respective basis on which liability is alleged. Similarly, not all circumstances that give rise to professional liability are, automatically, breaches of the ethical duties of an attorney. Put differently, it cannot be said that every attorney found liable in a professional indemnity claim is guilty of a misconduct solely by virtue of such liability. If a legal practitioner insured by the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF) is faced with a professional indemnity claim, the matter will be dealt with between the LPIIF (as insurer) and the legal practitioner (as insured). The LPIIF is independent of the LPC. Information submitted to the LPIIF by the insured in notifying the claim will not be shared with the LPC as a matter of course. The insurance relationship between the LPIIF and the insured is based on the terms of the Master Policy. The only circumstances under which the Master Policy permits the reporting of the conduct of an insured to the LPC are where either:

1. the insured fails or refuses to provide information, documents, assistance or cooperation to the insurer or its appointed agents and remains in breach for a period of ten days after receipt of written notice to remedy that breach (clause 27 (b)); or
2. there is a material non-disclosure or misrepresentation in respect of an application for indemnity (clause 35).

The Master Policy is available on the LPIIF website (www.lpiif.co.za).

The attorney's professional duties

The professional duties of an attorney have developed over the centuries. There is a rich body of jurisprudence on this subject developed from practice, judgments of the courts and the statutes that have regulated the conduct of legal practitioners at various stages in history. The textbook written by EAL Lewis, *Legal Ethics: A Guide to Professional Conduct for South African Attorneys*, contains a lot of information that is still relevant today, almost four decades after it was first published.

CH van Zyl, *The Theory of the Judicial Practice of South Africa* (1921) states the following (at 42):

"Now, these general remarks may be said to be axions applicable to all professions and callings of life, but still it is with regard to legal practitioners that they have mostly occupied the attention of

RISK MANAGEMENT COLUMN continued...

the Courts and the public. The origin and development of these principles, I shall now endevour to illustrate. Some of the duties of an attorney are by lawyers better understood than can be fully described. There are many canons of duty which have not yet been in print but (apply) not only to oneself and to one's client, but also to the Bench and the public. This duty on the part of an attorney is not a servile thing; he is not bound to do whatever his client wishes him to do. However much an act or transaction may be to the advantage, profit or interests of the client, if it is tainted with fraud or is mean, or in any way dishonourable, the attorney should be no party to it, nor in any way encourage or countenance it. Better far to part with such a client forever, though he may be till then 'the goose that laid the golden eggs'. 'Honesty' in law, as in everything else, is always and after all, 'the best policy'. The law exacts from an attorney *uberimma fides* – that is, the highest possible degree of good faith. He must manifest in all business matters an inflexible regard for truth. There must be meticulous accountancy, a minute high sense of honour and incorrigible integrity. He must not act in a case which he knows from the beginning to be unjust and unfounded. He must abandon it at once if it appears to him to be such during its progress. He must in no way betray his client to the other side, either by secret correspondence or communication, or in any manner whatsoever. He must enter into no contract or agreement with his client to share the fruits of the judgements in the case of success. *Pactum de quota litis*. He must, when reasonable and necessary, communicate with his client in all matters concerning the case; keeping his advocate well posted on all the facts and assist the client and counsel in devising what, in an honourable way, can tend to the advantage and defence of the rights of the client. He must, once he has undertaken his client's case, not abandon it without good and lawful reasons or excuse."

Though there have been some developments since the first publication of this passage almost a century ago, the key messages are still relevant and applicable today. The Contingency Fees Act 66 of 1997 now provides a statutory framework for the regulation of agreements between attorneys and their clients "to share the fruits of the judgements in the case of success" referred to in the passage quoted and 'many canons of that duty' are now written.

The purpose of the Legal Practice Act 28 of 2014 (the Act) includes the creation of a framework for the development and maintenance of appropriate professional norms and standards for the rendering of legal services by legal practitioners and candidate legal practitioners (section 3 (g) (i)). The Code of Conduct for legal practitioners, candidate legal practitioners and juristic entities (the code) issued in terms of the Act sets the standards of conduct for legal practitioners. The code prescribes that legal practitioners, candidate legal practitioners and commercial juristic entities established to conduct legal services (i.e., incorporated legal practices and limited liability partnerships as contemplated in sections 34 (7) and 34 (9), respectively) shall –

"3.1. maintain the highest standards of honesty and integrity;
3.2. ….
3.3. treat the interests of their clients as paramount, provided that their conduct shall always be subject to –
  3.3.1. their duty to the court;
  3.3.2. the interests of justice;
  3.3.3. the observation of the law; and
  3.3.4. the maintenance of the ethical standards prescribed by this code, any other code of ethics applicable to them and any ethical standards generally recognised by the profession;"

The primacy of the duty to the client is thus not an unfettered one, but subject to the other duties listed in the code. The maintenance of highest standards of honesty and integrity are the benchmark for professional con-

duct prescribed in the code and international documents alike.

The principles set out in section 3 of the code are aligned to similar provisions set out in the General Principle's for the Legal Profession adopted by the International Bar Association (IBA) in September 2006. Principle 2 reads as follows:

"2. Honesty, integrity and fairness

A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the Court, his or her colleagues and all those with whom he or she comes professionally into contact."

This essence of this principle was retained in the expanded wording of IBA's International Principles on Conduct for the Legal Profession initially adopted on 28 May 2011 and updated on 11 October 2018. The updated wording reads as follows:

"2. Honesty, integrity and fairness

A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact.

A lawyer shall ensure that equality of opportunity and respect for diversity govern all aspects of conduct in the lawyer's exercise of the profession.

A lawyer shall take reasonable steps to ensure that those unable to pay or otherwise gain access to justice because of personal circumstances are guided to the best alternatives for such access."

Various jurisdictions around the world have adopted similar rules of professional conduct for legal practitioners.

The current rules of professional conduct, however, were not always universally applied internationally. Professor Freedman (Freedman, Monroe H. (2006) "*In Praise of Overzealous Representation - Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*", Hofstra Law Review: Vol. 34: Issue 3, Article 6) writes that:

"For more than a century, the lawyer's ethic of zeal has required, and has inspired, entire devotion to the interests of the client, warm dedication in the maintenance and defense of his rights, and the exertion of the lawyer's utmost learning and ability. In the classic statement by Henry Lord Brougham in 1820 in *Queen Caroline's Case* [2 *Trial of Queen Caroline* (1821)]:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion."

This "traditional aspiration" of zealous representation pervades all other professional obligations of the lawyer to her client. Ordinarily, of course, a lawyer's zeal on behalf of a client is to be exercised only within the law and the disciplinary rules. "Overzealousness," therefore, connotes conduct that goes over, or beyond, the bounds of law and/or the disciplinary rules. By definition, therefore, it would appear that overzealousness can never be justified as ethical conduct. My argument here, however, is that zealous representation – "entire devotion to the interests of the client" – may sometimes require the lawyer to violate other disciplinary rules." (Footnotes omitted)

An attorney must guard against being placed in a compromised position when requested to pursue unreasonable positions taken by overzealous clients or acting as a mere tool to achieve the unrealistic expectations of the paymaster. The attorney must manage the expectations of the client and disabuse the latter of any perception that the instruction will be pursued "at all costs" or that the the attorney is prepared to risk breaching ethical rules in order

RISK MANAGEMENT COLUMN continued...

to achieve the client's objectives. Guaranteeing a favourable outcome to a client "by any means necessary" or "by whatever it takes" is both risky and unethical. The "means" adopted to achieve the guarenteed "end" might involve unethical or even criminal activities on the part of the practitioner. This risk commonly arises in cases where there is animosity between litigants or where litigation is conducted based on a principle. An example would be litigation undertaken to prove a point to the opposing party or litigation aimed at "teaching the opponent a lesson." Belligerent litigants are also risky clients. Attorneys who descend into the underlying dispute between the parties risk losing their independence and open themselves up to potential liability and the risk of breaching their professional obligations. The position was aptly put as follows in a judgment (*Skinner v Skinner*, 2013 MBQB 276 (CanLII) at paragraphs [22] to [24]) delivered by the Court of Queen's Bench of Manitoba (Family Division):

"[22] … In this case there is evidence that the petitioner exerted considerable influence over her lawyers and provided inflexible instructions to them. That does not excuse a breach of a professional responsibility.

[23] Clients can take unreasonable positions, but lawyers must serve as their own gatekeepers of professional conduct rather than blindly following instructions. Lawyers are not free to act on whatever instructions they might receive from their clients. On the contrary, lawyers are obliged by their rules of professional conduct to refrain from acting on certain instructions. Put another way, distinct restrictions or disabilities accompany the rights and privileges afforded to lawyers. One such restriction or disability precludes them from carrying out the instructions of over-zealous clients.

[24] It is the lawyer who has conduct of a litigation file – not the client. The lawyer must maintain a certain independence from its client and must not let the client override his professional judgement. The lawyer is required of course to take instructions from the client, and owes a duty to do his best for the client; but an important part of the lawyer's job is to steer the client through the rocky territory of litigation. The lawyer is responsible for his word, both to the court and to opposing counsel. He owes such a duty to each. The lawyer must maintain his integrity and honour to the profession at all times – even in the face of assertive clients and challenging courtroom environments. All of this is essential to his reputation and relationships with opposing counsel, which are of fundamental importance to the practice of law."

Managing the expectations of the client, explaining the attorney's professional duties and setting ground rules (or 'rules of engagement') will go a long way in managing the risk of over-zealous clients. Documenting the agreed terms on which the instruction will be pursued in a letter of engagement signed by all parties will go a long way to mitigate this risk. Making detailed file notes of all discussions clients and confirming the discussions in correspondence sent to the client as soon as possible after the discussion has taken place also helps to clear any confusion that might otherwise have crept in. These measures will assist in the event of a breakdown in the relationship with the client and where the latter then decides to zealously pursue a claim against your firm. Clients with unrealistic expectations tend not to be satisfied with the outcome of matters despite the best efforts and the achievement of, objectively viewed, the best possible results in the circumstances. I have seen claims where the breakdown in the relationship between an attorney and an assertive client is ignited by a cost order granted against the client. Punitive cost orders against attorneys acting in highly charged matters are also common. The Master Policy does not cover liability for compensation "arising from or in connection with any fine, penalty, punitive or exemplary damages awarded against the insured, or from an order against

the Insured to pay costs *de bonis propriis*" (clause 16 (g)).

Liability to non-clients

I have been asked on several occasions whether a non-client who is the opposite party in a legal matter can successfully pursue a claim against an attorney and, if so, where the basis of such liability lies.

It would not be possible in this article to give a detailed analysis of all the legal principles underlying the liability of an attorney to a non-client. I will, however, attempt to give a broad overview of the legal principles by reference to some of the cases where the matter was considered. The circumstances of each case will have to be considered in order to ascertain whether or not there is liability on the part of the attorney to the non-client. It is hoped that the cases referred to below will assist practitioners in understanding how the courts have dealt with the assessment of liability to the third party.

Road Accident Fund (RAF) related claims are one of the high risk areas of practice. For that reason, it is appropriate to commence with an example drawn from this area of practice. The principles raised in the case may also be relevant to some of the disputes between the RAF and certain attorneys acting for plaintiffs. In *Road Accident Fund v Shabangu and Another* 2005 (1) SA 265 (SCA) the attorney had innocently acted for an imposter claiming to be the widow of a man who had allegedly been killed in a motor vehicle collision between two vehicles. She also claimed that she was the mother of the deceased's children. The claim had been submitted to the RAF. The RAF settled the claim and the amount of the settlement was paid into the firm's account and then dealt with in accordance with their client's instructions. It later emerged that the imposter had colluded with the deceased's brother and an employee at the Department of Home Affairs. It was also later found that the deceased's dependents had no claim against the RAF as the vehicle driven by the defendant had collided with a tree and he was killed in the accident. No other vehicle was involved. It was not the RAF's case that the attorneys were involved in the fraud. The RAF sought to recover the amount paid in settlement from the imposter and the attorneys. The RAF based its claim on six alternative bases. For current purposes, only the four grounds listed below are relevant. The RAF contended that the respondents –

(i) had breached an express warranty in the discharge form that they were acting on behalf of the true widow- the court found (at [4]) that the RAF's submission was without merit as the warranty in the discharge form constituted an undertaking by the signatory, the attorney, that he was entitled to settle the claim on behalf of his client;

(ii) had tacitly warranted the identity of the claimant. The SCA (at [7]) found no basis for finding that if the claimant was an imposter, the respondents had tacitly undertaken liability to the RAF for any damages which the latter might suffer and that this was "a far-reaching conclusion and therefore inherently improbable". The court stated that "[a]n attorney who submits a claim on behalf of a client does not thereby and without more tacitly warrant the client's *locus standi* to make the claim any more than the attorney tacitly warrants the truth of the facts on which the claim is based or the correctness of the *quantum* of the damages claimed";

(iii) were bound to compensate the RAF because of their breach of warranty of authority. The court found (at [8]) it unnecessary to consider this ground as the answer to the contention was clear on the facts. It was clear from the facts that the attorney had the authority that he warranted, that is to act for his client, the claimant, and that was the end of the matter (at [9]);

(iv) had negligently misrepresented to the RAF that they acted for the true widow.

RISK MANAGEMENT COLUMN continued...

> The basis of the alleged negligence was that they failed to ascertain the identity of the true widow when they submitted the claim. The court (at [10]) considered whether an attorney can owe a duty to a third party whilst carrying out the instructions of a client. The court stated that it is only if a legal duty is owed that an enquiry into negligence can be conducted. The court stated that –

"[11] The attorney-client relationship imposes a duty on an attorney to advance the interests of his client, even where that course will cause harm to the opposite party; and in general, an attorney will incur no liability to the party on the other side in doing so: *White v Jones* [1995] 2 AC 207 (HL(E)) at 265C-D. In *Ross v Caunter* [1980] 1 Ch 297 Sir Robert Meggary V-C said at 322B-C:

"In broad terms, a solicitor's duty to his client is to do for him all that he properly can, with, of course, proper care and attention. Subject to giving due weight to the adverb 'properly', that duty is a paramount duty. The solicitor owes no such duty to those who are not his clients. He is no guardian of their interests. What he does for his client may be hostile and injurious to their interests; and sometimes the greater the injuries the better he will have served his client. The duty owed by a solicitor to a third party is entirely different. There is no trace of a wide and general duty to do all that properly can be done for him."

Of course the relationship and concomitant duty owed to the client will not protect the attorney civilly and criminally against unlawful conduct such as fraud. An attorney is not entitled nor obliged to advance his client's interests at all costs. But, generally speaking, it is no part of an attorney's function to protect the interests of the opposite party by so doing, or refraining from doing, something that might injure that party. Something more is required.

[12] It is impossible to lay down an all-embracing test as to when an attorney will be held to owe a legal duty towards a person other than a client particularly where, as here, that person relies on a negligent misrepresentation inducing a contract (here the contract of settlement), or on negligent omissions on the part of the attorney to safeguard that person's interests when the attorney is performing the duty the attorney owes the client. The question of wrongfulness that pertinently arises on each of such cases is essentially one of legal policy ...."

The court then considered cases from a number of foreign jurisdictions on the question whether an attorney can be liable to a person with whom that attorney had no contractual relationship. It found that the values and norms of the inhabitants of this country, enshrined in the Constitution, must dictate the legal position in South Africa. The respondents owed no legal duty to the RAF. The RAF had a statutory function to investigate claims or to appoint agents who had that function. The investigation included the *locus standi* of the claimant and therefore the claimant's identity, the merits and *quantum* of the claim. There was no statutory or contractual obligation on the attorneys bringing claims against the RAF on behalf of clients to verify the identity of claimants and public policy did not require the imposition of such a duty in delict and such a duty "would be inimical to the trust fundamental to the attorney-client relationship. It would also increase the cost to the client and result in delay, with the concomitant danger of prescription" (at [17]). Shifting the RAF's statutory investigative functions to the attorney would also undermine the attorney-client relationship. Even if the respondents had owed a legal duty to the RAF, there was no negligence in this case.

In *Barlow Rand Ltd t/a Barlow Noordelike Masjinerie Maatskappy v Lebos and Another* 1985 (4) SA 341 (T), the court stated (at p346) that "the duty of an attorney to the Court, as well as towards his opponent, is not a matter that readily admits of a clear definition."

The question regarding liability to a third party has also arisen in respect of conveyancing transactions. *Basson v Remini and Another* 1992 (2) SA 322 (N) considered

RISK MANAGEMENT COLUMN continued...

nature of the relationship between a conveyancer and the parties to a transaction. In accepting appointment as a conveyancer in a contract of sale, the conveyancer was said to become the agent of both the seller and the purchaser.

In *Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd and Others* [2014] ZACC 26 the Constitutional Court dealt with an appeal by a firm of attorneys. The firm had acted as conveyancers in a failed property transaction. Before the collapse of the transaction, the firm acted for the seller had received funds from the purchaser to be held in trust in accordance with the conditions of the sale. The firm had been cited as one of the respondents in an application brought by the purchaser. The firm had not opposed the application and the purchaser had withdrawn the application against it. The Supreme Court of appeal had, however, granted an order against the firm despite the fact that it was not a party to the proceedings in that court. The firm applied to the Constitutional Court for for leave to appeal that order. The Constitutional Court granted the leave to appeal and the appeal was successful. The rights and duties of a conveyancer in a failed transaction can also be gleaned from this case. As the conveyancer was acting as the agent of the seller, a payment to the conveyancer was payment to the seller. The seller, and not the conveyancer, was liable to purchaser.

The approach taken in *Clarkson NO v Gelb and Others* 1981 (1) SA 288 (W) was that an action by an heir for the loss suffered as a result of the executor's maladministration was not an *aquilian* action but is an incident of the special fiduciary position the executor holds. Where the executor is an attorney, his partner was found not liable under such an action. In *Jicama 194 (Pty) Ltd v Lotter NO 2012* JDR 0207 (KZD) the fiduciary duty of the executor towards the heirs was also considered.

Fourie v Van Der Spuy and De Jongh Inc (65609/2019) [2019] ZAGPPHC 449; 2020 (1) SA 560 (GP) (30 August 2019) arose out of circumstances where the plaintiff had suffered a loss following on a cybercrime incident and the attorney being duped into making payment to a fraudster. In considering the liability of the attorney, the court also considered the fiduciary duties of the attorney.

Other relevant cases include –

- *Pienaar v Pienaar* 2000 (1) SA 231 (O);
- *HEG Consulting Enterprises (Pty) Ltd v Siegwart* 2000 (1) SA 507 (C);
- *Pretorius v McCallum* 2002 (2) SA 423 (C);
- *Hirschowitz Flionis v Bartlett and Another* (546/04) [2006] ZASCA 23; 2006 (3) SA 575 (SCA) ; [2006] 3 All SA 95 (SCA) (22 March 2006);
- *Du Preez and Others v Zwiegers* (61/07) [2008] ZASCA 42; 2008 (4) SA 627 (SCA); [2008] 3 All SA 425 (SCA) (28 March 2008); and
- *Margalit v Standard Bank of South Africa Ltd and Another* (883/2011) [2012] ZASCA 208; 2013 (2) SA 466 (SCA); [2013] 2 All SA 377 (SCA) (3 December 2012).

Conclusion

The professional duties of an attorney are core to the relationship with clients. As demonstrated above, the ambit of the professional duties extends to the court and the opponents. The widening of the professional duties over the years has opened the doors for claims by non-clients. Prudent practitioners will ensure that their risk management measures adequately mitigate the expanding risks and are effectively applied in all cases.

Legal practitioners cannot risk pursuing the expectations of their clients without considering the broader implications of their actions.

The LPIIF offers a risk management service to all insured legal practitioners at no cost. Please contact the Practitioner Support Executive, Henri van Rooyen, on risk@lpiif.co.za to arrange a training session for you and your staff.