RISK MANAGEMENT & THE PRACTICE OF THE LAW

by Datuk N Chandran

The Risk Management and the Practice of the Law paper was first presented by Datuk N Chandran at a Risk Management Seminar in March 2004.

The object of this paper is to address on the sort of risks to which legal practitioners are exposed to and the ways in which such risks can be minimised or checked, controlled and avoided altogether.

There are risks in anything we do and at times, such risks are unavoidable. More than the risks themselves, what matters are the consequences of such risks, particularly where the consequences can be negative or destructive, with very grave consequences.

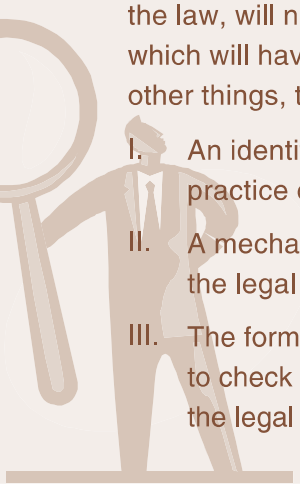
Robert Kiyosaki, in his book "*Rich dad poor dad*", had this to say: "*There is always risk, so learn to manage it instead of avoid it*", and "*if you hate risk and worry.....start early*".

This applies to the legal profession in the same way as it applies to any other professions. The concept of risk management, in the practice of the law, will necessarily involve proper planning which will have to take into account, amongst other things, the following:

I. An identification of the risks to which the practice of the law exposes the practitioner.

II. A mechanism to monitor the risks to which the legal practitioner could be exposed to.

III. The formulation of policies and procedures to check and control the sort of risks to which the legal practitioner could be exposed to.



Identifying the Risks to which the Practice of the Law May Expose the Practitioner To

The notion of risk management necessarily entails an identification by the legal practitioner of the sort of risks he may be exposed to and accordingly, there is a need to focus on this issue and take stock, in the first instance, of the possible risks to which a practitioner of law in this jurisdiction may be exposed to.

Perhaps the starting point is to remind ourselves that in this jurisdiction, the legal profession is a fused profession, in the sense that the practitioner is both an advocate and solicitor. A consequence of this is that, a legal practitioner, following his admission as an advocate and solicitor of the High Court is enabled to opt to practice as an advocate or a solicitor or as both.

Given the difference in the nature of the practice of law as an advocate, and as a solicitor, the risks attached to the two classifications of the legal practice, necessarily do differ too.

It is here proposed to recapitulate some such risks as attached to each of the two classifications of the legal practice and highlight the consequences of such risks visiting upon the legal practitioner concerned, by reference to decisions of our Courts.

It is felt that, there can be no better way of highlighting such risks and the consequences ensuing, than by references to decided cases.

Some Possible Risks of Advocates – Litigation Lawyers

I now move on to consider some of the sort of risks likely to be faced by the legal practitioners professing to practice law as advocates. In common parlance, such advocates are classified, as litigation lawyers essentially engaged in the practice of advocating the cause of their clients in Court.

A. Failure to Appear in Court

The risk of the advocate concerned, failing to appear in Court on the appointed date for the hearing of a matter cannot be over emphasised.

In the fairly recent case of **Lim Soh Wah & Anor v Wong Sin Chong & Anor and Another Appeal** reported **(2001) 2 CLJ page 344**, the Court of Appeal was faced with the issue as to whether the failure on the part of an advocate to appear at a hearing, and to inform his client of the hearing date, resulting in a judgment being ordered to be entered as against the client, gave rise to a claim in negligence as against the advocate.

The Court of Appeal in dismissing the advocate's appeal against a finding of negligence by the High Court and in doing so, stated as follows:

> **"Advocates and solicitors undertake an onerous task when they agree to act for a client. There is an assumption of responsibility by the advocate and solicitor, coupled with reliance by the client on the skill of the advocate and solicitor. The advocate and solicitor's duty to exercise reasonable care and skill is imposed both by contract and by the law of tort."**

The Court of Appeal took the view that by the advocate's failure to inform his client of the hearing date, the client lost an opportunity to convince the judge by way of oral testimony and documentary evidence that they had a complete answer to the claim brought against them.

What is of importance in that decision is the reiteration by the Court of Appeal on the fundamental duty of an advocate to diarize his cases, keep his client informed of the diarized dates and to prepare the case with the client.

In yet another case, **Syarikat Siaw Teck Hwa Realty & Developments Sdn Bhd v Malek & Joseph Au (sued as a firm) (1999) 5 MLJ page 588**, the High Court had held that an advocate who had failed to appear at a hearing of an appeal before the Federal Court, was professionally negligent and had awarded damages against the said advocate.

These two cases demonstrate the need for practitioners who have opted for litigation practice, to exercise care in the proper diarizing of matters in which they are required to be present in Court and at the same time, ensure proper notification of the date or dates for the hearing are given to their clients.

At times, the omission to enter the date or dates in the diary could be due to a deferment of the entry to some later point in time, and possibly by the secretary of the advocate concerned or the Court clerk of the firm in which he is practising.

Whatever the practice of the advocate concerned or his firm in attending to the diarizing of the dates be, what is clear from the two cases is the fact that managing such risks entails ensuring that the diarizing is attended to as promptly as possible and possibly such diarizing ought to be reflected both in the advocates own diary and possibly the diary of his secretary and perhaps a master diary

that is maintained by the firm and entrusted with the Court clerk.

B. Lodgment of Court Documents

It is part of the litigation practice to have to attend to the filing of documents within the time limited by the Rules of the Courts concerned, to do so.

The discharge of this duty by the advocate entails in the first place the knowledge of the relevant Rules provisions, so as to adequately appraised of the time limited for the lodgment of any document in Court, and the diligence and care exercise in ensuring the lodgment of the document on time and in the proper form.

The failure on the part of an advocate and solicitor to ensure the lodgment of a document in Court within the time prescribed by the law for such lodgment and the consequence of such failure is demonstrated by a decision of the Federal Court in the case of **Miranda v Khoo Yew Boon (1968) 1 MLJ page 161**.

The Federal Court in that case held an advocate and solicitor liable in professional negligence for having failed to lodge a Memorandum of Appeal within the time period stipulated for the lodgment of the same.

What is significant in the decision of the Federal Court in that case is the statement by the Court that while a solicitor is not expected to know every statute, there are some statutes which it is his duty to know.

Quare - How does one manage such a risk?

It is suggested that the management of such risk by its very nature, has got to lie mainly in the hands of the advocate and solicitor entrusted with such a brief. An advocate and solicitor who is required by the calling of his profession to lodge documents in Court and that too, within the time period stipulated, has got to familiarise himself with the provisions of the law applicable thereto and ensure strict compliance therewith.

A rule of thumb should be to seek the aid of the relevant law provision to familiarise oneself of the requirement of the law in this regard. Indeed, the relevant Rules provision, be they the Rules of the High Court, the Rules of the Subordinate Courts, Rules of the Court of Appeal, or the Rules of the Federal Court, have got to be the bible to the advocate and solicitor concerned and located in the place of practice where they are readily accessible to the advocate and solicitor concerned.

In a larger practice, the management of such risks could take the form of a readily accessible interaction amongst the lawyers in the firm, and in particularly as between the juniors and the seniors in the litigation department to facilitate the right sort of guidance to the juniors in attending to such matters as the lodgment of documents in Court within the time frame provided by the law.

Needless of course to add that such guidance can only be forthcoming upon a request made for the same and it is here that the advocate and solicitor faced with the task of having to lodge a document in Court and who has some difficulty either in regard to the applicable law and/or the form of the document to be lodged to candidly seek the guidance of the senior in the firm.

One other possible way of managing such risks will of course be, as is the practice in some firms, to declare it as a policy of the firm that documents required to be lodged within a stipulated time period and in more particular, documents to be lodged with the Appellate Courts in respect of any appeal before the Court, ought to be discussed and vetted by the junior with his senior in the firm.

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