

April 2009

The Professional Liability of the Legal Advisor: A Jordanian and English law Perspective: A Critical Study

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Recommended Citation

Mahasneh, Nisreen and Masadeh, Ayman Khaled (2009) "The Professional Liability of the Legal Advisor: A Jordanian and English law Perspective: A Critical Study," *Journal Sharia and Law*. Vol. 2009 : No. 38 , Article 7.

Available at: https://scholarworks.uaeu.ac.ae/sharia_and_law/vol2009/iss38/7

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Cover Page Footnote

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The Professional Liability of the Legal Advisor

The Professional Liability of the Legal Advisor A Jordanian and English law Perspective: A Critical Study *

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Abstract:

This study deals with the professional liability of the legal advisor. To attain this purpose it starts by distinguishing between a lawyer who represents his client before courts and a mere legal advisor who undertakes the paper work and consultations. This study tries to follow the position of the Jordanian Bar Law as to whether it recognizes this distinction between an agent lawyer and a mere lawyer who submits a legal advice. Moreover, there are particular duties which lie on a lawyer, the question being here whether the wordings of the provisions of the Jordanian Bar Law extend to cover an agent lawyer and a legal advisor. Whenever a legal advisor commits a professional fault resulting in harm to his client, the client becomes entitled for compensation under the general rules of law, in addition to the sanctions imposed by the relevant laws of the profession. For the purpose of determining the legal effect of the professional fault, it is necessary to determine the legal nature of the contract between the legal advisor and his client and determine whether this nature is different from the legal relationship between an agent lawyer and a client. All these questions have been dealt with under the laws of Jordan (the Bar Association Law and the Civil Law). Also a reference has been made to English Law which distinguishes between a solicitor who conducts paper legal work and a barrister who performs the court work. This study concludes that all solicitors in the UK are bound to carry an insurance cover against professional liability. This consists a prerequisite for practicing law. Whereas, in Jordan professional liability is covered by the general rules of law, whereby lawyers bear

•Approved for publication on 13/2/2008 .

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it personally. What is more, the wordings of the provisions of the Jordanian Bar law may not be clear enough to the effect that a mere legal advisor is under the same duties that are addressed to an agent lawyer.

Introduction

Professional liability has in general become one of the most important **issues**, whether for lawyers, doctors or other professions. This is due to the fact that people rely heavily on this category of people (the professionals) in their lives. In reality such professionals may commit a professional mistake which in turn causes harm for their clients, invoking thereby professional liability, subject to some conditions.

Thus, this study aims to discuss the professional liability of the legal advisor for losses resulting from his legal advices. This requires first to distinguish between the lawyer who represents his client before courts and the lawyer who merely gives legal consultations. This distinction is important in terms of determining the nature of the contract in either case. Moreover, this study aims to outline the obligations of the legal advisor under both the relevant laws of the profession and the general rules of law.

Finally, remedies for harms resulting from legal advice cannot be ignored in this study. Such remedies are provided for under both the general rules of law and laws concerning the legal profession. Thus, reference will be made to the Jordanian Bar Association Law No (11) 1972 and its amendments No (51) 1985, the Code of Conduct issued by the Jordanian Bar on 1980 and the Civil Law of Jordan No (43) 1976 (temporary law), which became an ordinary law in 1996. As for the situation in the UK, reference is made to the Solicitors' Code of Conduct 2007⁽¹⁾, Solicitors' Indemnity Insurance Rules 2002, Solicitors Act 1974, besides the general rules of English Law.

To sum up, this study deals with, among others, the following questions:

- I. Does the Jordanian Bar Law distinguish between an agent lawyer and a mere legal advisor?
- II. What is the legal nature of a relationship between a legal advisor and a client?
- III. To what extent the professional duties of the lawyers in general, as

(¹) Code of Conduct 2007 has entered into force on the 1st of July 2007. and it is published on the web rules.sra.org.uk.



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provided for by the Bar Law, are clear and adequate?

- IV. What are the conditions under which the legal advisor is to be considered in breach?
- V. What is the remedy for the breach committed by a legal advisor? And To what extent the remedy of compensation provided for under the general rules of law in Jordan is fair and adequate to the client, taking into consideration comparative practices, namely English Law.

It is worth indicating at the outset that although this study is mainly concerned with Jordanian Law, referring to English Law helps observing the merits and gaps of the Jordanian Laws that regulate the professional liability in cases of legal advice. Therefore, only the most important issues under English law are to be dealt with and as far as this reference is helpful to analyze and evaluate the situation under the Jordanian law.

This study is divided as three sections: section one discusses the concept of the *Legal Advice* and explains what is meant by the phrase "Legal Advisor" for the sake of this study. Section two deals with the duties of the legal advisor under both, the laws of profession and the general rules of law. Section three discusses the remedies that can be claimed for professional liability. These remedies are tackled under both, the laws of profession and the general rules of law. In dealing with all these aspects, reference is made to English Law as far as it is necessary.

Section One: The Concept of the Legal Advice and the Legal Advisor.

This section defines two different phrases that are: on the one hand, the legal advice in terms of its concept and nature. On the other hand, the legal advisor including the distinction between rendering of legal consultations and representing clients before courts. For this purpose, this section will be divided as two subsections where each phrase is dealt with respectively.

1:1: The Legal Advice

The legal advice is required every time when a person or a body, whether governmental or private, needs to know the position of the law with regards to a specific matter. This may include information about the rights and duties for such body requiring the advice. Therefore, seeking a legal advice arises before and/or without any dispute takes place. However, a party may require a legal advice in relation to a probable dispute in the future, the purpose of which is to predict the opportunities of winning or losing, when the matter is brought before the court.⁽²⁾

(2) ماري الحلو رزق، في منهجية العلوم القانونية، دار نعمان للثقافة، لبنان، ٢٠٠١ ص ١٩٩.

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Furthermore, the legal advice becomes highly needed and important when someone is up to conclude a transaction in a specific area. The benefit of which is to ensure that the contract's conditions are in his best interest, and that he is in a strong position. However, a good legal advice cannot be given unless the legal advisor is provided with all relevant information about the factual circumstances surrounding the concerned transaction. Such information could be written or oral.

As for the role of the legal advisor, it can be said at the outset that he is required to give a solution as provided by the law. This duty does not include by any means criticizing the provisions of the law. Instead, the legal advice should necessarily contain a clarification of the potential consequences of the advice itself, and the recommended procedures that the client must take quickly in order to mitigate any potential loss.⁽³⁾

In doing so, the legal advisor must use and adhere to the documents and the materials that are given to him by his client. Some other rules may be mentioned concerning the legal advice. Firstly, if there is more than one solution of the legal issue, the advice should indicate all solutions and the consequences for each. However, the legal advisor must make it clear to the client which solution he prefers. Hence, it is not acceptable that the client chooses between all solutions given to him, but rather the legal advisor must act positively. The reason behind that is the reliance of the client on the judgment of the legal advisor. Secondly, the client may address specific questions to the legal advisor concerning the problem, or he may leave to the legal advisor the task of concluding these questions from the facts.⁽⁴⁾

The legal advice might be a written or an oral one. As for the former, it is assumed that the legal advisor took time to work on the facts and reached an accurate solution. However, giving an oral legal advice at the moment when the legal advisor is approached by may increase the chance of inaccuracy due to the lack of precise search for the legal position concerning the issue in question. Nonetheless, the liability of the legal advisor may arise in both cases.

Mary Razq, Methodology of Legal Science, Numaan Publishing House, Lebanon, 2001,p199.

(٣) عكاشة محمد عبد العال و سامي بديع منصور، المنهجية القانونية، منشورات دار الحلبي الحقوقية، بيروت، ٢٠٠٥، ص ٥٣٧.

Okasha Abudel All and Sami Mansour, Legal Methodology, Al Halabi Publishing House, Bruit, 2005 p537.

(٤) المرجع السابق، ص ٥٣٨ (op.cit.at 538)

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Of course needles to say that the legal advice is not binding to the client, in the sense that he may or may not follow the content of the advice. However, there is no place to the liability unless the advice has been followed.

1:2: The Legal Advisor

This subsection aims to determine what is meant by the phrase "*Legal Advisor*" under both Jordanian and English laws. As for Jordan, the phrase "*Lawyer*" is used to indicate to the person who gives legal opinion as well as represents his client before the courts. To this extent there is no legal distinction in Jordan between the two roles, i.e working at office, and working in the court. Therefore, there is one law and one Bar for lawyers in Jordan, regardless of the kind of work they perform.

This fact becomes clear by referring to Article 6 of the Bar Association Law in Jordan 1972, as amended, which defines lawyers as the "*people whom their profession is to give judicial and legal aid to others who require it for money*". Art 6 then continued by confining the areas that lawyers can work within: acting, as an agent, on behalf of others before court or arbitrators, or any other administrative body, whether in claiming or defending, drafting contracts as well as giving legal advice.

Article 6 of the Bar Law indicates to the existence of more than one class of lawyers, the first being agents, the second are lawyers who draft contracts and conduct any related procedures, and finally lawyers who give legal opinions in legal matters. Moreover, many provisions under the Bar Law use the language of "*an agent or a legal advisor*". From a linguistic view, the word "or" can be used for two purposes; on the one hand, to give the ability of choice between two different things. On the other hand, to provide synonyms. Having said that, it is unclear which one of the two meanings was meant by using the word "or" in the Bar Law.

However, in many other provisions that deal with the rights and the duties of lawyers, concentration is made on the agency contract, which makes the rules contained in such provisions only applicable to the first class of lawyers mentioned under Art 6 of the Bar Law (agent lawyers). It is submitted here that the language of the Bar Law in Jordan must be addressed also to lawyers who work without being agents (legal advisors and contracts' drafters). Any how for the purpose of this study legal advisor means a legally qualified person who submits legal aid to clients in his office without having to bring an action before the court. This in turn includes all advisory work, the most important of which giving opinions in legal matters.

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Conversely, in the UK it is highly distinguished between *Solicitors* and *Barristers*; no person is allowed to practice as a barrister and a solicitor at the same time.⁽⁵⁾ It can be said that this historical distinction appears in the following aspects: Firstly, solicitors deal with paper work, the preparations of litigations and evidence, interviewing witnesses, issuing writs, drafting contracts and wills and others that they can do at their offices. Whereas, barristers perform primarily as advocates, in the sense that they appear before all kinds of courts. As for solicitors they have a limited right to appear in the courts.⁽⁶⁾

However, this is not quite always the case, since barristers may devote some of their time to give consultations, besides their exclusive right of audience in High Court, the Court of Appeal and the House of Lords. On the other hand, solicitors have the right of audience in magistrates' courts, county courts and in some cases in the Crown Court.⁽⁷⁾

Secondly, in relation to the profession solicitors may enter into partnership, which cannot be done by barristers. Moreover, solicitors may, unlike barristers, sue their clients for their fees. This rule has been justified by the fact that solicitors have a contractual relationship with their client, whereas the fees of the barristers are mainly considered as honorary rather than contractual. Thirdly, solicitors can, for this reason, be liable to their clients due to professional negligence, while barristers are immune from this liability. Finally, solicitors take instructions from the clients, but barristers can be instructed by solicitors only.⁽⁸⁾ This research, however, deals only with solicitors and their liability. That is because solicitors in the UK parallel what can be called in Jordan legal advisor, since this research is mainly concerned by office legal work rather than work at the court.

As for the type of education, both solicitors and barristers must obtain a university degree in law. However, the barrister takes the Bar examination under

(5) Denis Keenan, *English Law*, 8th ed. Pitman Publishing, London, 1986, at p 106

(6) P.W.D. Redmond, *General Principles of English Law*, 5th ed. (Macdonald and Evans, 1973) p 49-50

(7) Frances Russell and Christine Locke, *English Law and Language*, (Cassell Publishers, Lond, 1992),p121. The Solicitors Act 1974 has determined in Art 19 the kind of courts that a solicitor has a right of audience before.

(8) R. J. Walker and M. G. Walker, *The Legal English System*, 3rd ed. (Butterworths: London, 1972) p 203. The relationship between a barrister and his client has been described as being "sui generic" in the sense that it cannot be a contractual one, since the barrister receives his work from a solicitor or the court, and should be paid by them. The question of whether the immunity of the barrister extends even when he submits a legal advice or drafts a contract has been discussed by the courts in the UK and the majority opinions go to the conclusion that this immunity should not be existed in such cases. See Walker pp 218-220.



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the aegis of Inns of Court School of Law, whereas the solicitor takes the examination under the aegis of Law Society. Those different examinations in turn take account to the different role of each.⁽⁹⁾

Section Two: The Duties of the Legal Advisor.

There are several duties that rest upon the legal advisor in the course of practicing his profession. His liability is thus judged and measured by whether or not he fulfills those duties. These duties are discussed within this section under both, the laws of profession as subsection one, and the general rules of law as subsection two.

2:1: The Duties of the Legal Advisor under the Laws of Profession.

In Jordan, reference is to be made to the Jordanian Bar Association Law 1972, as amended in 1985, besides the Bar Code of Conduct 1980. Regarding English Law, in 2007 the Solicitors Regulation Authority has issued the Solicitors' Code of Conduct, which was put into force recently.⁽¹⁰⁾

The underlying purpose here is to go through the duties that are set upon a lawyer by the law in Jordan, and to try to compare them with those provided for under English Law, taking into consideration two facts: Firstly, that Jordanian law does not recognize the distinction that is recognized under English law between a solicitor and a barrister. Second, for the purposes of this research, an indication will be made only to the most important duties upon solicitors in the UK which in turn consist the professional ethics. These professional duties are to be discussed as follows:

2:1:1: Integrity and Respect.

According to the Jordanian Bar Association Law, a lawyer must act with integrity and honor, as well as dealing with his colleagues in a proper way.⁽¹¹⁾ No more details are given regarding this duty under the said law. In the UK, a solicitor must act with integrity in his dealing with his clients, the court, other lawyers and the public. Besides, a solicitor must be independent.⁽¹²⁾ This duty is detailed under the Solicitors' Code of Conduct where the first rule of the core duties provided that: a solicitor must give full respect not only to his client but also to the court and

(9) Frances Russell and Christine Locke "op.cit." at p 122

(10) The Solicitors' Code of Conduct was made on the 25th of January 2007 and entered into force on the 1st of July 2007 .

(11) See Section 54 and 57 of the Jordanian Bar Association Act.

(12) See Rules 1.02, core duties, Rule 1, Solicitors' Code of Conduct.

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third parties with whom he is dealing on behalf of his client; this rule is expressed by “*Justice and the Rule of Law*”.⁽¹³⁾

In this regard a solicitor should not use his position to obtain unfair advantages even in his personal life. Furthermore, a solicitor should take care when dealing with some one who lacks legal representation, and legal knowledge and drafting skills. Another point here relates to providing the client with information about the cost of the work which is to be performed by the solicitor. Also, a solicitor must not contact any other party who, to the knowledge of the solicitor, has retained a lawyer or licensed conveyancer to act in a matter unless in some exceptional circumstances.⁽¹⁴⁾

In the field of a contract of sale, a solicitor must not act on behalf of both the seller and the buyer, or on behalf of more than one prospective buyer.⁽¹⁵⁾ However, acting on behalf of both seller and buyer can be accepted under some conditions, among others, the written consent of both parties, besides, no conflict of interests must exist or arise.⁽¹⁶⁾ Moreover, if a solicitor instructed a lawyer of other jurisdictions, he must pay proper fees for that lawyer, unless in some exceptional cases.⁽¹⁷⁾

The rule relating to the position of the lawyer in a sale contract is provided for under the Civil Law in Jordan. Article 115⁽¹⁸⁾ of the said Law generally applies to all kinds of deputies, and disallows them from representing the two parties in any contract, including the sale one. In such a case, the Civil Code provides that

(13) See Rule 1.01- core duties Solicitors Code of Conduct 2007.

(14) See Rule 10- Relations with third parties, Solicitors' Code of Conduct 2007. Those exceptions as provided for under Rule 10-4 are: 1- to request the name and address of the other party's lawyer or licensed conveyancer 2- where it would but reasonable to conclude that the other party's lawyer or licensed conveyancer has refused or failed for no adequate reason either to pass on messages to their client or to reply to correspondence, and has been warned for your intention to contact their client direct 3- with that lawyer or licensed conveyancer's consent 4- in exceptional circumstances.

(15) See Rule 10-06 Solicitors' Code of Conduct 2007.

(16) See Rule 3-10 Solicitors' Code of Conduct 2007.

(17) See Rule 10- Relations with third parties, Solicitors Code of Conduct 2007. those exceptions are indicated under Rule 10-07, the most important one is where a solicitor "has expressly disclaimed that responsibility at the outset, or at a later date he has expressly disclaimed responsibility for any fees incurred after that date"

(18) Art 115 states: "Subject to any contrary provisions of the law or rules of commerce no person shall without license from the principal make a contract with himself in the name of the person he represents whether the contract is for his own account or of another person but the principal may in such case ratify the contract."

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the said contract is to be deemed a conditional one, in the sense that it is not valid until it is ratified by the principal. Besides under section 548⁽¹⁹⁾ of the Civil Law a deputy is not allowed to buy for himself the matter he is ordered to buy on behalf of another. Here, it may be said that these rules include lawyers (agents) necessarily, but does not include the legal advisor who may work without an agency contract.

In other words, a legal advisor may give opinions on transactions, draft the contract of sale, without being an agent. The question being here, is he prohibited from working for the seller and the buyer at once? Is he prohibited to buy the matter of the transaction? The said provisions fall short of covering the legal advisor who just submits legal opinion and undertakes paper work, without being in need to an agency contract.

Here, it appears that the Jordanian law uses a vague language to indicate the ethical principles that a lawyer should have. This result is supported by the fact that the Bar Law in Jordan dealt with integrity and respect in brief, without giving any details or connecting them with practice. In the contrary, English law specifies those principles, and makes them clearer.

2:1:2: Conflict of Interests:

Generally speaking, Jordanian law does not deal directly with the matter of conflict of interests. However, some rules are provided for and may touch the principle of conflict of interests. In this regard, a lawyer must not give an opinion for the opponent of his client, if at any time this lawyer was an agent to this client in this particular lawsuit, and even after the termination of the agency, if this opinion relates some how to the lawsuit of this client.⁽²⁰⁾

Besides, a lawyer is not allowed to represent both parties of the same lawsuit. A lawyer must not accept agency against his client who has given him a general agency or against a former client at the same lawsuit or a related one⁽²¹⁾. Moreover, a lawyer in Jordan is independent, in the sense that he must not practice law and have another job, such as commercial business, being a Minister, or an official

(19) Art 548 states: "No person who represents another by virtue of a provision of the law, agreement or an order from the competent authority may subject to the provisions relating to the family law purchase directly in his name or in a borrowed name even by auction what has been authorized to him by virtue of his representation"

(20) See section 60/5 of the Jordanian Bar Association Act

(21) See section 61 of the Jordanian Bar Association Act

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employee or any other kind of job that is inconsistent with being a lawyer,⁽²²⁾ and undermines the lawyer's independency.⁽²³⁾

However, the 1980 Jordanian Code of Conduct does expressly mention the issue of conflict of interests. It established a rule that a lawyer must not be an agent of two different persons whom interests are in conflict; instead he must inform them about this conflict. Here, two comments can be made; first; Section 5 states that "the lawyer must inform the client about any relationship between him and any other client where there is a chance for conflict of interests". It is unclear whether or not merely informing the client about this conflict and/or the client's acceptance is to be seen as an exception to this rule. Second, the provision refers to (agency and agent) which in turn excludes the lawyers who give legal service without being agents.⁽²⁴⁾

Having analyzed these rules, it can be noted that Jordanian Law always links the work of the lawyer to the agency contract, as all the related provisions to the principle of conflict of interest do mention agency, and assume that the relationship is between a client and an agent. This link is derived from the traditional understanding of the role of the lawyer, where there is a common perception that the lawyer needs to have a power of attorney from a client in order to represent him before the court. However, the lawyer's role has been developing, and legal advice, oral or written, can be required some time without the lawyer being an agent to the client.

As for English Law, the general rule is that a solicitor is not principally prevented from acting for two parties whose interests are in conflict. This principle is drawn from case law, where in *Clark Boyce v Mouat*⁽²⁵⁾, Lord Jauncey of Tullichettle decided that in the case of conflict of interests, the solicitor must obtain the consent of both parties. As a result, both parties must fully understand that their shared solicitor may not be able to disclose all information to each one, besides, he may be disabled from advising one party in the area that his interest conflicts with the interests of the other party. This duty is provided for under the Solicitor Practice Rules 1999.⁽²⁶⁾

(22) See section 11 of the Jordanian Bar Association Act

(23) However, a lawyer can join the academic staff of any of the law schools in Jordan, and/or work as a member in some boards and in the legal mass media See Art11/2 Bar Law.

(24) See the Code of Conduct for lawyers in Jordan 1980, section 5.

(25) {1993} 4 All ER 268.

(26) Sylvia Elwes, "Solicitors and a Conflict of Interest", Business Law Review, May 2005, p 113

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It has been said that there are three different types of conflict of interests: Firstly, the conflict that arises between the client's interest and the solicitor's interest. Secondly, the conflict that arises between the interests of two or more clients dealing with the same solicitor. Lastly, the conflict of confidentiality, where a solicitor holds confidential information for a current or a former client, which is relevant to another client. In such cases the solicitor must not act. (Being the general rule, two conditions are required to vary this general rule, i.e. a written and informed consent of the clients, and also it must be reasonable for the solicitor to act in the circumstances.⁽²⁷⁾

As for the last type of conflict, there are some additional exceptions, those are: where the solicitor informed the parties that he holds information that he cannot disclose and where there are some agreed conditions upon which the solicitor will act.⁽²⁸⁾

Once again, Jordanian Law does not cover the said case, i.e. a legal advisor should not be able to give legal opinion to two parties to the same contract whom interests are in conflict. The Bar Law does not clearly say that, as the language is addressed only to a lawyer acting by virtue of an agency. Furthermore, if we agree that article 60/5 of the Jordanian Bar Law and article 5 of the Jordanian Code of Conduct did envisage the conflict of interests' principle, they do not provide any important exceptions similar to those provided for under English law.

2:1:3: The Relationship Between the lawyer and the Client:

Another rule is set out by Jordanian Law, which is to bind the lawyer to defend his client, and to be honest and loyal to him. Again this language is vague and needs to be further clarified and specified⁽²⁹⁾.

Here, reference may be made to the following rules that are provided for under the Bar Law in Jordan, regarding the relationship between the lawyer and the client: a lawyer is prohibited to do one or more of the followings: attract the clients via commercials and mediators, buying the cases and rights which are subject to disputes, accepting deeds by written order of payment in order to claim the rights contained in personally and without an agency, being a witness against his client in a lawsuit where the lawyer is an agent for this client.⁽³⁰⁾

(27) Tina Campbell, "Acting responsibly", *The Lawyer*, June 2005, p 25 at the web www.thelawyer.com-Professional Negligence.

(28) Tina Campbell, p25

(29) See section 55 of the Jordanian Bar Association Act

(30) Se Art 60 of the Jordanian Bar Association Act

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As for the situation under English law, last core duties mentioned in rule 1 of the Solicitors' Code of Conduct make the solicitor responsible for acting in good faith towards the best interests of the client. On the other hand, a solicitor must provide a good standard of client care, implementing his skills and diligence for this purpose. Also, a solicitor must behave in a way that convinces the public to place their trust in him.⁽³¹⁾

Furthermore, the 2007 Solicitors' Code of Conduct sets out very important rules as to the nature of the relationship between the solicitor and his client. In this regard, the solicitor must not act in the cases where he will be breaching the law or the professional conduct, or even when the solicitor lacks the competence to deal with a specific matter. When the solicitor is acting on behalf of more than one client, he must satisfy the wishes of all clients, by not being instructed by only some of them.⁽³²⁾

In addition, the client must be informed fully about the progress in his case, and about the steps that have been taken or will be later taken. A solicitor is also required to explain his responsibilities to the client. Regarding the cost of the legal service, the solicitor is under a duty to inform the client about the estimated cost and all other details concerning, for example whether insurance will bear such cost, whether the client is eligible for public funding, besides bearing any other cost as money paid to others or the risk of payment the opponent's costs.⁽³³⁾

Here, it can be noted that the ethical dimension under English law as far as the relationship between a lawyer and his client is clearer than the one under Jordanian Law, in particular the rule preventing a solicitor from acting when he lacks competence, and the rule that binds the solicitor to be clear with his client by providing him with all information pertaining to the progress of his case and, most importantly, to its estimated cost. Such luminal and ethical important rules are inadequate under the law of Jordan.

1:1:4: Complaints:

Complaints are mentioned under the Jordanian Bar Law, such complaints must be addressed to the Bar in writing. The law mentions that complaints might be submitted by the Minster of Justice, the Attorney General, any other lawyer or a

(31) Rule 1.04, 1.05 and 1.06, Guidance to rule 1- core duties, The Solicitors' Code of Conduct 2007

(32) Rule 2- Client relation. The Solicitors' Code of Conduct 2007

(33) Rules 2.02 and 2.03- Client relation. The Solicitors' Code of Conduct 2007

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client. The Bar is mandated to handle such a complaint, and it is the sole discretion of the Bar whether or not to proceed with the complaint.⁽³⁴⁾ It is noted that there is no obligation upon the Bar to inform the complainant about the outcome of his complaint, or the timeframe within which the Bar handles the complaint. This fact minimizes the effectiveness of such complaint, especially for clients who have been harmed by the conduct of their lawyers.

Under English Law, an important rule is set out to protect clients' interest by requiring the law firm, *if appropriate in the circumstances*, to afford written complaints procedures to clients. For that purpose, the client should be informed in writing about his right and be directed to whom he should complain. Once the client submits such a claim, he is then entitled to be informed about the way his complaint will be handled, and the timeframe within which he may have any response from the firm.⁽³⁵⁾

It may be well to comment here that this difference in dealing with complaints in Jordan and in the UK reflects the difference in the way the profession is practiced in both countries. In other words, in Jordan, law is practiced via personal offices, where in the UK law is practiced via legal companies, which in turn makes the legal company able and eligible to be objective in handling the complaints.

2:1:5: Excluding Liability:

In Jordan, there is no specific rule within the Bar Association Law regarding limiting the liability of the lawyer. However, reference may be made to the general rules of law under the Civil Law, specifically Art 358 which allows any agreement between the parties that aims to increase or ⁽³⁶⁾decrease or even exempt the debtor from liability where his obligation is to give care, unless where the debtor committed a deceit or gross default.

Here, an indication is made to this subject under the Jordanian Code of Conduct where Art 29 specifies two kinds of service to be given by a lawyer, in the first place bringing an action before the court. Second, submitting legal advice. Regarding the latter service, the provision decides that the lawyer is fully liable for

(34) See Section 68 of the Bar Association Act in Jordan

(35) See Rule 2.05 Client relation. The Solicitors' Code of Conduct 2007.

(36) Article 358-1of the Civil Code states "If the obligation of the debtor is the preservation of a thing or its administration or the exercise of care in the performance of his obligation he shall be deemed to have performed his obligation if he has exercised in its performance all that it is exercised by an ordinary person even if the intended purpose is not achieved, unless the law or the contract otherwise provides".

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the wrongful legal advices he gives and cannot escape liability.⁽³⁷⁾ However, it is still believed that this provision is subject to Art 358 of the Civil Law.

In the UK, a solicitor is prohibited from excluding his civil liability, by a contractual term towards his client. However, he may limit this liability provided that it is not less than the minimum level of cover provided for under the Solicitors' Indemnity Insurance Rules. Also such a limitation must be in writing and brought to the attention of the client.⁽³⁸⁾

Here, the validity of a term under the contract that limits civil liability is subject to more than one English law, and such term must satisfy those laws. To illustrate, the solicitor is not allowed to restrict his professional liability regarding fraud or reckless. This rule is established by the general principles of English Law. By reference to the Solicitors Act 1974, a term in a contentious business agreement which makes a firm not liable for negligence is considered void. Within the Unfair Contract Terms Act 1974, any provision limits the liability of the firm must be subject to the test of fairness and reasonableness; if it appears that it is not fair and reasonable in the circumstances, then it would be void.⁽³⁹⁾

The Unfair Terms in Consumer Contracts Regulations 1999 deal with the terms which are put in a contract and have not been individually negotiated; one party must be a consumer. The Regulations consider the term which has been put in the contract in advance as not being individually negotiated. This is because the consumer has not been able to influence the substance of the term, therefore causes a significant imbalance in the parties' rights and obligations. Such a term is regarded as unfair and must not prevail.⁽⁴⁰⁾

Indeed, it is submitted that it is unfair to allow such an agreement that limits or exempts the legal advisor from liability, because it does give a privilege to the legal advisor -who is in the strong position- over the client, since he has the legal knowledge. It is suggested here that the Bar Law should contain a rule that prevents such agreements, in order to protect the client. However, the client may

(37) In this regard, Article 29 of the Jordanian Code of Conduct explains that the lawyer is free to decide the type of legal service he may choose to offer to his clients. Having made such a choice, he shall remain responsible for any wrongful legal advice he may deliver, even though if he was receiving instructions from his client.

(38) See Rule 2.07 Client relation. The Solicitors' Code of Conduct 2007

(39) Guidance to rule 2.07- client relations- limitation of civil liability by contract- The Solicitors' Code of Conduct 2007

(40) Guidance to rule 2.07- client relations- limitation of civil liability by contract- The Solicitors' Code of Conduct 2007

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waive his right in damages after the occurrence of the harm or after he is awarded these damages by the court. In other words, the client may not waive a right before it exists.⁽⁴¹⁾

2:1:6: Confidentiality:

In Jordan, the Bar Law provides for a rule as to bind the lawyer not to disclose the secrets of his clients which the client himself mentioned, or the lawyer knows as a result of his work for that client. This obligation remains valid even after the termination of the agency.⁽⁴²⁾ It is worth indicating **here that the Jordanian Code of Conduct does also impose** the said obligation upon the lawyer as an agent, and it provides for an exception where there is a written approval from the client.⁽⁴³⁾

Here, the language of the said provisions is addressed to the lawyer as an agent and ignores the case where a legal advisor is giving a legal service without being an agent. It is suggested here that the language of the Bar Law and the Code of Conduct should be amended to cover two classes of lawyer, agents and legal advisors.

Another indication to this issue is made under the Jordanian Evidence Law, where Article 37 disallows a lawyer and an agent from disclosing any information he knew because of his profession even after the termination of the relationship between him and his client. However, the lawyer or the agent must disclose the secret's of his client, where the secret information relates to the client's intention to commit a crime. Contrary to the Bar Law and the Code of Conduct, Article 37 of the Jordanian Evidence Law expressly indicated to lawyers and agents, which makes the rule applicable to both agents' lawyers and legal advisors.

Regarding English Law, the fourth rule provided for under the Solicitors' Code of Conduct deals with confidentiality and disclosure. The duty of confidentiality means that the solicitor must keep confidential the affairs of his

(٤١) عبد الباقي محمود سوادى، مسئولية المحامي المدنية عن أخطائه المهنية، دار الثقافة، عمان، ١٩٩٩ ص ٣٣٠ و ما بعدها.

(Abdul Baqi Sawadi, The Civil Liability of the Lawyer on Professional Faults, Al Thaqafah Publishing House, Amman, 1999, p330).

(42) See Section 60/4 of the Jordanian Bar Association Act.

(43) See the Code of Conduct in Jordan, Art 35 1980

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current or former clients, unless the law binds him to disclose, or the client himself approved disclosure.⁽⁴⁴⁾

As for the duty to disclose, the solicitor is bound to disclose to the client all material information that is relevant to the client matter. However, in cases where there is a conflict between confidentiality and disclosure, the principle of confidentiality prevails. Besides, there are some exceptions where disclosure is not required, among others where such disclosure is prohibited by law.⁽⁴⁵⁾

Here, it can be noted that English Law deals clearly with the obligation of confidentiality and disclosure, and it indeed embodies a comprehensive methodology, as it specifies the general rule first, and builds a relationship between the two concepts of confidentiality and disclosure, ending with some exceptions to the two concepts. It would have much better, and still advisable, that Jordanian law gives more details about the obligation of confidentiality.

Finally, it is worth mentioning that by reviewing the Code of Conduct for lawyers in Jordan, it appears that the Code tries to find this distinction between the role of the lawyer as an agent and a lawyer as a legal advisor. This trend seems to be clear in three provisions under the Code which are: first, Art 24 under the heading "The professional conduct out the scope of courts" the obligations of the legal advisor according to the Code are;

1-Honesty in giving the right advice that is consistent with the law regardless the desires of the clients.

2-In advising clients, regard must be had to the soul of the provisions, the principles of equity and fairness. The legal advisor should not restrict him self literally to the wordings of the provision.

3-As for the contract drafting, the legal advisor should pay attention to the interests of both parties. If any dispute arises between the contract parties about the interpretation of its provisions, the contract drafter must not represent any of them in solving this dispute.

Second, Art 30 which provides that a lawyer should not give a service or an advice by which it breaches the law or the integrity of the court, spoils people who work in public service, or includes deceit and treason to the public.

(44) Rule 4- Confidentiality and disclosure- Solicitors' Code of Conduct 2007

(45) Rule 4- Confidentiality and disclosure- Solicitors' Code of Conduct 2007

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Third, Art 7 of the Code of Conduct binds the lawyer to collect all related information before he gives a legal advice, besides he must provide the client with a clear opinion and must be honest and reasonable in determining the chances of winning or losing, especially in the cases where giving an agency to the lawyer is dependent upon the lawyer's assurance that there is a good chance to win.

Apart from these provisions, the Code of Conduct repeats some rules that are provided for under the Bar Law, and does concentrate on the role of the lawyer as an agent. This fact, in turn, makes the distinction between an agent and a mere legal advisor under the Code is immature yet.

2: 2: The Duties of the Legal Advisor under the General Rules of Law

The duties of the legal advisor in Jordan can be tracked under the Civil Law. As for a solicitor, his duties can be inferred from the rules of contract law under English law. Therefore, the nature of the contractual relationship between a legal advisor and his client must be discussed first, and then the nature of the obligation of the legal advisor/solicitor (gives care or achieves a result). These issues are discussed hereunder.

2:2:1: The Nature of the Relationship Between the Legal Advisor and His Client.

Within Jordanian Law, a distinction is to be drawn between two roles that maybe played by a lawyer; on the one hand, representing the client before courts and bringing lawsuits, this role is completely governed by the contract of agency. Furthermore, the lawyer is not allowed to represent his client before the court unless and until he is authorized to do so by an agency contract.⁽⁴⁶⁾

On the other hand, when the lawyer provides a client with a written or an oral legal opinion in some particular issues, as to reviewing a contract, suggesting some amendments, directing the client to take some actions and others, in such cases, the lawyer does not need to be empowered by an agency contract. This is because the legal advisor in the said case provides the client with services, this kind of relationship between a lawyer and a client consists in turn, a work contract.⁽⁴⁷⁾

(٤٦) عدنان إبراهيم السرحان، شرح القانون المدني - العقود المسماة في المقاوله، الوكالة، الكفالة، دار الثقافة، عمان، ٢٠٠١، ص ١٦ .

(Adnan Al Sarhan, Non-Nominated Contracts: Works, Agency and Guarantee, Al Thaqafah Publishing House, Amman , 2001 p 16)

(٤٧) جعفر الفضلي، الوجيز في العقود المدنية، البيع، الايجار، المقاوله، دراسة في ضوء التطور القانوني و معززة بالقرارات القضائية، دار الثقافة، عمان، ١٩٩٧، ص ٣٧٢ .

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Here, a lawyer may have an agency contract to work for a specific client for a specific period of time, during which he undertakes both types of activities: representing his client in lawsuits before courts, besides providing him with legal opinions and paper work. At this stage even though there is an agency contract, but it would not govern the relationship regarding the mere rendering of legal advices. This is because of the fact that the legislative definition of the agency falls short of covering the said relationship.

In this regard, Art 833 of the Jordanian Civil Law provides: "*The agency is a contract by virtue of which the principal appoints another person on his behalf for a certain permissible disposition*". Thus, in the case of the legal advice the lawyer does not represent his client, noting that representation is the most important element in agency contract. Moreover, the legal advice itself, whether written or oral, is not binding to the client in the sense that the client may or may not follow it. Yet, any action in which the lawyer represents the client makes the later bound by it.

The independent work contract is defined under Art 780 of the Civil Law of Jordan as "*The contract for independent work is a contract by virtue of which one of its two parties undertakes to manufacture an object or to perform work for a consideration which the other party undertakes*". Here, submitting work includes material and intellectual work, and the legal advice is an example of the mental or intellectual work. Bearing in mind the two said definitions (agency and work), it appears that the general rule for agency contract is that it is a voluntary one, the exception being for money as the case of the lawyer representing his client before courts. However, the work contract is always for money.⁽⁴⁸⁾ To sum up, the legal advisor who renders legal opinions without going to court is providing his service for money; this fact makes such a contract classified as a work contract.

In drawing a distinction between agency and work contract, it is submitted that the former always relates to legal actions, whereas the latter relates to material ones. However, this criterion is not true under Jordanian Law, as agency is subject to both legal and material actions. This trend under the Jordanian Civil Law is due to the fact that Jordanian Civil Code is influenced by Islamic law.⁽⁴⁹⁾

(Jafaar Al Fodeli, Civil Contracts: Sale, Leasing and Works, Al Thaqafah Publishing House, Amman, 1997 p372)

(48) See Art 780 and Art 833 of the Civil Law in Jordan that define agency and work contract

(٤٩) عدنان السرحان، المرجع السابق، ص ١٢٢ - ١٢٣

(Adnan Al Sarhan "op. cit." pp 122-123).

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In this regard, mention should be made to section 43 of the Jordanian Bar Association Law, which binds some types of companies to hire "*an agent or a legal advisor*". This must be by a contract which is registered with the Notary Public. It is noted here that the law does not specify the kind of such contract; i.e it does mention an agent or a legal advisor.⁽⁵⁰⁾ Here, it is understood that hiring an agent indicates to the existence of an agency contract; however, it is not understood what is the nature of the contract of hiring a legal advisor? It may be that the law is using the term "an agent" as a synonym to the term "*Legal Advisor*".

It may be well to conclude here that the mere signing of such a contract does not authorize the lawyer to represent such a company before courts; as he must in addition have a special Power of Attorney. However, the contract mentioned under section 43 of the said Law is enough for providing legal consultations. Yet, the question remains what is the type of this contract? In the case of dispute taking place between the legal advisor and the company, what legal rules shall the court apply?

However, it is established that the relationship between a solicitor and a client under English Law is based upon a contract, namely a contract of agency. This is because that the client has to retain the solicitor, and the solicitor derives his authority from the retainer.⁽⁵¹⁾

However, in Jordan the client may seek a legal advice from a lawyer without having to retain him, which necessarily results in eliminating the agency contract. It can be said in this regard that the different style of life and traditions in both countries imposes such a result. In other words, people in Western Countries generally believe that each person must have a legal advisor to look after their legal interests. Indeed, it has been said that a solicitor is a businessman who gives advice to his client not only in legal, but in financial and other matters, in the sense that his work is not all of legal nature, even though it requires legal training. Most of the solicitor's work concerning property dealings, preparing contracts of sale, conveyances and wills, acting as executor and trustee, company formation. To sum

(50) In this regard, Article 43 from the Bar Law makes it obligatory for any industrial or commercial establishment, and for any shareholding company or any other company, including foreign operating companies, whose registered capital exceeds 1 5,000JD to appoint a legal agent/legal advisor from those registered lawyers with the Bar. Such an appointment should be by virtue of a contract to be first endorsed by the Notary Public and then communicated to the Bar within one month from such an appointment.

(51) R. J. Walker and M. G. Walker "op. cit." at p 208.

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up, many of the work that can be conducted by a solicitor has an administrative dimension.⁽⁵²⁾

On the contrary, in Jordan most people do not approach lawyers unless there is a dispute, or that they face a legal problem requiring them to start a legal action before the court. The mere seeking of a legal advice is a new and limited trend in Jordan.

As for the agency relationship between a solicitor and a client, the agent must be authorized to the acts brought by him in order to bind the principal by them. However, in the cases where the agent is unauthorized or exceeds his authority, his actions are not binding on the principal unless the latter has approved them.⁽⁵³⁾

2:2:2: Nature of the Obligation: Giving Care or Achieving a Result

It is submitted that a work contract may or may not be established upon a personal consideration.⁽⁵⁴⁾ What is more, the obligation of the contractor might be to achieve results or just to give care. To illustrate, when the contractor's responsibility is to achieve a result, and where such a result is not achieved, he becomes liable regardless of the reasons, except for the *Force Majoure*.⁽⁵⁵⁾ However, when the responsibility of the contractor is to give care, he is not in breach whenever it is proven that the contractor has given all the required care, but the result was not achieved. In other words, the liability of the contractor is measured by the amount of care he has given.⁽⁵⁶⁾

As for the legal advisor who merely provides services, thereby making personal character an important element in the contract, it can be said that this contract is a work contract. In other words, the legal advisor becomes in the position of a contractor, whose liability is to be measured by the amount of care he

(52) Denis Keenan, "op. cit." at p 109

(53) Micael Furmston, Cheshire, Fifoot & Furmston s Law of Contract, 14th ed. Butterworths, LexisNexis, 2001, p 546

(٥٤) أحمد سعيد المومني، التزامات صاحب العمل و انقضاء المقاولة، دراسة قانونية مقارنة، عمان، ١٩٨٩، ص ١٨٩ و ما بعدها.

(Ahmad Al Momani, the Obligations of the Employer and the Termination of a Works Contract, Amman, 1989 p189)

(55) See Art 786 of the Civil Law of Jordan

(٥٦) قدرى الشهاوي، عقد المقاولة في التشريع المصري و المقارن، منشأة المعارف، الاسكندرية، ٢٠٠١، ص ٩٦ .

(Kadri Al Shahawi, Works Contract under Egyptian and Comparative Law, Al Maararef Publishing House, Aleksandra, 2001,P96)

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gives while performing the contract. Here, it is useful to make a reference to section 358 of the Civil Law in Jordan, which provides that:

" 1- if the obligation of the debtor is the preservation of a thing or its administration or the exercise of care in the performance of his obligation he shall be deemed to have performed his obligation if he has exercised in its performance all that is exercised by an ordinary person even if the intended purpose is not achieved, unless the law or the contract otherwise provides.

2- and in any case the debtor shall remain liable for his deceit or gross default".

In this context, it should be noted that when dealing with work contract, Jordanian Law concentrates only and mainly on the construction contract and most of the rules are applicable only to such a contract. However, this view has to be changed because the concept of work contract has in reality become larger, as a result of the variety of services that can be provided to customers. Here, it is suggested that it would be of a great use if an amendment is made to the law in order to accommodate the so-called "contract of services". Interestingly, Art 780 of the Jordanian Civil Law which defines work contract still indicates to both constructions and services as previously mentioned.

It is worth mentioning that Art 786 of the Civil Law of Jordan provides for the liability of the contractor, but it does not comprise the cases in which the contractor is only required to give care.⁽⁵⁷⁾ In other words, the provisions of the law deal mainly with the case in which the obligation of the contractor is to achieve a result and ignore the other case where this obligation is to give care. This fact under the Civil Law of Jordan makes the scope of work contract very limited to construction contracts; therefore, many other service contracts might fall out of the ambit of work contract. The court may classify such contracts as not-nominated contracts and apply the general rules of law instead of the rules of work contract.

Thus, the Jordanian Supreme Court has considered the agreement between a lawyer and some other people which aimed to free their brother from the jail in Iraq for money, as a not-nominated contract. Because, the lawyer did not need an agency nor did he represent any body during doing the work.⁽⁵⁸⁾ However, such

(57) Article 786 of the Civil Code states that: "The contractor shall be liable for the damage or loss that results from his work or manufacture whether by his trespass or negligence or otherwise and liability shall not be due if the cause is an accident which could not be avoided".

(58) تمييز/ حقوق ٩١/١٠٨٨، هيئة خماسية، ١٩٩٢ منشورات عدالة (The Supreme Court of Jordan,)
(Decision No. 1088-91)

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relationship is a clear example of service contract, which should be governed by the rules of a work contract.

To sum up, the lawyer who represents a client before the court, and a legal advisor who only provides the client with an opinion are required to give care, bearing in mind that their personal characters are important in the contract. They are only liable if it is proven that they did not give the required care. However, when establishing the liability of both, a distinction is to be drawn between two kinds of relationships, on the one hand, a lawyer and a client, the relation in which case is all about representation and it is governed by agency contract, and on the other hand, a legal advisor and his client, where the element of representation is missing, since the legal advisor is not acting on behalf of the client. Hence, it is submitted that this kind of relationship should be regarded as a service contract and governed by the contract of work.

Now, reference is made to the general rules under English Law in order to determine the obligations of the solicitor (agent) as well as the cases under which he becomes liable.

There are several duties that rest upon an agent regarding his relationship with the principal; those duties as known under the general rules of law have an application to a solicitor while acting as an agent. A solicitor must follow his client's instructions, taking into consideration that there are some technical points in the work of the solicitor, which make the value of the client's instructions less important than it would be in other agency contracts. Moreover, an agent must act with due care and skill, it is established that the degree of such care and skill is dependent upon, among others, the circumstances, the profession, whether the agent is paid or gratuitous.⁽⁵⁹⁾

To illustrate, a solicitor must act with a high standard of skills and give a reasonable care, as he is practicing law which is a skillful profession, besides he is most likely paid. Agents including solicitors are under the fiduciary duty, as they are required not to be in a position where there is a conflict of his interest and duty. Therefore, an agent is not allowed to sell his goods to the principal while he is appointed to buy. Besides, it is not acceptable that he buys the goods of the principal if he is appointed to sell. The same is said where the agent is acting on behalf of two different principals with a third party. In all the above cases, the agent is subjecting himself to conflicting duties.⁽⁶⁰⁾

(59) G. H. Treitel, *The Law of Contract*, 9th. ed. , London, Sweet & Maxwell, 1995, pp 661-663

(60) Treitel, pp 661-663

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However, it is foreseeable that a solicitor gives a wrongful advice, the question being here, is he liable? In order to answer this question reference is made to some English cases in which the court found the solicitor not to be liable. Thus, in *Hedley Byrne & Co., Ltd v. Heller and Partners, Ltd*⁽⁶¹⁾, it has been held that there is no liability in negligence where the plaintiff is the client and the defendant is the solicitor. However, it is questionable whether there still be a liability in tort in respect of negligent advice, where there is no contract between parties.⁽⁶²⁾

In *Pickersgill v Riley* the facts were that a client concluded a transaction with someone and the solicitor failed to give him a commercial advice that such person does not have enough assets. The client claimed that the solicitor gave him an inadequate commercial advice and asked for damages. However, the court found that "solicitors are not responsible for commercial mistakes made by experienced business people". It has been commented here that if the client was an old lady, it might be a duty upon the solicitor to tell her that this transaction is not good for her. However, if the client is a businessman, a solicitor has no duty to warn the client⁽⁶³⁾.

Moreover, in *John Mowlem Construction Ple v Neil P Jones & Co* the court of Appeal held " a solicitor was not under a duty to advise their client to notify their insurers of a potential claims".⁽⁶⁴⁾ It can be inferred that under English law the solicitor has to have more experience than the client in order to be liable for wrongful advice, but where the client is a professional in the business conducted, he is able to look after his interests, and there is no duty upon the solicitor to give him commercial advice.

Section Three: Remedies for the Legal Advisor's Breach of his Duties.

Having concluded that there are several duties rest upon a legal advisor, whether under the law of profession or under the general rules of law, this section turns now to discuss the remedies available when the legal advisor breaches any of

(61) {1964} A. C. 465; {1963} 2 All E.R. 575. Quoted in Walker "op. cit." at p 207

(62) R. J. Walker, " op. cit." at p 207

(63) Naoini Rovnick "Courts Protects Lawyers against Commercial Negligence Claims" the Lawyer, 8 March 2004. In another case, a football league claimed that the law firm has not given them an adequate legal advice to protect their interest under the contract while they were negotiating such a contract with a company. In result, the league lost nearly interests of 150,000 Pounds, and brought an action against the law firm. Until the time of accomplishing this research, no decision is reached yet. See Joanne Marris "Hammonds Bullish as football league pursues 150 m Claim" the lawyer 12 September, 2005.

(64) Richard Harrison, " Got it Covered?" the Lawyer 5th September 2005 see the web www.thelawyer.com Professional Negligence

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his obligations under both the laws of profession and the general rules of law, taking into consideration the nature of the contract; which has been classified as a work contract under the law of Jordan, and as an agency contract under English law. For this purpose, this section is divided into two subsections.

3:1: The Remedies for the Breach under the Laws of Profession.

Art 63 of the Jordanian Bar Association Law provides for three sanctions in case a lawyer breaches any of the statutory duties, or commits any act which is inconsistent with the moral value of the legal profession. Those are: notification, reproof and preventing the lawyer from practicing law.

Remedies in this Section will be dealt with in two parts; the first tackles the procedures to be followed in the course of applying remedies. Whereas, the second is concerned with analyzing the concept and nature of the same. All as follows:

3:1:1: Procedural Issues:

In a ruling of the High Court of Justice, the sanctions that might be imposed on a lawyer for misconduct where highlighted as follows:

“Article 54 of the Bar Law requires the lawyer to commit himself to moral principles in practicing law and otherwise in his private life. Failing to adhere to such principles, the lawyer maybe subjected to sanctions ranging from notice, reproofing, preventing from practicing law for a maximum period of 5 years, and removal from lawyers register”⁽⁶⁵⁾.

These sanctions are imposed by a Punitive Council; the lawyer can appoint another lawyer to defend him in front of the Council; and the Council is allowed to hear witnesses. All sessions of the Punitive Council are confidential. It is worth noting here that the Council does not give the verdict, rather it only reviews the case and sends the file to the Bar Council which in turn has to establish whether or not the lawyer is liable, and then elect one or more of the sanctions provided for under Art 63 of the Bar Association Law. In this regard it has been held that:

“By virtue of Article 72 of the Bar Law, the Bar Council is not obligated to follow the recommendation made by the Punitive Council, as the Bar Council is the competent authority to impose sanctions upon lawyers in accordance with Article 63 of such law, regardless of such a recommendation”⁽⁶⁶⁾.

The High Court of Justice, Decision No. 2000-459. منشورات عدالة ٢٠٠٠/٤٥٩ عدل عليا (٦٥)

The High Court of Justice, Decision No. 2000-459 منشورات عدالة ٢٠٠٠/٤٥٩ عدل عليا (٦٦)

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It appears that the Bar Council enjoys a wide discretion in determining the kind of sanction; however, this discretion is subject to judicial review as the decision of the Bar Council can be objected before the High Court of Justice. The Ruling by the said court is final. Nonetheless, it is found that the role of the High Court of justice is limited. In this regard, the Court says:

“The Opinion of this Higher Court of Justice has been constantly stable that it has no right to comment upon the evidence upon which the Bar Council has built its decision, but rather it can only verify that the punitive procedures taken by it were made in accordance with the law.

The Decision taken by the Bar Council to disallow the Appellant from practicing law for 6 months does not seem to correspond to the act committed by him, which represents in our opinion an excessive way in applying the law”⁽⁶⁷⁾.

Furthermore, if a lawyer is involved in a criminal case, and a verdict from the competent court has been issued against him, the Bar must have a copy of the verdict. Here, it is entirely left to the Bar Council to impose upon such a lawyer any of the sanctions provided for under Art 63, provided that the criminal case falls within the category of the so-called "crimes of moral nature".

To illustrate, it can be said that the Bar Law is merely concerned with the procedures more than with the substance of the sanctions. For example it is not fully understood what reproof means, how it is to be implemented, what is the legal consequence of the notification, does it mean depriving the lawyer from any benefits? As for preventing the lawyer from practicing law, what are the minimum and the maximum periods for that prevention?

According to English Law, reference is to be made to the Solicitors Act 1974. The said Act deals mainly with three kinds of breach by a solicitor to his professional duties, those are: misconduct, breaching any rule of law or any rule provided for under the Solicitors Act and finally and most importantly submitting legal services to clients that are not of the required quality that is expected from such a solicitor⁽⁶⁸⁾. In which case, the law society has the right to investigate the matter by taking some procedures, such as asking the solicitor to hand over all

(٦٧) عدل عليا ٢٠٠٥/٤٩٥، منشورات عدالة و قد تأكد هذا الاجتهاد في عدة قرارات منها ٢٠٠٢/٣٥٧ و ٢٠٠٠/٤٥٩ (The High Court of Justice, Decision No. 2005-495)

(68) See the Solicitors Act 1974 Art 44 B

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documents that are related to his breach, besides bearing the expense of the investigation⁽⁶⁹⁾.

In this regard, the Solicitors Disciplinary Tribunal is the body responsible for receiving complaints about solicitors, investigation and taking a decision imposing a sanction. Generally speaking, those sanctions that are provided for under the Solicitors Act are:

- 1-Sticking the name of the solicitor off the roll.
- 2-Suspension of the solicitor from practice indefinitely or for a specified period.
- 3-The payment of a penalty not exceeding 5000 Pounds.

The decision taken by this Tribunal can be objected before the High Court; however, the decision of the High Court is final⁽⁷⁰⁾. It is worth indicating here to the case where the Law Society finds that the legal services that are provided by a solicitor are not of the quality which is reasonable to expect of him as a solicitor. Here, the Council of the Law Society can exercise one of the followings;

- 1-Decreasing the Cost
- 2-Directing the solicitor to rectify the service at his expense
- 3-Paying compensation to the client
- 4-Directing the solicitor to take at his expense any other action in the interest of the client as the Bar may specify⁽⁷¹⁾.

3:1:2: The Substance and Nature of Remedies:

In this regard, mention may be made to some rulings in which the court tackled the remedies for the lawyer's breach of his duties under the Bar Association Law. For example, the Court decided in 2002 that:

“The act of the Appellant (the Lawyer) of demeaning the Chief of Administration at the Bar represents a professional misconduct that invokes a professional sanction. This Court finds that the Decision taken by the Bar Council

(69) See the Solicitors Act 1974 Art 44 C

(70) See the Solicitors Act 1974, Arts 47/2 and 49

(71) See the Solicitors Act 1974 Schedule 1 A F189 Inadequate Professional Services

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to disallow the Appellant from practicing law for 9 months for such an act is in order and corresponds to the misconduct of the Appellant⁽⁷²⁾.

In another case, the court explains that:

"If it is found that the investigated lawyer did receive a sum of 950 JD from his client, as professional fees, to file a case on her behalf, and four months later he failed to file such a case, and/or to return such an amount to his client, then the Bar Decision to penalize this lawyer for unethical behavior by disallowing him from practicing law for a period of three months is considered by our court to be in line with the Law⁽⁷³⁾.

The same remedy has been used in relation to the lawyer's duty to keep the client informed about the developments within his case:

"The lawyer must keep his client informed about the cases which he filed on his behalf. The lawyer must also, upon a request from his client, return back all documents he received from such client and also return any advance payment received in case no case has been filed. If the lawyer fails to provide the Bar Council with any documents evidencing that he has filed the case, accordingly the Board has decided to disallow this lawyer from practicing law for one year, then this Court finds such an action to be in legal order⁽⁷⁴⁾.

With regards to criminal cases, some questions have emerged out: Why is it optional for the Bar Council to punish a lawyer? Why is it a condition that the crime is to be of a moral nature? Do not all criminal crimes negatively touch morality? What is the exact definition of a crime of moral nature?

To explain, it is useful to mention here the following decisions:

"If a court ruling has discharged a lawyer from a crime of provocation to commit kidnap, the Bar Council can still verify any professional misconduct by such a lawyer. Therefore a sanction to disallow such a lawyer from practicing law for one year is in legal order⁽⁷⁵⁾."

- (72) عدل عليا رقم ٢٠٠٢/٣٥٧ منشورات عدالة (The High Court of Justice, Decision No. 2002-357)
(73) عدل عليا رقم ٢٠٠٦/٤٨٦ منشور في مجلة نقابة المحامين الأعداد (٤,٥,٦) السنة الخامسة والخمسون صفحة ٥٠٨ (The High Court of Justice, Decision No. 2006-486)
(74) عدل عليا ٢٠٠٠/١٢٣ منشور صفحة ١٩٣٩ عدد مجلة نقابة المحامين ٢٠٠١/١/١
(75) عدل عليا ٢٠٠٠/٢٢٦ منشورا عدالة (The High Court of Justice, Decision No. 2000-226)

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It is noted that this decision is inconsistent with Art 73/2 of the Bar Law, since the Bar Council imposed a sanction despite the fact that the competent court ruled that the lawyer was innocent. However, according to Art 73/2 of the Bar Law the Bar Council may exercise sanctions only if the court charges the lawyer by a final ruling.

In another case the court ruled that:

"The decision taken by the Bar Council not to enroll the applicant in the lawyers register because it appeared to it that such applicant was previously charged with a crime of issuing a bankcheque without having enough credit is in legal order, as such a conduct by the applicant is in contrary to the moral principles of law profession⁽⁷⁶⁾."

As for breaching the rules of conduct that are required to be observed and respected by a lawyer, some examples may be indicated by the following rulings:

" The fact that the Appellant falsely declared in his Registration Application to the Bar that he was not engaged in any official job makes his application in violation to Article 8-1-H of the Bar Law, which deals with the morality of lawyers, thereby turning the Bar Decision to decline his registration to be in line with the Law⁽⁷⁷⁾."

" The conduct of a lawyer to use the special Power of Attorneys given to him by his clients as a bargaining tool in order to settle financial issues relating to the professional fees with his clients is considered in violation of the ethics and rules of the legal profession which dictates that such Power of Attorneys should be used only for their specific purpose. Therefore panelizing the Appellant for conducting such an act is in line with the Law"⁽⁷⁸⁾.

"If a dispute arises between the lawyer and his client concerning professional fees, then the lawyer should deposit with the relevant Bar Fund any payment/sum he receives on his client behalf. Failing to do so, and particularly withholding such Payment/sum by such a lawyer consists an unethical professional conduct, making

(٧٦) عدل عليا ٢٠٠٠/٢١٢ منشور في مجلة نقابة المحامين صفحة ٣٣ تاريخ ٢٠٠١/١/١
The High Court of Justice, Decision No. 2000-212) (

(٧٧) عدل عليا ٢٠٠٦/٢٠٠ منشور في مجلة نقابة المحامين الأعداد (٤,٥,٦) السنة الخامسة والخمسون
صفحة ٤٩٣ (The High Court of Justice, Decision No. 2006-200)

(٧٨) عدل عليا رقم ٢٠٠٦/٤٩٩ منشور في مجلة نقابة المحامين الأعداد (٤,٥,٦) السنة الخامسة و
الخمسون صفحة ٥٠٤ (The High Court of Justice, Decision No. 2006-499)

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thereby the Bar Decision to penalize him by disallowing him from practicing law for one month to be in line with Article 63 of the Bar Law"⁽⁷⁹⁾.

It is worth indicating here to Art 39 of the Jordanian Bar Law which provides that a lawyer is not liable for legal advices given by him in good faith. This Article is vague, since it is not clearly understood how a lawyer may give a legal opinion in a good or in a bad faith? Besides, if he is not liable under the Bar Law, can he be then held liable under the general rules of law?

Here, good faith is one of the most important principles under the Civil Law of Jordan; it is applied in all kinds of contract, whether in conclusion or execution⁽⁸⁰⁾. However, good or bad faith is dependent upon the nature of the relationship between the parties and the circumstances. Generally speaking, bad faith relates somehow to the knowledge of the party in breach about the fault, it does not relate by any means to the intension to cause harm⁽⁸¹⁾.

Building on the said ideas, the legal advisor is not liable when he gives a mistaken legal opinion believing that it is the right one. However, it may be well to conclude here that it cannot be right to **measure** the liability of the legal advisor by his knowledge in law, since he must know the law. Instead and as we previously discussed, this liability should be **measured** by the care given by him, and he should be liable under the general rules of law regardless of good faith.

Indeed, Art 39 of the Bar Law, which deals with the liability of the legal advisor, may create a lot of problems in practice, since it is inconsistency with the general rule of liability under the Civil Law. As earlier seen, the Jordanian Civil Law deals with the principle of good faith in several provisions, yet it provides no one unified criterion for this principle that suits all kinds of relationships. Likewise, Art 39 itself does not specify a criterion for good faith. Here, if we are to

(٧٩) عدل عليا رقم ٢٠٠٦/٤٩٨ منشور في مجلة نقابة المحامين الاعداد (٤،٥،٦) السنة الخامسة و الخمسون صفحة ٥١٢ (The High Court of Justice, Decision No. 2006-498)

(80) Anwar Sultan "op. cit." at 240

(81) See for example Article 1176/ Jordanian Civil Law which provides " Whoever possesses any thing shall be considered a bona fides possessor if he is ignorant of his trespass on the right of another. Bona fides shall be presumed unless it is otherwise proved". See also Article 1140 which indicates to bad faith as "which he knows..." and Article 1141 which indicates to good faith as " ...on an alleged justifiable grounds...". Under English law a distinction is established between raised issues and un-raised issues. Whenever the solicitor is giving an advice in an issue that courts have raised it and dealt with it, his responsibility to give the right advice is harsh, and his liability is likely to be established. This presumption may be close to the concept of "bad faith". To the contrary, whenever the solicitor is giving an advice in a new issue that has not been raised in front of the courts, his liability is unlikely to be established. This presumption is close to the concept of "good faith"

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use the notion that the Bar Law is a particular law, and the Civil Law is a general law, then it may well be to say that a judge is obligated to apply Art 39 and to gauge the liability of the legal advisor by good faith.

What is more, Art 39 is dealing only with a non-agent lawyer (legal advisor), which in turn creates two different kinds of liability, one for an agent lawyer, other for legal advisor. The first one is in line with the Civil law (general rules of liability) whereas the other one is not. It is strongly suggested that Art 39 should be abolished, since there is no need for it.

Back to English Law, Art 37 of the Solicitors Act 1974 deals with forming a Compensation Fund that is needed to compensate clients who are harmed by the actions taken by their solicitors. Besides, the said law gives the authority to the law society to issue special rules for indemnity⁽⁸²⁾.

Therefore, The Solicitors' Indemnity Rules 2002 was issued. These rules in turn make it a condition for solicitors in order to practice law to have current professional indemnity insurance is in force. The Law Society nominates some insurance companies as qualified insurers. Any firm can obtain an insurance policy with one or more than one insurance company. The minimum value of such insurance is One Million Pounds, and it is governed by Minimum Terms and Conditions issued by the Law Society. However, any firm may exceed this amount (top-up cover). In which case, the firm may choose any other insurance company than qualified insurers. Here, excess insurance cover is not subject to the Minimum Terms and Conditions⁽⁸³⁾.

The Law Society takes into consideration that some firms may not be able to obtain an insurance policy from a qualified insurer for some reasons such as the big size of risk of claims expected by the insurance company regarding a particular firm. As for such firms, the Law Society has established the so-called Assigned Risks Pool (ARP), which means that a firm which fails to be admitted to a qualified insurance company can as a temporary alternative be insured through the (ARP) for a maximum of 24 months in any five year period⁽⁸⁴⁾.

Notwithstanding the above, such firms have to pay a higher premium, and to be subject to inspection and monitoring by the Law Society at the firm's expense.

(82) See Art 37 of the Solicitors Act 1974

(83) The Law Society, Solicitors Indemnity Insurance Rules 2002 with commentary published on the web: rules.sra.org.uk

(84) The Law Society, Solicitors Indemnity Insurance Rules 2002 with commentary.

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Before or after the laps of the 24-month-period, such firm must be able to have insurance from a qualified insurer, otherwise it must cease practice⁽⁸⁵⁾.

Ideally, the said insurance policy shall cover the civil liability of solicitors against any claims regarding their breaches of their duties while practicing law. It is interesting to note that the Solicitors' Indemnity Insurance Rules 2002 were made by the Council of the Law Society itself.⁽⁸⁶⁾

Indeed, such a mechanism under English law serves two purposes; on the one hand it provides solicitors with security and confidence while practicing law, since the insurance company will undertake covering of their professional liability. On the other hand, it does protect the clients' right in damages, and makes it easier for clients to receive their compensation, benefiting from the creditworthiness of the insurance company.

3:2: The Remedies for the Breach under the General Rules of Law:

Having concluded that the relationship between a legal advisor and his client forms a work contract under Jordanian Law, reference should be now made to the rules of the said contract, in addition to the general rules of civil liability under the Civil Law of Jordan. As previously mentioned, the rules of the work contract are more concerned with construction works than with intellectual one, despite the fact that the legal definition of a work contract expands to further include intellectual work.

Here, three kinds of remedies can be discussed, where the legal advisor does not give the required care in dealing with the client case, which results in the legal advisor giving a wrongful legal opinion, causing thereby harm to the client. These are specific performance, repudiation and damages. A light would be shed on the first two remedies in part one, then damages would be discussed in part two.

3:2:1: Specific Performance and Repudiation:

Specific Performance is dealt with under Arts (355-359) of the Jordanian Civil Law. It means forcing the debtor by a court's decision to perform his obligation under the contract. The question here is whether the remedy of specific performance suits the breach of the legal advisor. The answer in most cases is simply no because the damage would have already been done, after the client followed the advice, and cannot be repaired. If the legal advisor is delayed in doing

(85) The Law Society, Solicitors Indemnity Insurance Rules 2002 with commentary

(86) The Law Society, Solicitors Indemnity Insurance Rules 2002 with commentary

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the consultation work, the client may resort to specific performance. However, the client will not be able in this case to force the legal advisor to do the work without the latter consent, because the personal character of the legal advisor is a vital element in the contract. Therefore, specific performance in such contracts proves unhelpful.

As for English law, the remedy of specific performance is unlikely to be implemented for two reasons, the first being that the nature of work required by the solicitor which depends deeply on the personal character of the solicitor and his freedom. Secondly and most importantly, the trend **under** English law towards specific performance as considering it an equitable remedy (secondary remedy) and is not to be awarded unless damages are inadequate, and in exceptional cases⁽⁸⁷⁾.

The second remedy is repudiation of the contract. It results in returning each party to the position he was in before the conclusion of the contract. Again, if the wrongful advice was followed, the damage would also be done. Then it is impossible to return the client to his first position, especially in the cases where the contract between the legal advisor and the client is for one legal opinion. However, where the contract calls for more than one consultation, the client might be able to repudiate the contract for the remaining future consultations.

Repudiation of contract under English law is linked to fundamental breach. It means the breach that goes to the root of the contract, material or serious breaches⁽⁸⁸⁾. The court may determine the degree of the importance of such a breach by referring to the intention of the parties or the seriousness of the consequences which resulted from the breach. Repudiation is not allowed unless the breach is fundamental⁽⁸⁹⁾. However, as seen the contract between a solicitor and a client is an agency one, which makes the said contract fall out the scope of the general rules of repudiation, in the sense that the client may revoke the authority of the solicitor at any time by his unilateral act via a notice addressed to the solicitor. This right to a client in an agency contract may be exercised even without a breach

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- (87) S. Wheeler and Jo Shaw, *Contract Law Cases, Material and Commentary*, Clarendon press, Oxford, 1994, pp863-864. see also Burrows A. S., *Remedies for Torts and Breach of Contract*, Butterworths, London, 1987, p295
- (88) Haddad Hamzeh, *Remedies of the Unpaid Seller in International Sale of Goods under ULIS and UN Convention*. Law & Arbitration Centre, Amman, 1985 at p 24.
- (89) Furmston "op. cit." at 226

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committed by the agent⁽⁹⁰⁾. To sum up, repudiation is an option to the client that he can use in the case of a negligent advice.

3:2:2: Damages:

The final remedy and probably the most appropriate one is damages, which is a sum of money to be awarded by the competent court to the innocent party who has been harmed because of the other party's breach of his obligation under the contract. Damages are based on the contractual liability and it requires the existence of three elements to be invoked under the Civil Law of Jordan. The first element is the wrongful act, in a contract between the legal advisor and a client; the client must prove that the legal advisor failed to give the care that should be given by an ordinary legal advisor at his same class as to qualifications and experience⁽⁹¹⁾.

To illustrate, if the default made by the legal advisor was minor and trivial to the extent that any junior lawyer can find, then this legal advisor is in default. On the contrary, if the consultation work proves to be unusual and complicated, and a similar legal advisor would have given the same consultation, then there is no liability. However, an exception is to be applied here, in the sense that where it is proved that there has been a deceit or a gross default, the legal advisor shall be liable even if he gave the required care. For example, collusion with the opponent of the client may be considered deceit⁽⁹²⁾.

In this regard, it is to be distinguished between three kinds of default: first, ordinary default which is an irrelevant one to the profession. In cases of such a default, the given care is measured by the care given by an ordinary person at the same circumstances. Second, the professional default that means the one that is relevant directly to the profession. The liability in which case is measured by the care given by a professional person being in the same circumstances. Finally, the gross default that means the unforgivable unawareness of the basic rules of law⁽⁹³⁾.

Under the Jordanian Law, the legal advisor is liable according to his default under some conditions, or/and in all cases according to his gross default. As previously mentioned, the client has to prove the default in the side of the legal

(90) Roy Goode, Commercial Law 3rd ed. Penguin Books, London, 2004 at p 177.

(٩١) عدنان السرحان و نوري خاطر، شرح القانون المدني، مصادر الحقوق الشخصية (الالتزامات) دراسة مقارنة، دار الثقافة، عمان، ٢٠٠٥، الصفحات ٣٠١-٣١٧

(Adnan Sarhan and Nuwri Khater, Civil Law: Sources of Obligations. Al Thaqafah Publishing House, Amman, 2006 pp 317-301)

(92) See Art 358 of the Jordanian Civil Law

(٩٣) عبد الباقي محمود سوادى، المرجع السابق ص ٨٨-٩٤ (Abdul Baqi Sawadi, op. cit. pp88-94)

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advisor, which in turn embodies a heavy and hard burden on the client and makes his chances in establishing the legal advisor's liability very poor. What is more, the Civil Law of Jordan does not recognize the concept of professional default as a separate kind of other defaults.

The second element that must be proven is the harm which resulted from the wrongful advice; in most cases such harm is embodied in losing money. It is established in Jordan that contractual liability does give the creditor the right to be reimbursed for the material, direct, ascertained, expected and due loss only⁽⁹⁴⁾. However, there is an uncertainty regarding the ability to reimburse the client for injured feelings (moral loss), or loss of chance.

As for the burden of proof, again the client must prove not only the default but also the harm suffered by him⁽⁹⁵⁾. This task; however, is not easy for the client by any means and does, in practice, minimize his chances in winning his case.

The final element regarding the contractual liability is the causation. It means that the harm suffered by the client should result from the wrongful act committed by the legal advisor, in the sense that there must be a casual relationship between the harm and the default. Once the client has proven the default and the harm, a presumption is then established as to the existence of such a relationship⁽⁹⁶⁾. However, the legal advisor can avoid liability by proving either *Force Majour*, the client's action or a third party action, which in turn breaks the casual link between the act and the resulted harm. For example, the legal advisor may prove that the harm would not have been resulted had the client given all documents and information to the legal advisor.

According to the English general rules of the Law of Contract, the remedy which is likely to arise in the case of the breach of the solicitor is damages, taken into consideration that the relationship between a solicitor and a client forms an agency contract⁽⁹⁷⁾.

In order to determine the amount of damages under English Law, reference is to be made to what is so called *Expectation Measure*, according to which damages mean "to put the innocent party so far as money can do it in the same situation as if

(٩٤) أنور سلطان، مصادر الالتزام في القانون المدني الأردني (دراسة مقارنة في الفقه الاسلامي) المكتب القانوني، عمان، ٢٠٠٢ الصفحات ٢٦٩-٢٧٨.

Anwar Sultan, Sources of Obligations in Jordanian Civil Law, Arab Bureau, Amman, 2002, pp278-269.

(٩٥) عبد الباقي محمود سوادى، المرجع السابق، ص ٩٧. Abdul Baqi Sawadi, op. cit. p97.

(٩٦) أنور سلطان، ص ٢٨٠ (Anwar Sultan, op. cit. p280)

(97) R. J. Walker, "op. cit." at p 208

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the contract had been performed"⁽⁹⁸⁾. There are some conditions that must be met to award damages; the events to be compensated by damages must have been resulted from the defendant's breach. Furthermore, any damages under English Law are subject to the principle of mitigation. In this regard mitigation means that the aggrieved party is under a duty to minimize his loss as is reasonable within the circumstances⁽⁹⁹⁾.

As for the kinds of loss that can be compensated under English Law, it is established that there is no place under English Law to compensate losses which are "too remote". Hence, the losses to be compensated here are losses flowing naturally; that is in the ordinary course of things, from the breach, or those losses which might be supposed to have been contemplated by the parties at the time of the conclusion of the contract⁽¹⁰⁰⁾.

This includes consequential damages including loss of profit provided that they are not too remote. However, there is no place under English Law for damages in relation to the loss of chance in a contractual relationship. As for damages for injured feelings and reputation, the general principle is that such loss is not recoverable in a contractual relationship. Yet this general principle is subject to many qualifications; mention may be made here to some exceptions in which a client can recover damages from his solicitor for injured feelings; this kind of damages can be awarded for physical inconvenience. In *Bailey v. Bullock*⁽¹⁰¹⁾ a solicitor was found liable for damages because he failed to take the appropriate proceedings to recover his client's house; as a result the client had to live two years with his wife's parents⁽¹⁰²⁾.

Another exception to the general rule is that where the purpose of the contract is the protection of the claimant against the sort of damage suffered, there would be a place for damages for an injury to reputation. Besides, cases where the same action amounts to breach of contract and to a tort. Damages can be awarded for anxiety only when the purpose of the contract is to secure relief from an existing state of anxiety. In this regard, a solicitor was found liable for damages for anxiety

(98) John Adams, *Key Issues in Contract*, Butterworths, London, Dublin, Edinburgh, 1995 at p 49

(99) W T Major and Christine Taylor, *Law of Contract*, 9th ed. Patman Publishers, Great Britain, 1996, at p 282

(100) John Adams, "op. cit." at p 50

(101) (1950) 66 T.L.R.(pt.2) 791. See also *Hobbs v. London & South Westren Ry.* (1975) L. R. 10 Q.B. 111; *Mafo v. Adams* {1970} 1 Q. B. 548. Quoted in Treitel "op. cit." at p 892

(102) Treitel at 847, 891, 892

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where he failed to take the required steps in non- molestation proceedings, as a result the molestation of the client continues⁽¹⁰³⁾.

Therefore, a claim by a client for a breach of the solicitor of any of his obligations under the contract of agency is governed by the said criteria of loss and the way of calculating damages. It seems, however, that Jordanian Law is not in line with English law regarding the kind of loss that can be recovered, the test of contemplation to measure the element of remoteness as well as mitigation. To illustrate, consequential damages (indirect loss) and injured feelings are not to be compensated under Jordanian Law. Meanwhile, the loss of profit is recoverable under both Jordanian and English Law, besides both laws do not compensate for loss of chance in relation to a contract.

It remains to be said that once damages are awarded to the client under English Law, the qualified insurance company must pay this amount of damages according to the Solicitors' Indemnity Insurance Rules 2002, as previously discussed. However, under Jordanian Law, if damages are awarded, the legal advisor himself has to pay them, since the law of the profession does not impose any requirements as to insurance cover for civil liability

Conclusions and Recommendations

Having discussed the subject of the professional liability of the legal advisor under the Jordanian Law with reference to English law, it may be well to say that the law of profession is vitally needed for the society and should aim at establishing fairness and equity. This supreme purpose is directly related to the existence of advanced legal rules that govern the conduct of lawyers and their professional liability.

An attempt is made now to draw together the conclusions and the recommendations which emerged out of this study.

Conclusions

First: Art 6 of the Bar Association Law 1972 as amended defines lawyers, and set three classes of them, agents who represent clients before courts, lawyers who help in drafting contracts and finally legal advisors who give opinions in legal matters. Seemingly, the said law distinguishes between these three classes of

(103) Treitle at 893, 894

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lawyers. Besides, there are some other provisions under the law that use the language of "a *lawyer* or a *legal advisor*", which may indicate that the said Law envisaged that they are different. Bearing in mind that "or" might be used to indicate similarity as well.

However, when dealing with the rules of conduct and professional duties, the said Law does insist on using the language of "*agent, agency*", which, to the contrary of the above, indicates that the Law only recognizes lawyers who represent their clients by virtue of an agency contract, and not legal advisors merely delivering legal consultations. Similarly, the Code of Conduct for lawyers in Jordan albeit is trying to recognize this distinction in some of its provisions, it nonetheless repeats many of the lawyers duties as mentioned under the law, such as conflict of interests, confidentiality and disclosure, thereby concentrating mainly on the lawyer as an agent.

Second: the legal advisor may work and give legal services without being in need for an agency contract. For example, he may give a legal advice, or draft a contract. In this particular relationship, the contract between the client and the legal advisor forms a work contract. However, it is noted that the rules of work contract under the Civil Law of Jordan deal mainly with construction, and do not generally suit the relation between a legal advisor and a client, especially Art 786 which assumes that the duty of the contractor is always to achieve a result, and that he is always liable whenever this result could not be achieved except in the case of *Force Majoure*. This fact however, proves inaccurate for the duty of the legal advisor to merely give care.

Third: concerning the duties of the lawyers in general under the Bar Law, some duties have to be made clearer and more detailed, such as providing for some exceptions in case of conflict of interests. Moreover, to obligate lawyers to keep their clients informed about the developments within the case or the possible cost that maybe incurred by them; and also to build a relationship between the two concepts of confidentiality and disclosure, in addition to imposing an obligation upon a lawyer as not to act when he lacks competence. In this particular point, it appeared that the Bar in Jordan does not play any role in watching the quality of legal services provided to clients. Likewise, some sanctions are unclear under the said Law; such as notice and reproofing, especially as to how the Bar would implement such sanctions.

Fourth: it appeared that the mechanism of complaining by clients to the Bar does not include any sufficient protection or guarantees in favor of the clients, nor does it allow them to follow up their complaints. Furthermore, it can be said that

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the legal advisor may according to the general rules of the Civil Law (Art 358) exempt himself or minimize his liability. It may be well to say here that the said right will result in depriving the client from the needed protection. It is recommended therefore that professional liability should not be subject to any limitation or exemption.

Fifth: the liability of the legal advisor is established upon the contractual liability, which needs the existence of three elements: default, harm and causation. The client is to prove both the default and the harm, and it is believed here that this in practice represents a very heavy burden upon the client and may result in the legal advisor escaping liability.

Recommendations

First: an amendment is recommended to the Bar Association Law in Jordan in order to remove the uncertainty about the distinction between the agent and the mere legal advisor. In this regard, when dealing with the duties of a lawyer it is better to use the word " lawyer" to indicate the three classes of lawyers mentioned under Art 6 of the Bar Law instead of the words " agent, agency". This in turn makes all classes of lawyers bound by these duties.

Second: Article 39 of the Jordanian Bar Law may create in practice many problems, as it measures the legal advisor's liability by good faith. It has been concluded that this criterion is not in line with the general rules of civil liability which establish the liability upon the given care. Besides, the said article is only concerned with non-agent lawyers (legal advisors) which in turn creates two different kinds of liability for lawyers. It is recommended here that Art 39 of the Bar Law to be abolished.

Third: the time has come for Jordan to introduce to our laws the concept of services contracts, considering the fact that work contract under the Civil Law focuses mainly on construction works and ignores other services contracts. It is believed that a relationship between a legal advisor and a client forms a service contract which is a type of a work contract; however, it does require introducing some special rules. Here, it is submitted that the burden of proof should not lay on the client in all services contract, because the client in such a contract relies on the professional person he is dealing with; this reliance justifies giving him extra protection.

Fourth: insurance against civil liability has indeed a lot of benefits for both lawyers and clients; it is highly recommended that the Jordanian Bar Association takes the initiative to implement this idea within our law practices. Here, the

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English experience might be of a great help. This idea may play a great role in filtering lawyers and guarantee that they are committed to the rules and principles of the profession, especially if this insurance cover is a **pre-condition** to practicing law.

REFERENCES

First: English Books and Articles

- Adams John, Key Issues in Contract, Butterworths, London, Dublin, Edinburgh, 1995.
- Burrows A. S., Remedies for Torts and Breach of Contract, Butterworths, London, 1987.
- Campbell Tina, "Acting responsibly", The Lawyer, June 2005, at the web www.thelawyer.com- Professional Negligence.
- Elwes Sylvia, "Solicitors and a Conflict of Interest", Business Law Review, May 2005.
- Furmston, Cheshire, Fifoot & Furmston s Law of Contract, 14th ed. Butterworths, England, 2001.
- Goode Roy, Commercial Law 3rd ed. Penguin Books, London, 2004.
- Haddad Hamzeh, Remedies of the Unpaid Seller in International Sale of Goods under
ULIS and UN Convention. Law& Arbitration Centre, Amman, 1985
- Harrison R. " Got it Covered?" the Lawyer 5th September 2005 see the web aite:
www.thelawyer.com Professional Negligence.
- Keenan Denis, English Law, 8th ed. Pitman Publishing, London, 1986.
- Major W. T. and Christine Taylor, Law of Contract, 9th ed. Patman Publishers, Great Britain, 1996.
- Marris Joanne " Hammonds Bullish as Football League Pursues 150 m Claim",

Dr. Nisreen S. Mahasneh & Dr. Aymen Masadeh

the Lawyer 12 September 2005.

- Redmond P.W.D, General Principles of English Law, 5th ed. (Macdonald and Evans, 1973.
- Rovnick Naoini "Courts Protects Lawyers against Commercial Negligence Claims" the Lawyer, 8 March 2004
- Russell Frances and Christine Locke, English Law and Language,(Cassell Publishers, London, 1992.
- Treitel G. H, The Law of Contract, 9th. ed., London, Sweet & Maxwell, 1995.
- Walker R. J. and M. G. Walker,The Legal English System, 3rd ed. Butterworths, London, 1972.
- Wheeler S. and Jo Shaw, Contract Law Cases, Material and Commentary, Clarendon press, Oxford, 1994.

English Legislations:

- Solicitors' Code of Conduct 2007
- Solicitors' Indemnity Insurance Rules 2002
- Solicitors Act 1974 (c. 47)

Websites:

- www.rules.sra.org.uk
- www.statutelaw.gov.uk
- www.thelawyer.com

ثانياً: المراجع العربية

- أحمد سعيد المومني، التزامات صاحب العمل و انقضاء المقاولة، دراسة قانونية مقارنة، عمان، ١٩٨٩
- أنور سلطان، مصادر الالتزام في القانون المدني الأردني (دراسة مقارنة في الفقه الاسلامي) المكتب القانوني، عمان، ٢٠٠٢
- جعفر الفضلي، الوجيز في العقود المدنية، البيع، الايجار، المقاولة، دراسة في ضوء التطور القانوني و معززة بالقرارات القضائية، دار الثقافة، عمان، ١٩٩٧.

The Professional Liability of the Legal Advisor

- عبد الباقي محمود سوادى، مسؤولية المحامي المدنية عن أخطائه المهنية، دار الثقافة، عمان، ١٩٩٩.
- عدنان ابراهيم السرحان، شرح القانون المدني - العقود المسماة في المقاولات، الوكالة، الكفالة، دار الثقافة، عمان، ٢٠٠١.
- عدنان السرحان و نوري خاطر، شرح القانون المدني، مصادر الحقوق الشخصية (الالتزامات) دراسة مقارنة، دار الثقافة، عمان، ٢٠٠٥.
- عكاشة محمد عبد العال و سامي بديع منصور، المنهجية القانونية، منشورات دار الحلبي الحقوقية، بيروت، ٢٠٠٥.
- قدري الشهاوي، عقد المقاولات في التشريع المصري و المقارن، منشأة المعارف، الاسكندرية، ٢٠٠١.
- ماري الحلو رزق، في منهجية العلوم القانونية، دار نعمان للثقافة، لبنان، ٢٠٠١.

التشريعات العربية

- قانون نقابة المحامين النظاميين رقم (١١٩) لسنة ١٩٧٢ قانون معدّل لقانون نقابة المحامين النظاميين رقم (٥١) لسنة ١٩٨٥
- القانون المدني الأردني (مؤقت) رقم (٤٣) لسنة ١٩٧٦. أصبح قانوناً دائماً سنة ١٩٩٦.
- لائحة آداب مهنة المحاماة و قواعد السلوك للمحامين، نقابة المحامين الأردنيين، ١٩٨٠

المسؤولية المهنية للمستشار القانوني دراسة نقدية في القانون الأردني والقانون الإنجليزي *

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ملخص البحث

تتناول هذه الدراسة التعريف بالمحامي و محاولة التمييز بين المحامي الوكيل الذي يمثل موكله أمام المحاكم من ناحية و من ناحية اخرى مجرد المستشار القانوني الذي يعطي آراء قانونية و فتاوى في مسائل قانونية. و قد تمّ التعرض للواجبات المفروضة على المستشار القانوني و الجزاءات المفروضة على المخالفين بموجب قوانين المهنة (قانون نقابة المحامين في الأردن و القوانين الخاصة بالسلوك المهني في بريطانيا)، ثم انتقلنا الى تكييف العلاقة بين المستشار القانوني و طالب الاستشارة و تبين أن هذه العلاقة تشكل عقد مقاوله في الأردن و عقد وكالة في بريطانيا.

أما فيما يتعلق بالمسؤولية، فتقوم مسؤولية المستشار القانوني بتوافر ثلاث أركان هي الخطأ و الضرر و علاقة السببية، مع التأكيد بأن التزام المستشار القانوني هو التزام ببذل عناية و لا يكون مسئولاً إلا إذا ثبت أنه لم يبذل العناية المطلوبة. لقد تبين أن التعويض هو الجزاء الغالب في حال ثبوت الخطأ المهني، و

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أن الالتزام بدفع هذا التعويض يقع على عاتق المستشار القانوني شخصيا في الأردن، أما في ظل القانون الإنجليزي فإن هناك ما يعرف بالتأمين ضد المسؤولية المدنية و هو نظام إجباري مفروض من خلال قوانين المهنة و تنظمه النقابة و لا يسمح للمستشار القانوني بممارسة المهنة بغير هذا الغطاء التأميني.