

**PROFESSIONAL SELF - REGULATION AND
CHALLENGES IN ENFORCING PROFESSIONAL
DISCIPLINE**

**A CASE STUDY OF THE ADVOCATES' DISCIPLINARY
PROCESS IN KENYA**

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**UNIVERSITY OF NAIROBI
SCHOOL OF LAW**

**PROJECT PAPER IN PARTIAL FULFILMENT OF
THE DEGREE IN MASTER OF LAWS (LLM)**

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OCTOBER, 2008

DECLARATION

I, Roselyne Lagat-Korir, do hereby declare that this Thesis is my original work and has not been submitted for a degree in any other university.

Roselyne Lagat-Korir
Student

Date _____

This Thesis has been submitted for examination with my approval as
University supervisor

Professor Albert Mumma

Date _____

DEDICATION

TO MY HUSBAND, KORIR

You have been true all the way

TO MY CHILDREN MARTIN, MICHELLE, KEVIN & MELISSA

Be inspired to great heights of academic excellence

ACKNOWLEDGMENT

My journey towards accomplishing LLM studies has been possible with the support, encouragement and assistance of many people. Though I cannot name them all, I register my appreciation and a prayer for God's blessings for them.

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Finally and from the depth of my heart I acknowledge the loyalty and total backing of my family whose support inspired me to the very end.

And to God – All Honour and Glory.

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ACRONYMS

ACC	- Advocates Complaints Commission
AG	-Attorney general
All ER	-All England Report
CA	-Court of Appeal
CLE	-Council of Legal Education
DC	-Disciplinary Committee
EKLR	-Electronic Kenya Law Report
EALR	-East Africa Law Report
GK	-Government of Kenya
HC	-High Court of Kenya
HL	-House of Lords
IHDR	-In-House Dispute Resolution
KLR	-Kenya Law Report
LN	-Legal Notice
LSK	-Law Society of Kenya
SG	-Solicitor General
UN	-United Nations
UK	-United Kingdom

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CHAPTER ONE

INTRODUCTION AND LITERATURE REVIEW

1.0 INTRODUCTION

Regulation means the act or process of controlling by rule or restriction.¹ It denotes the administration of a set of rules and administrative codes which have the force of law over a distinct group of persons engaged in the same trade or possessing the same skill. Professional regulation has a number of identifiable features. Firstly, the members of the profession are recognized as having a special skill and learning in some field of activity in which the public needs protection against incompetence; and, secondly, they are identifiable by reference to some register which is regularly kept. In self-regulation, members of professional bodies voluntarily submit themselves to standards of ethical conduct beyond that required by law. They also set and enforce the standards themselves. The task of policing is often left to the senior and respected members of the profession.²

The enforcement of professional discipline among practitioners of various professions is both necessary to protect the recipients of professional services, and; desirable to uphold high standards and integrity of the particular profession.³ In the past, the State reserved the power and task of regulation. Increasingly, many professions have claimed this role from the State and have put in place mechanisms for self – regulation to enforce professional discipline among its members.⁴

The legal profession is one of the professions which are highly regulated. In many jurisdictions, the profession is invariably regulated by law and through observance of either a written or non-written code of conduct by its members. Substantive law usually provides duties owed by the advocates to the courts, their clients and the public while

¹ Black's Law Dictionary 8th edition ,2004

² Stephen F. H. and Love, J.H.(1999) 'Regulation of the Legal Profession' in *Regulation of the Legal Profession* p 970 (hereinafter Stephen and Love)

³ Ibid p 989

⁴ Ghai Y.P and McAuslan J.P.W.B., (1970), *Public Law and Political Change in Kenya*, (hereinafter Ghai and Mc Auslan)

code of conduct emanate from the higher calling of advocates and give prescriptions of professional conduct and etiquette.⁵

Elements of self-regulation and State intervention in professional regulation as a policy are discernible from the law. The following select jurisdictions exhibit common features in the professional association of lawyers through Bar Associations or Law Societies; and, in the powers of the profession to enforce professional discipline on its members. The role played by the State through Courts as well as the presence of State officials in the Disciplinary Committees is also a common feature.

In South Africa, the profession is regulated by the Attorneys Act.⁶ The object of the Act is 'to consolidate the laws relating to the admission and practice of attorneys, notaries and conveyancers; the Attorneys Fidelity Fund; and Law Societies established in respect of the profession of attorney, notary or conveyancer; and to provide for matters connected therewith.' The Act also establishes the General Council of the Bar with overall regulatory power over legal practitioners. It also establishes a Bar Council for every Province. The General Council draws its membership from both the State and the private bar.

The Ugandan legal profession is regulated by the Advocates Act.⁷ The object of the Act is to 'amend and consolidate the law relating to advocates and to make general provisions for purposes connected with the legal profession'. The Act establishes the Law Council whose functions *inter alia* are "to exercise general supervision and control over professional legal education in Uganda" and 'to exercise through the medium of the Disciplinary Committee, disciplinary control over advocates and their clerks'. It also regulates entry into and exit from the profession. Membership of the Council is drawn from both the public and private bar. They are a judge, President of the Law Society,

⁵ Kailesh, Rai, (2002), *Legal Ethics and Accountancy For Lawyers*, Central Law Publications, Allahabad, P. 12 (hereinafter Kailesh Rai)

⁶ Act No. 53 of 1979, Laws of the Republic of South Africa.

⁷ Chapter 267 of 1970, Laws of Uganda

head of the faculty of law, Makerere, Director of the Law Development Centre, two practicing advocates, and one government lawyer appointed by the Attorney General.

In the United Kingdom, Solicitors and Barristers are regulated by different bodies. While the two divisions of the profession subscribe to the unwritten ethical code of the profession, solicitors are further bound by the Solicitors' Code of Conduct, 2007. The Law Society plays a key role in the regulation of the profession. The Solicitors' Act, 1974, establishes the Solicitors' Complaints Tribunal to exercise disciplinary power over solicitors for breach of the ethical code.⁸

In Kenya, the legal profession is regulated by the provisions of the Advocates Act (Cap 16 Laws of Kenya) among other laws. The Act was passed in 1989 with the objective of amending and consolidating the law relating to advocates. It regulates matters relating to professional qualification, legal practice, remuneration and professional discipline. The regulation is aimed at ensuring that advocates uphold the highest standards of integrity and professionalism in the practice of law. Actions that threaten such standards may constitute professional misconduct and include such acts as failure to account to clients; withholding clients' money; failure to honour professional undertaking; acting contrary to clients' instructions; failure to attend court and prosecute clients' case; failure to inform client of likely costs; overcharging fees and 'any other act which does not befit the conduct of an advocate'⁹

The professional disciplinary machinery for lawyers established under the Advocates Act¹⁰ comprises the Advocates' complaints Commission which is a statutory body under the Attorney General's Chambers, the Disciplinary Committee and the High Court. The legal framework for the professional discipline of advocates vests disciplinary power and the resolution of client/advocate disputes concurrently in these three institutions. Any person may lodge a complaint against an advocate with the Complaints' Commission or directly with the Law Society of Kenya while the High Court has inherent jurisdiction to punish advocates for misconduct committed in the course of proceedings before the court

⁸ <http://www.solicitorstribunal.org.uk/constitution.html>, last updated 1st May 2008, accessed 8th December 2008

⁹ Legal Watch, A publication of the Advocates Complaints Commission (unpublished and undated)

as well as entertain appeals from the Complaints Commission and the Disciplinary Committee.¹¹

The disciplinary machinery set out under the law has however not been very effective. The multiplicity of institutions dealing with complaints namely, the Commission, and the Disciplinary Committee and the High Court presents a complex web of institutional and procedural issues which limit or impede access to substantive justice by the complainants. The Complaints Commission has often been accused of delay in handling of cases while it is generally felt that both the Commission and the Disciplinary Committee are lenient to the advocates and do not afford substantive and procedural justice to the complainants who are often the poor and vulnerable.¹²

The law vests in the Commission, the Disciplinary Committee and the High Court power to punish advocates for professional misconduct. Although the prescribed penalties for professional misconduct are severe, the process of determining the complaints is long drawn, hazy and often ill affords substantive justice to the complainants. There is need therefore to re- examine the concept of professional self- regulation, analyse the legal and institutional framework for the advocates' disciplinary process and its qualitative outcome, and; where appropriate, to propose policy, legal and administrative reforms that facilitate a more effective disciplinary process.

1.2 RESEARCH PROBLEM

The proposed research seeks to discuss the concept of professional regulation using the advocates' disciplinary processes and mechanisms as a case study. In pursuit of this objective, the study will map and analyse the disciplinary process undertaken by the Advocates' Complaints Commission and the Disciplinary Committee and discuss its efficacy in delivering justice for the parties in client/ advocate disputes and particularly to

¹⁰ „Section 53, 57 and 56 respectively

¹¹ Section 62, Advocates Act, 1989

¹² Chunga, B, Chief Justice, Speech: Official Closing of 3rd ACC Workshop on Honesty and Excellence in the Provision of Legal Services, Kisumu, 4th December, 2001

the complainants. Further, the study will make proposals for policy, legal, and administrative reforms to support a more effective disciplinary process.

1.3 RESEARCH OBJECTIVES

This study critically examines the policy, legal and institutional framework for the professional discipline of lawyers and the quality of justice for the poor and vulnerable in client/advocate disputes. It maps and documents the advocates' professional disciplinary process highlighting the gaps in the legal and institutional framework. It analyses the concept of self – regulation and the role of the state in professional discipline. It urges a re-examination of the internal processes of the Commission with the aim of suggesting necessary institutional reforms. Specific objectives are:-

- a) To examine the theoretical basis of professional regulation and enforcement of professional discipline in the legal profession.
- b) To examine the policy, legal and institutional framework for the professional discipline of advocates in Kenya.
- c) To examine the efficacy of the disciplinary process and the extent to which that process delivers substantive justice to complainants who are often poor and vulnerable.
- d) To recommend policy, legislative and institutional administrative reforms to support effective resolution of client/ advocate disputes and enforcement of professional discipline among advocates.

1.4 RESEARCH QUESTIONS

The study will seek to answer the following research questions:

- a) What is the theoretical basis for self-regulation and State intervention in the enforcement of professional discipline among advocates?
- b) What is the policy, legal and institutional framework for the professional discipline of advocates in Kenya?
- c) What is the efficacy of the disciplinary process and to what extent does it deliver substantive justice to the complainants who are often poor and vulnerable?

- d) What are the gaps in the existing disciplinary process and what policy, legislative and administrative reforms are necessary for the effective enforcement of professional discipline?

1.5 HYPOTHESIS

The study proceeds on the following hypotheses:-

- That the policy, legal and institutional framework which facilitates both professional self-regulation and state participation in the advocates' professional disciplinary process mitigates the shortcomings in professional self – regulation.
- That the power balance in an advocate/client relationship and the use of quasi-judicial process governed by technical rules and procedures is heavily tilted against the client and impedes justice in advocate/client disputes.
- That a firm foundation of ethics is necessary for the efficacy of a professional self - regulatory framework.

2.0 LITERATURE REVIEW

Professional regulation is motivated by several factors which include the protection of consumers on the one hand and the protection of the monopoly of services and privileges enjoyed by members of a profession on the other hand. Stephen and Love (1999)¹³ discuss professional regulation from an economic perspective whereby the professional service in the hands of a professional is sold to a consumer. In this respect, the regulation of the professional market is necessary.

In the legal profession, Stephen and Love argue that regulation is necessary because of the information asymmetry between the professional and the client where the client is usually less well informed about the nature of legal problems and their remedies than the lawyer and often relies on the lawyer to define the problem in the first place as well as recommending a course of action and implementing it. They stress that this kind of relationship demands some protection for the consumer of personal professional services. The protection of consumers in this sense takes the form of regulation of the profession and its markets.¹⁴

Professional regulation is deemed necessary as it sets a profession apart from other trades. Kronman(1998)¹⁵ states that the word profession suggests a certain stature and prestige and that a profession implies that the activity to which it is attached possesses a special dignity that other non-professional jobs do not. He notes that for centuries, the practice of law has been considered a profession both by lawyers and lay people and legal education has always been thought of as a form of professional and not merely vocational training.

The professionalism in the practice of law which confers on lawyers what Weber¹⁶ describes as “status pride” of lawyers or the high self-regard they experience as the

¹³ Stephen and Love, opcit, p 989

¹⁴ Ibid p.992

¹⁵ Kronman, A, (1998) ‘The Law as a profession’ Essay presented at Chapman University, School of Law, p. 30.(hereinafter Kronman)

¹⁶ Quoted in Kronman Ibid p. 31

members of a profession makes regulation as a medium of enforcing professionalism attractive to the members of the profession.

Discussion on regulation of the various professions is often centered on the need for regulation as well as who should undertake the task of regulation. Ghai and McAuslan (1970)¹⁷ in discussing the history of the Bar in Kenya state that the legal profession was subject to a measure of public or State control exercised primarily through the Chief Justice. In 1949, the profession was given self-governing powers in law and henceforth it progressed to incrementally acquire powers of self-government.¹⁸ Ghai and McAuslan describe the legal profession in Kenya which prior to independence was wholly non-African as being aloof and remote from the African population and the legal problems affecting it. They argue that the profession concentrated on systematically increasing self-governing powers and this struggle culminated in the passage of The Advocates Ordinance and the Law Society Ordinance in 1949. The two Ordinances substantially shifted the power to control and regulate the profession from the State to the private Bar. Ghai and McAuslan state that the changes were motivated by the profession's need for professional independence from the State.¹⁹

In examining the arguments for professional self-regulation, Dingwall and Fenn (1987)²⁰ comment that self-regulation arises from the social institution of trust: a social contract between society and the profession which mitigates the moral hazard problem arising from the information asymmetry articulated by Stephen and Love cited above. They insist that safeguards must be built into a self-regulatory framework to ensure that the profession does not operate as a cartel.

The legal profession is one of the professions that exercise self-regulation in many jurisdictions. It has been underscored that the profession which considers itself noble and honourable has evolved rules of conduct and ethics which only its members can design

¹⁷ Ghai and McAuslan, *Op cit* P. 386

¹⁸ This was done via various amendments to the law.

¹⁹ *Ibid* p.386

²⁰ Quoted in Stephen and Love, *op cit.* p.991

and enforce. It has been argued that the fundamental aim of legal ethics is to maintain the honour and dignity of the profession. Professional legal ethics has been defined as a code of conduct written or unwritten for regulating the behaviour of a practising lawyer towards himself, his client, his adversary in law and towards the court (Kailash Rai 2002)²¹.

The unique position occupied by lawyers in the administration of justice bestows on the profession dignity and honour as well as heavy responsibility to safeguard the public interest. Thus the norms which guide the profession and which have evolved through the centuries were given recognition by the United Nations in 1990 when the General Assembly endorsed the UN Basic principles on the role of lawyers. The principles *inter alia* provide that lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The principles also state that the executive body of such professional associations shall be elected by its members and shall exercise its functions without external interference.²²

Arguments for self regulation in the legal profession often turn on the principle of independence. Gordon²³, in his article 'Why Lawyers Just Can't Be Hired Guns', argues that lawyers must exercise independence in their legal duties and in discharging public responsibilities. Lumumba (2005)²⁴ states that meaningful independence of the profession covers independence in professional judgment in respect of a particular case, exercise of discretionary judgment, and freedom to act in the interest of the public good.

²¹ Kailash Rai, *opcit*, pg. 39

²² United Nations Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba on 27th August 1990

²³ Gordon, R.W., 'Why Lawyers Can't Just Be Hired Guns', Essay, University of Alabama school of Law

²⁴ Lumumba, P.L.O, 2005 "The legal Profession in Kenya, Towards a New Ethos", in Franceschi, G and Ritho, A, (Eds) Legal Ethics and Jurisprudence in Nation Building, p.38 (hereinafter Lumumba, P.L.O)

Arguments against self-regulation have been advanced. Cranston²⁵ argues that self-regulation has the danger of 'cartelisation' and that 'lawyers should not have a free hand in writing the codes'. He urges that what is contained in the codes should be subject to public scrutiny to ensure that it is best for society.

While the importance of upholding professional ethics has been hailed, the systems of administration of the ethical codes have been the subject of criticism for inefficiency and ineffectiveness. Gordon²⁶ has summarized the challenges of regulatory systems by stating that 'Regulatory regimes tend to be appallingly complex and technical, crammed with loopholes and ambiguities, sometimes put there by regulated interests, often inadvertent.' This view seems to apply to regulation of the legal profession. Reynolds,(1998)²⁷ states that 'the procedures whereby professional bodies monitor and discipline lawyers have been improved and developed; but they remain relatively cumbersome and slow.' He however lauds the regulatory systems by stating that 'the bodies concerned, and the ethical rules they administer, serve an important purpose; namely, the maintenance of appropriate ethical standards of behaviour in the legal profession.'

Many jurisdictions have developed comprehensive Codes of Conduct. Examples of such jurisdictions include the U.K, U.S, Canada, and South Africa. Some jurisdictions rely on Subsidiary Rules made under Statute and Rules of Professional Conduct crafted by the Law Societies as is the case with Kenya.

Canada presents a good example of a jurisdiction which has codified rules of conduct and practices self-regulation. The Code of Professional Conduct was developed by the Canadian Bar Association. The current Code was adopted by Council in August 2004 and February 2006. The introduction to the Code states that '...the Code does not attempt to define professional misconduct or conduct unbecoming; nor does it try to evaluate the relative importance of the various rules or the gravity of a breach of any of them. Those

²⁵ Cranston, Ross., (ed) *Legal Ethics and Professional Responsibility*, p.6 (hereinafter Cranston)

²⁶ Gordon, *opcit*, p.48

²⁷ Reynolds, F.M.B., 'Lawyers' Duties to the Court' , *Law quarterly review* Vol. 114, p. 64

functions are the responsibility of various governing bodies'.²⁸ Further, the responsibility for preparation and publication of Codes of Conduct, maintaining the standards of professional conduct and for disciplining lawyers who fail to meet those standards has been left to the profession.²⁹

Every Canadian State has a Law Society established by Statute. These Societies or governing bodies are independent. They are mandated to regulate the profession in the public interest. The disciplinary mechanism is entirely in the hands of the profession. Each Society nominates members to sit in the disciplinary panels whose mandate is to inquire into complaints against legal practitioners and take disciplinary action. It is a requirement that lay persons are included in the Panels. The decisions of the panels are subject to appeal and judicial review.³⁰

The Canadian model of self-regulation has been hailed on the grounds that it protects the independence of the profession and by extension of the justice system. In a paper defending the system, the President of the Federation of Law Societies of Canada, Milani Q.C.³¹ states that 'both governments and courts have consistently recognized that an independent, self-regulated legal profession is fundamental to the maintenance of the Rule of law' and that Law Societies regulate the profession in the public interest while the Bar Associations represent the interests of the profession'. He argues that the public participation in the governance of lawyers through 'lay benchers' brings an important independent perspective of the wider public to the regulation of the profession. In his view, the system works well.³²

The system has however been criticized as not serving the public interest. A recent lawyers' conference in Edmonton, Canada which brought together experts to look into changes and challenges facing the 21st century lawyers concluded that 'if lawyers wish to

²⁸ www.cba.org /code of conduct. Updated 2007, accessed on 8th December 2008

²⁹ *ibid*

³⁰ *ibid*

³¹ Milani, M, 2007, Paper 'Why look to the UK? Canada's system of lawyer regulation works Well' (hereinafter Milani)

³² Milani, *ibid*

retain regulatory autonomy, then they must be prepared to rationally argue and defend the proposition that the current law best serves the public interest³³

In the United Kingdom, solicitors and barristers are regulated by different bodies. The office for Supervision of Solicitors (OSS), which succeeded the Solicitors Complaints Bureau, handles complaints against solicitors. The Bureau was a semi-independent body established in 1986 to open up the regulation of solicitors to external participation beyond the Law Society. The OSS receives all complaints against solicitors but only resolves the minor ones. Charges of serious professional misconduct are forwarded to the Solicitors Disciplinary Tribunal³⁴. Solicitors are bound by the Solicitors' Code of Conduct, 2007. Solicitors' firms are required to have an internal complaints mechanism and complaints are only entertained by the OSS if they have first been subjected to the internal mechanism.³⁵

The Solicitors' Disciplinary Tribunal is established under Section 46 of the Solicitors Act, 1974. Its principal function is to hear and determine applications in respect of solicitors relating to allegations of unbecoming conduct or breaches of the Rules relating to professional practice. Applications to the Tribunal are made by the Law Society although it is open to any one to make an application to the Tribunal without recourse to the Society. However, complainants often first approach the Society to investigate the complaint first. Cases before the Tribunal are conducted by lawyers for the Law Society. Members of the Tribunal are appointed by the Master of Rolls from solicitors of not less than 10 years standing and lay persons. There is no statutory limit of the number of members. The Tribunal sits in divisions of three.³⁶

The Tribunal's proceedings are regulated by the Solicitors (Disciplinary Proceedings) Rules, 2007.³⁷ It may order that a solicitor be struck off the Roll; be suspended from practice; fined; or be reinstated. It may also order payment of costs by any party. The

³³ McDougall, K., 2007 'Is lawyer self-regulation a Canadian anachronism?'

³⁴ Berlins p.54

³⁵ www.legalcomplaintsservice.org.uk, last updated 1st May 2008, accessed on 18th October, 2008

³⁶ Supra, note 8

³⁷ Statutory Instruments, 2007 No. 3588

Tribunal does not have power to award compensation. Appeals from the Tribunal lie to the High Court.³⁸

On the workings of the Disciplinary Tribunal, it has been stated that 'a review of the regulatory framework for legal services in England and Wales made no criticism of the Tribunal and its work.'³⁹ The in-house complaints system has however been criticized with solicitors being criticised for 'delaying tactics, pedantry, and rampant obstrusiveness' when dealing with complaints in-house.'⁴⁰

In South Africa, the profession is regulated by the Attorneys Act.⁴¹ The Act provides for the establishment of a Bar Council for each of the Provinces. A Council is empowered to inquire into cases of alleged 'unprofessional or dishonourable or unworthy conduct on the part of any attorney, notary or conveyance' and to exercise disciplinary power over legal practitioners. The Council members are elected by the professional society.

The disciplinary jurisdiction of the Bar Councils over the legal practitioners transcends the regional provinces. A Council has the mandate to summon any practitioner or any witness in the course of such an inquiry. It may impose various sanctions including reprimand, fine, suspension or debarment⁴². An appeal against a finding of the Council lies to the High Court. The Court may confirm, set aside, or substitute such finding and sanctions⁴³.

The regulatory regime in South Africa has been criticized for being ineffective. A discussion paper issued by the Policy Unit in the Department of Justice stated that misconduct and corruption on the part of practitioners is not always adequately investigated and acted upon⁴⁴

³⁸ *ibid*

³⁹ *ibid*

⁴⁰ Berlins, M and Dyer, C.,(2000) *The Law Machine* p. 54

⁴¹ Act No. 53 of 1979 Laws of the Republic of South Africa.

⁴² *Ibid*, S. 71

⁴³ *Ibid* S.72

⁴⁴ 'Transformation of the Legal Profession, Discussion paper: policy Unit, Department of Justice and Constitutional Development', RSA, September 1999

The Ugandan legal profession is regulated by the Law Society and the Law Council established by the Advocates Act.⁴⁵ Membership of the Council is drawn from both the public and private bar. They are a judge, President of the Law Society, head of the faculty of law, Makerere, Director of the Law Development Centre, two practicing advocates, and one government lawyer appointed by the Attorney General.

A complaint against an advocate may be made to the Disciplinary Committee by the Council itself or any person. The Committee also receives complaints from the Courts through the Chief Registrar. Like the Kenyan law, the jurisdiction of the Disciplinary Committee does not oust the jurisdiction of the court in the discipline of advocates. Appeals against the orders of the Committee lie to the High Court. An appeal against the orders of the Disciplinary Committee lies to the High Court.

The Disciplinary Committee in Uganda is said to be busy. Wante⁴⁶ comments that ‘... there has been an increasing number of complaints against advocates received by the Committee in recent times. One reason for this may be the steady falling of professional conduct among advocates in this country. But the main reason seems to be that the Disciplinary Committee is becoming very active in its duties and the public is increasingly becoming aware of its role and pursuing their rights.’

From the jurisdictions above, it appears that except for Canada, the common practice is self-regulation with differing degrees of state and public participation. In Kenya the regulatory system for advocates seems to blend elements of self-regulation as seen in the active role played by the Law Society, and external regulation, seen mainly in the active role of the State through the Complaints Commission and in the Disciplinary Committee. This blend can best be described as co-regulation.

⁴⁵ Chapter 267 of 1970, Laws of Uganda

⁴⁶ Wante, E ‘The Lawyer’s duty to the Court and the public’ in *Uganda Law Society Review* vol.1.No. 2

There is paucity of literature specific to the regulation of the legal profession in Kenya. That notwithstanding, the theories and principles espoused by the literature above generally apply. The concern for falling professional and ethical standards has preoccupied both the profession and the State and has by and large influenced the development of the current disciplinary mechanism.

This concern has been the subject of discussion in many lawyers' fora. The Complaints Commission alone has in the last few years hosted a total of five workshops resting with the last one held in April 2008. The objective of the workshops has been to sensitise advocates on professional conduct and the disciplinary process. Addressing one such forum, the Attorney General stated thus:

'The theme for this workshop arises from the sad realization that the legal profession has suffered and continues to suffer from deterioration in the standards of provision of quality legal services....we must therefore put a halt to the declining standards of professional conduct and etiquette and restore the 'honourable' image of lawyers to enable our clients, the public and the country as a whole have confidence and trust in members of the profession. Cases abound of delayed actions, sheer incompetence, frustrations, mishandling of clients, withholding funds or failure to keep clients informed and intimidation of clients with exorbitant and unrealistic bills of costs '⁴⁷.

Similar concerns had earlier been raised by the Chairperson of the Law Society in the following terms:

'Over the past decade or so, public confidence in the legal profession has been severely eroded. Needless to say, aberrations in the delivery of legal services have contributed to this. This plummeting of professional standards presents an acute challenge to the

⁴⁷ Wako, Amos (AG), Key Note Speech. Official Opening of ACC Workshop on 'The Lawyer and the Disciplinary Process' Nairobi (KCB Institute, Karen,) 22nd April 2008.

effectiveness and survival of the legal profession in this country, and is clearly a matter of grave concern.’⁴⁸

It is noteworthy that despite many discussions on the question of professional discipline in Kenya, the number of advocates facing charges of misconduct continues to rise unabated. This study seeks to analyse, understand and document issues surrounding the regulation of advocates, the disciplinary process, challenges of enforcing professional discipline, and the voices of clients who are often poor and vulnerable. In this regard the study will contribute to knowledge in the area of the regulation of the legal profession.

3.0 JUSTIFICATION FOR THE STUDY

Studies in the field of professional regulation of advocates have often focused on the wide field of regulation covering the need for regulation, entry and exit from the profession, professional ethics and conduct and the vexing issue of whether the profession should be externally or self regulated. The current study draws heavily from the concepts discussed in earlier studies, as outlined by the literature reviewed, and goes further to discuss the same from the perspective of the Kenyan situation. It seeks to analyse, understand and document issues surrounding the regulation of advocates, the disciplinary process, and challenges of enforcing professional discipline. In this respect, it will fill a research gap and contribute to knowledge by documenting the advocates’ disciplinary process from an empirical perspective.

Apart from the academic purpose stated above, the study is important as it addresses a policy and legal issue which has a bearing on access to justice for complainants who are often poor and vulnerable. This is because since the development of the legal framework vesting the Advocates’ Complaints Commission and the Law Society with powers to inquire into the conduct of advocates and impose sanctions against them for proven acts of professional misconduct, the disciplinary process has been fraught with systemic, institutional, technical and capacity challenges. This has led to delay in the investigation

⁴⁸ Omamo ,Raychelle, (Chairperson, LSK), ‘Restoring Public Confidence in the Legal Profession’ Seminar Paper , ACC Second Workshop on Honesty & Excellence in the Provision of Legal Services : Mombasa, (Whitesands Hotel), 14th May, 2001.

and prosecution of complaints against advocates, their determination and restitution of complainants' rights. The inherent jurisdiction of the High Court to intervene in the disciplinary process upon application of the defendant advocates also works to delay the final settlement of the dispute. An understanding of this complexity of the disciplinary process is necessary for purposes of informing the development of better policies and an enabling legal framework. The study is therefore timely in contributing to on – going dialogue on policy and legal reform in the advocates' disciplinary process while at the same time it will offer practical suggestions for improvement of the services offered by the Advocates' Complaints Commission in enforcing professional discipline among lawyers. In this respect, the study will be an invaluable tool for canvassing institutional and administrative reforms for the Advocates Complaints Commission.

In addition to the above justification, this study has been motivated by my personal experience and observation in investigating complaints, interviewing complainants at the Commission and prosecuting complaints before the Disciplinary Committee over a one year period. The experience helped in the conceptualization of the research and the analysis of the findings.

4.0 CONCEPTUAL FRAMEWORK

The concept of regulation in professions, otherwise called professional regulation refers to the act of governing or bringing into conformity with set standards members of a profession. Black's Law Dictionary (2004)⁴⁹ defines a profession as a vocation requiring advanced education and training. Jurist Roscoe Pound has defined a profession as "...a group pursuing a learned art as a common calling in the spirit of public service – no less a public service because it may incidentally be a means of livelihood",⁵⁰ Law is considered a learned profession because of the advanced education and training required. In Commonwealth vs. Brown⁵¹, the court stated that:

⁴⁹ Black's Law Dictionary 8th edition, 2004 West Publishing Co. U.S.A

⁵⁰ Quoted in Lumumba, P.L.O, 2005 "The legal Profession in Kenya, Towards a New Ethos, in Franceschi, G and Ritho, A, (Eds) Legal Ethics and Jurisprudence in Nation Building, p.37(hereinafter Lumumba, P.L.O)

⁵¹ quoted in Black's Law Dictionary 1bid p. 1246

“Learned professions are characterized by the need of unusual learning, the existence of confidential relations, the adherence to a standard of ethics higher than that of the market placeTraditionally, the learned professions were theology, law, and medicine”

Two principles underlie the concept of professional regulation. These are the need to uphold professional integrity and standards of conduct and practice for the sake of the profession itself, and to protect the public against incompetence and acts of professional misconduct which can cause harm to the public⁵². These principles were stated in the Matter of Freeman (34 NY 2d 1, 7 (1974)) thus:

“A profession is not a business. It is distinguished by the requirements of extensive formal training and learning, admission to practice by qualifying licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the market place, a system for discipline of its members for violation of the code of ethics, a duty to subordinate financial reward to social responsibility, and notably an obligation on its members even in non-professional matters, to conduct themselves as members of a learned, disciplined and honourable occupation”.

In the legal profession and other professions which create a fiduciary relationship between the professional and the client or person seeking the services of the professional, professional ethics form the basis of regulation. Lawyers are bound to observe legal ethics which has been defined as the minimum standards of appropriate conduct within the legal profession involving the duties that its members owe one another, their clients and courts⁵³. They are bound to observe a code of ethics. Such code may be written or unwritten⁵⁴. It has been explained that “In one sense, the term “Legal Ethics” refers narrowly to the system of professional regulations governing the conduct of lawyers. In a broader sense, however, legal ethics is simply a special case of ethics in general as ethics

⁵² Kailash Rai, Opcit p. 38; Stephen & Love, Opcit p. 240

⁵³ Black's Law Dictionary Opcit 592

⁵⁴ Rai, K Opcit pg 39

is understood in the central traditions of philosophy and regulation..... Legal ethics cuts more deeply than legal regulations and concerns the fundamentals of the moral lives of lawyers.⁵⁵

Professional regulation may be undertaken externally by state agencies or internally by the profession itself. Self – regulation is the terminology used to describe the later situation where the profession sets the standards of both practice and the conduct of its members and enforces those standards itself. The legal profession is one of the professions that undertake self – regulation. The code of conduct (written or unwritten) has been developed by the profession itself and is enforced by its members. Invariably, the codes contain a lawyer's duties and responsibilities towards the client, the court, and professional colleagues.⁵⁶

Arguments advanced in favour of self-regulation include the fact that 'representatives of the profession itself are the best judges of misconduct and its seriousness' and that it is in the profession's interest that public confidence in the profession is maintained.⁵⁷ In Bolton v. Law Society (1994) 2 All ER 486, 492- 3, the court stated:

‘A profession's most valuable asset is its collective reputation and the confidence which that inspires....The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price’⁵⁸

It is also argued that ‘self – regulators have specialist expertise and technical knowledge of professional practice, which means that the information costs in setting and enforcing

⁵⁵ Deborah L. Rhode & David Luban, *Legal Ethics* 3 (1992) cited in Black's law Dictionary Ibid

⁵⁶ Kailesh Rai, *Legal Ethics*, Introduction pg. 13; See also Compendium of Codes of Legal Practice, Conduct, Ethics, and Etiquette in East Africa

⁵⁷ Cranston, R, *Legal Ethics and Professional Responsibility*, p.3

⁵⁸ Quoted in Lumumba,P.L.O., opcit p 40

standards may be lower than otherwise and that self-regulators may be in a better position to respond to changing market conditions',⁵⁹

The concept of self regulation is intricately intertwined with the concept of professional independence. Independence denotes the freedom from external control. In the legal profession, independence, otherwise referred to as independence of the bar, is understood to mean that the profession is independent of the state and its influences. It is regarded as an institutional safeguard between the ordinary citizen and the government. Independence also denotes a lawyer's professional judgment in respect of a particular case or client.⁶⁰ It has been argued that the independence of the bar is significant in promoting the independence of the judiciary as lawyers who enjoy independence are better placed to defend the independence of the judiciary.⁶¹ It has been authoritatively stated that:

'An independent legal profession is an important force in pressuring government under the law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice',⁶²

Lawyers play a central role in the administration of justice and the rule of law. Their independence is critical to this role. This role was underscored by the United Nations in 1990 when the General Assembly endorsed the UN Basic principles on the role of lawyers. The principles *inter alia* provide that lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The principles also state that the executive body of such professional associations shall be elected by its members and shall exercise its functions without external interference.⁶³

⁵⁹ McEwin, I., Regulation of the Legal Profession, New Zealand Business Roundtable p. 42(hereinafter McEwin)

⁶⁰ Lumumba, P.L.O *ibid*, p 43

⁶¹ Lugulu, H. 'The Role of Legal Ethics in Achieving a Just Society' in *Legal Ethics and Jurisprudence in Nation Building*

⁶² American Bar Association Annotated Model Rules of Professional Conduct, cited in Lugulu, H. *ibid* p 84

⁶³ United Nations Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba on 27th August 1990.

The concept of independence of the bar has received varied interpretation. On the one hand, it is understood to mean that the profession alone can regulate itself by setting standards and enforcing professional discipline. This interpretation has contributed to lawyers' struggle for self-government and the resistance to any attempts by the State to participate in such regulation and has led to statements such as '....the legal profession must be independent at all times. From this independence stems its strength to uphold the cause of justice without fear or favour.'⁶⁴ Advocates for the total independence of the legal profession argue that to give the state a hand in the regulation and discipline of advocates is to compromise professional independence. They fear state interference in the work of advocates generally and in the disciplinary process in particular.⁶⁵

On the other hand, there is a school of thought which holds that professional regulation cannot be left entirely in the hands of a profession. This is because it is feared that 'self-regulation is characterized as 'potentially having the effect of a cartel' concerned mainly with the interests of its own members (representative role) rather than the interests of the public and that in case of misconduct 'professionals are bound to protect their own'.⁶⁶ In the UK, the Solicitors' Complaints Bureau was set up as a semi-independent body in 1986 on the recommendations of the Royal Commission on Legal Services in 1979 due to what the Commission described as 'a general feeling of unease about the (Law) Society's handling of complaints –a feeling that 'lawyers look after their own' ⁶⁷ It is these differing perspectives that have influenced both the debate and the regulatory framework for the legal profession in Kenya.

4.1 SCOPE AND DELIMITATION OF THE RESEARCH

The study addresses the concept of professional regulation of advocates in Kenya. It notes that the regulation of the legal profession spans a wide spectrum including training, qualification, admission to the Bar, conditions for practice and professional discipline.

⁶⁴ Lumumba, P.L.O ibid, p 40

⁶⁵ Ojienda, T.O 'The Legal Profession in 2015: Rethinking the Challenges, Opportunities and Threats' in The Law Society of Kenya Journal Vol.1 2005 No. 2 (hereinafter Ojienda)

⁶⁶ Berlins, M and Dyer, C, *The Law Machine* p.54 ; Also McEwin, ibid p.54

⁶⁷ Berlins, M and Dyer, Ibid p. 55

The focus of the study however is the professional discipline of advocates in Kenya. In this regard the study identifies and analyses the policy, legal and institutional framework for enforcing professional discipline of lawyers.

Where necessary and only for the limited purpose of comparison, the legal framework in other jurisdictions has been identified. An analysis of the legal and institutional framework of the Advocates' Complaints Commission and the Disciplinary Committee is necessary and has been undertaken. The research has mapped the disciplinary process by using instructive case studies to identify and discuss bottlenecks that impede the expeditious determination of complaints against advocates. The study does not however purport to be a comprehensive evaluation of the performance of the Complaints Commission and the Disciplinary Committee nor a comparative study of advocates' disciplinary processes.

4.2 METHODOLOGY

This study is exploratory. It relies heavily on qualitative data. The following data collection methods have been used.

4.2.1 Library research

A review and analysis of published texts was undertaken. Such information was found in libraries and on the internet. Reports and publications of the researched institutions namely the Advocates' Complaints Commission and the Disciplinary Committee were also analysed.

4.2.2 Empirical Sources, Case Law and analysis of cases

Case studies have been used to map and analyse the various processes under discussion. In appropriate cases and where feasible, on-going cases as well as concluded cases were used. Cases in this study refer to court cases as well as complaints filed and processed through the advocates' disciplinary process. All the complaint case studies used have been given anonymity to protect the identities of the parties and the confidentiality of the

Commission's and Disciplinary Committee's records. Such cases have not therefore been given the official citation.

Empirical statistical data has been used to illuminate the research issues. Whereas the sources of such data have been disclosed, the detailed referencing of the files and records has been omitted to protect the confidentiality of parties and records.

4.2.3 Formal and Informal Discussions

The study benefited from both formal and informal discussions with various members of staff at the Commission. This gave the researcher broader insights to the research problem. Such discussions began at the conceptualisation of the research problem and continued through out the study period. Discussions with some complainants in the course of duty by the researcher also gave insights from the perspective of the complainants.

4.3 LIMITATIONS OF THE RESEARCH

This study faced various limitations. The first one was shortage of time. At the planning stage, a select number of policy makers and executives of the Advocates' Complaints Commission and members of the Disciplinary Committee were expected to be interviewed. Focus Group discussions were also planned. This however did not take place due to limitation of time. The conclusions and recommendations of the study would have been enriched by data collected through the interviews. Another limitation was the paucity of local published literature. This led to a heavy reliance on unpublished Papers and Reports.

5.0 CHAPTER OUTLINE

This research report is divided into the four Chapters as follows:

Chapter One contains background information and introduction to the research report. It contextualizes the research problem; discusses the research objectives, questions, hypotheses, and the justification for research. It also discusses the methodology adopted and the specific data collection methods.

The Chapter reviews literature on the broad subject of professional self- regulation and various concepts and theories underpinning the regulation of the legal profession. For a limited comparative purpose, the Chapter highlights mechanisms of enforcing professional discipline among advocates in select jurisdictions.

Chapter Two analyses the policy, legal and institutional framework for the advocates' professional disciplinary process. It highlights the role of the State and the Law Society in the regulation of the legal profession and how these roles impact on professional independence and the disciplinary process. A discussion of the institutional set up and mandate of the Advocates' Complaints Commission, the Disciplinary Committee, and the role played by the judiciary in enforcing advocates professional discipline is undertaken.

Chapter Three critiques the advocates' disciplinary process. It profiles the type of complaints handled by the Complaints Commission and the process of handling them. It critiques the various procedures and processes both at the Commission and at the Disciplinary Committee. Using case studies, the Chapter demonstrates the inherent institutional weaknesses and the perceived leniency towards advocates as opposed to the complainants.

Chapter Four contains conclusions and recommendations drawn from the study. It is expected that the recommendations will be useful to policy makers, the Advocates Complaints Commission and the Disciplinary Committee.

CHAPTER TWO

2.0 THE POLICY, LEGAL AND INSTITUTIONAL FRAMEWORK FOR ADVOCATES' PROFESSIONAL DISCIPLINE IN KENYA.

2.1 Introduction

Chapter one introduced this study by setting out the research problem, objectives, questions, and hypotheses. It also set out the theoretical basis for professional regulation generally, and the regulation of the legal profession specifically. It highlighted the general characteristics of comparative regulatory frameworks resting with the Kenyan situation. This chapter sets out the legal and institutional framework for the professional discipline of advocates in Kenya generally, and the disciplinary process in particular. It discusses the role of the State and the Law Society in the regulation of the legal profession and how these roles impact on professional independence and the disciplinary process.

The institutional set up and mandate of the Advocates' Complaints Commission, the Disciplinary Committee and the role played by the judiciary in enforcing advocates professional discipline is highlighted. The Chapter postulates that the underlying policy, legal and institutional framework for the professional discipline of advocates in Kenya draws from two main sources. The first of this is the theoretical foundation for the professional discipline of lawyers common to the legal profession across jurisdictions as discussed in chapter one. The second and perhaps more critical is the historical social and political environment in which the profession has been natured in Kenya.

2. 2 A historical perspective: The evolution of the legal profession and its regulatory framework.

2.2.1 The Legal profession at colonial times

At the advent of colonialism, the British imposed the British legal system in Kenya with such modifications as were necessary for the administration of the Protectorate. The system of administration of justice during the colonial era has been given detailed treatment by Ghai & McAuslan.⁶⁸ They discuss the introduction of a dual system of justice – one for the natives through the native courts and traditional justice systems and the other for the settlers through the English legal system and common law. At that time, the profession was divided into two – the public and the private. The public legal profession consisted of members of the colonial legal service and the judiciary. These were lawyers who had obtained Bar qualifications in England, were employed by the Crown, could be posted anywhere in the colonies and had prospects of being promoted up a reasonably well-defined hierarchy.

On the other hand, the private legal profession, consisting of individual advocates referred to collectively as the Bar, served the general public⁶⁹. Ghai & Mc Auslan note that in Kenya the profession was fused, meaning that an advocate performed the functions of both barrister and solicitor. The rules governing the profession were however drawn increasingly from the rules governing solicitors in England. They further note that “division of the profession despite common educational background was clearly marked and influenced the development of the private profession and still remains a feature of the legal profession in Kenya. They trace the roots of the uneasy relationship between the Government and the legal profession to the approach to the administration of justice taken by the colonial administration. The colonial administration saw the legal system as an extension of the administration. On the other hand, advocates in private practice supported a judicial approach to the administration of justice. It was mainly advocates of Asian origin who went into private practice while their English counterparts joined government service as lawyers and judicial officers. The private practitioners were treated with great suspicion by the Government as they often championed the causes of private citizens against the State.

⁶⁸ Ghai and McAuslan *Op cit* pgs. 359ff

⁶⁹ *Ibid* Pg. 382

2.2.2 Regulatory mechanism during colonial times

Prior to 1949, the legal profession was subject to a measure of public control exercised primarily through the Chief Justice. The first elements of statutory regulation was first introduced in 1901 vide the East Africa Legal Practitioners' Rules⁷⁰. During that time, the practice of law was not restricted to lawyers. The Regulations empowered the protectorate judge (the senior judge of the High Court) to license other persons of good character and adequate capability to practice. The Regulations allowed Barristers and Solicitors from England and pleaders from India High Courts to practice. Disciplinary control was vested in the High Court with a right of appeal to the High Court at Zanzibar. A further appeal lay to the Foreign Secretary. Remuneration was also regulated. Remuneration agreements had to be in writing, registered with the court and the court had power to reduce such remuneration if it thought it unreasonable.

In 1911, more regulation was introduced through the Rules of Court (Legal Practitioners)⁷¹. The Rules prohibited the licensing of non-lawyers except Vakeels⁷². The Rules clarified the disciplinary provisions by empowering the Crown Advocate (later renamed Attorney General) or a person aggrieved by an advocate's conduct to apply to a judge in chambers for a rule directed to that practitioner to show cause why he should not be suspended. The hearing of such an application was in open court. The rules also provided for maximum rates of remuneration⁷³. The Rules of Court (Legal Practitioners) introduced a new requirement that one had to be a resident for six months in Kenya before commencing practice and introduced penalties against anyone who practiced law while not qualified to do so. Ghai and Mc Auslan assert that this legal framework remained in place until 1949⁷⁴. Ghai and Mc Auslan's account has been reproduced and reaffirmed by Harvey (1975).⁷⁵

⁷⁰ Cited in I E.A.L.R 121 reproduced in Ghai & McAuslan P.384

⁷¹ No.2 (1911) Reproduced in 4 E.A.L.R 3 Appendix 1

⁷² Vakeels were lay persons allowed to practice in the Muslim courts.

⁷³ Rules of Court (Advocates' Remuneration and Taxation of costs) No.2 1916 cited at 5 E.A.L.R P.14 and reproduced in Ghai & McAuslan P.384.

⁷⁴ Ibid P. 385.

⁷⁵ Harvey, W.B, (1975), *Introduction to Legal Systems In East Africa* p.84-101

During the colonial period, the lawyers organized themselves into two law societies, one based in Mombasa and one in Nairobi. These two later merged into one and began demanding that the legal profession be organized on the lines of the solicitors' profession in England with the Law Society being given a central statutory role. A Committee was established to make recommendations to the Attorney General. The recommendations made to the Attorney General in 1939 were by and large implemented in 1949 when the Advocates Act (1949) and the Law Society Act were passed.

The Law Society Ordinance 1949

The Law Society of Kenya Ordinance⁷⁶ established the Law Society as an incorporated body. The objectives of the society were listed as; the maintenance and improvement of the standards of conduct of the legal profession in Kenya and the representation and protection of, and assistance to members of the profession as regards their conditions of practice and otherwise and, the protection of and assistance to members of the public in all matters touching law.⁷⁷ The Society was governed by a Council consisting of a president and six other persons elected at an annual general meeting. The President was elected by the Council.

The Council was empowered to make rules including those governing the expulsion of a member from the Society. The Council's decisions were not subject to the approval of any other person or body. Membership to the Society was voluntary and expulsion from it did not prevent one from continuing to practice.

The Legal Practitioners Ordinance 1949.⁷⁸

The Advocates Ordinance established the Advocates Committee and the Remuneration Committee. The former Committee had the responsibility of professional discipline while the later as the name suggests dealt with matters of remuneration. Members of the Advocates Committee were; the Attorney General, the Solicitor General and three advocates nominated by the Law Society.

⁷⁶ No. 10 of 1949

⁷⁷ Ghai & Mc Auslan Op cit p.386

⁷⁸ No. 55 of 1949

The disciplinary procedure took the following form; the complainant and the advocate were heard by the Committee. After hearing, the Committee submitted a report to the court together with all the evidence if this was a *prima facie* case to answer. A two judge court was constituted to consider the report and where necessary conducted a hearing. The Court had the power to admonish, suspend or order the advocate to be struck off the Roll of Advocates. In case of suspension or striking off the Roll, an advocate would be prevented from practicing.

Ghai and McAuslan⁷⁹ observe that the Committee performed the function of a filter, the actual disciplinary decision still left to the judges who acted largely on the evidence collected by the Committee. They further observe that by this 1949 legislation, the advocates gained significant control over the discipline of advocates since they had majority representation in the Advocates' Committee.

Apart from issues of discipline, the law empowered the Law Society to control entry to the legal profession. A person applying to be admitted to the Roll of advocates had first to be interviewed by the Law Society (by a Committee of the Council in practice). The Report of the Committee was then forwarded to the Chief Justice who was vested with the power to admit advocates into the Roll.

The Remuneration Committee consisting of five advocates nominated by the Law Society was given exclusive jurisdiction to enforce or set aside a remuneration agreement on the application of either party. The law allowed advocates to take security from their clients for their costs. It also introduced a new rule prohibiting advocates from undertaking work for a fee below the prescribed rates of remuneration. Maximum rates were transformed into minimum rates which the Law Society would in future have the major say in prescribing and policing.

⁷⁹ Ghai and McAuslan, *Op cit* p. 387

Through various amendments to the 1949 Ordinance, the Law Society continued to amass powers of self-government or regulation culminating into an overhaul of the regulatory framework through the passage of the Advocates Act in 1961.⁸⁰ The new law was drafted and passed with the influence of the Law Society.

The Advocates Act 1961 introduced further changes in the advocates' regulatory regime. Key among these was changes related to professional discipline. Under the new Act, the advocates' Committee which under the 1949 Ordinance played an advisory and filter role was replaced by a Disciplinary Committee with full executive powers over the discipline of advocates. The 1961 Act retained the membership of the Disciplinary Committee as the Attorney General, Solicitor General and three advocates of at least 10 years' standing. One of the three advocates had to be practising outside Nairobi. It also introduced Boards of Inquiry consisting of three advocates of not less than five years' standing appointed by the Law Society. The mandate of the Board of inquiry was to make inquiries regarding any advocate against whom a complaint was made. The Board had the power to reject the complaint or refer it to the Disciplinary Committee.

A complainant whose complaint was rejected by the Board was allowed to refer the same to the Disciplinary committee on payment of a high fee. Such fee was aimed at deterring frivolous complaints. Where the Disciplinary Committee decides to hear the complaint, the advocate is required to appear and be heard. There was no equivalent duty to hear the complainant. The Committee had the power to dismiss a complaint, admonish the advocate, fine the advocate or order that the advocate be struck off the Roll.

2.3 A comment on the role of the State and its institutions on professional regulation and the State/Bar relationship.

The State pursued a policy of intervention in the regulation of the legal profession. It as it were, kept a watchful eye in the development of the regulatory framework. Ghai and McAuslan's account of the State/Bar relations at that period hint at 'behind the scenes'

⁸⁰ Act No.34 of 1961

struggles and manouvres from both sides. The policy of State intervention was continued through the role of the Court.

The Role of the Court

The Disciplinary Committee was required under the 1961 Advocates Act to present a report of its findings to the Court and the Registrar. An advocate aggrieved by the decision of the Disciplinary Committee had a right to appeal to the High Court. Such an appeal was heard by a two-judge bench. The Court could either refer the report back to the Committee or make orders confirming varying or reversing its decision. A final appeal lay to the East African Court of Appeal. Under the 1961 Act, the Chief Justice retained the power to restore an advocate to the Roll either on his own initiative or on the recommendation of the Disciplinary Committee.

Other notable features of the 1961 legislation were the additional powers given to the Law Society in the creation of a more powerful Remuneration Committee whose task was to make recommendation to the Chief Justice for the prescription of remuneration rates and provisions that made it difficult for a client to easily change an advocate. Under the new provisions, one wishing to change an advocate had to apply to court and if the court was not satisfied that there had been neglect and improper delay on the part of the advocate, the client would remain liable to pay the advocate the full amount of the fees stated in the remuneration agreement.⁸¹

2.4 THE CURRENT POLICY, LEGAL AND ADMINSTRATIVE FRAMEWORK FOR THE PROFESSIONAL DISCIPLINE OF ADVOCATES

2.4.1 The Legal Framework

The Constitutional framework for the administration of the justice and legal practice is found in the provisions on the Bill of Rights;⁸² establishing the Judicature;⁸³ and the

⁸¹ Ghai and McAuslan Opcit. Pg.388

⁸² Chapter 5

office of the Attorney General;⁸⁴ and protective provisions under section 77 and 84. Beneath this framework, the principal legislation governing the professional regulation of advocates is the Advocates Act, Chapter 16 of the Laws of Kenya.⁸⁵ The Act was passed in 1989 to amend and consolidated the law relating to advocates. Broadly the Act regulates every aspect of legal practice by prescribing *inter alia* professional qualifications⁸⁶, conditions for entry into the profession⁸⁷, conditions for practice⁸⁸, remuneration of advocates⁸⁹ and the enforcement of professional discipline⁹⁰.

Rules and regulations have been promulgated under the Act to provide guidance on what constitutes proper conduct and to guide the regulatory process. Both the Act and Rules provide rules of conduct that relate in summary to an advocates' duties to the court, to professional colleagues to the client and to the public. Failure to adhere to these rules may constitute professional misconduct and in some instances give rise to criminal actions. A highlight of various provisions under the Rules is provided here below:

(i) The Advocates (practice) Rules.⁹¹

The Rules prohibit touting⁹², undercutting⁹³ and sharing of profits with non-professionals. These Rules infer a duty of fair competition between advocates. Honesty in dealing with the court is inferred in the prohibition of coaching witnesses⁹⁴ and prohibition from acting in a matter in which an advocate is likely to be a witness⁹⁵. Rule 12 provides that no advocate shall practice under any name other than his own name or the name of a past or present member or members of the firm.

⁸³ Chapter 4

⁸⁴ Section 26

⁸⁵ Act No.18 of 1989

⁸⁶ Part III

⁸⁷ Part IV

⁸⁸ Part VI

⁸⁹ Part IX

⁹⁰ Part XI

⁹¹ LN No 223 of 1984

⁹² Rule 11 Advocates(Practice) Rules

⁹³ Section 36 of the Advocates Act (1989)

⁹⁴ Rule 10

⁹⁵ Rule 9

This Rule is aimed at protecting the public from dishonest advocates who may change their practice named from time to time.

(ii) The Advocates (Accounts) Rules.⁹⁶

The Rules requires an advocate to maintain one or several client accounts to keep client's money separate from his money. The Rules are aimed at protecting client's money. Indeed it is noteworthy that the training of advocates includes a compulsory course in Accounts. Failure of an Advocate to observe the Advocates (Accounts) Rules often lead to misconduct relating to withholding of funds, or failure to account to the client.

(iii) The Advocates (Deposit interest) Rules.⁹⁷

The Rules require an advocate to account to a client for interest received on moneys deposited in a client account where the moneys are deposited in a separate designated account.

(iv) The Advocates (Accountant's certificate) Rules.⁹⁸

An advocate is required under these Rules to deliver annually to the Council a certificate signed by an accountant showing that the advocate has complied with the Advocates Accounts Rules⁹⁹. If any advocate failed to comply with these Rules a complaint in respect of such failure may be made by or on behalf of the Council to the Disciplinary Committee¹⁰⁰

(v) The Advocates Remuneration Order.¹⁰¹

As the name suggests, the Order provides for the remuneration of advocates. It gives guidance on charging of fees, disbursements, reimbursements and taxation of such fees. Failure to comply with the Order, in some instances causes disagreements

⁹⁶ LN No.112 of 1997

⁹⁷ L N No. 112 / 1997

⁹⁸ L N No. 224/1984

⁹⁹ Rule No.3

¹⁰⁰ S.12 Advocates (Accountant's Certificate) Rules

¹⁰¹ L.N No 550 of 1997

between advocates and their clients while in others, strict application of the order works to great disadvantage of the client as the fees legally charged may be too high particularly in cases arising out of accident compensation.

The Advocates (Disciplinary Committee) Rules and The Advocates (Complaints Commission) Rules provide guidance on the disciplinary process arising out of breach of the statutory law and code of conduct discussed above. Their application will be discussed later in the study.

The provisions of the Advocates Act reflect the legal, moral and professional obligations of the legal practitioner to the clients, the court, the profession and the public. The Act contains provisions which espouse ethical principles whose breach amount to offences with serious penalties at one level and rules of conduct which define desirable behaviour and honour at another.¹⁰² Although there is an overlap between the two, it is the later category that this chapter focuses on.

Besides the Advocates Act, there are a number of other statutes that have a bearing on the advocates' professional discipline. These are:

- (i) The Law Society Act¹⁰³ which provides for the establishment of the Law Society and brings all advocates under its jurisdiction.
- (ii) The Council of Legal Education Act¹⁰⁴ which establishes the Council of Legal Education with the mandate to regulate the training and qualification of advocates.
- (iii) The Civil Procedure Act¹⁰⁵ with respect to appeals from the decisions of the disciplinary bodies and execution of their orders.
- (iv) The Penal Code¹⁰⁶ with respect to provisions that constitute both criminal conduct and professional misconduct.

¹⁰² Kailesh Rai , Opcit p.13

¹⁰³ Chapter 18, Laws of Kenya

¹⁰⁴ Chapter 16 A, Laws of Kenya

¹⁰⁵ Chapter 21

- (v) The Criminal Procedure Code¹⁰⁷ with respect to the prosecution of professional misconduct which amounts to a criminal offence.
- (vi) The Evidence Act¹⁰⁸ with respect to evidence in proceedings before the Disciplinary bodies.

2.5.2 INSTITUTIONAL FRAMEWORK FOR PROFESSIONAL DISCIPLINE OF ADVOCATES

The Law Society of Kenya

The Law Society of Kenya exercises regulatory oversight over advocates in Kenya through a number of ways. Firstly, under Section 23 of the Advocates Act, an advocate becomes a member of the Society automatically upon taking out a practicing certificate 'without payment of any further fee, subscription, election, admission, or appointment...' This means that one automatically becomes bound by the objects and jurisdiction of the Law Society.

Compulsory membership to the Law Society and subscription to its objects has been the subject of litigation. In Kenneth Kiplagat vs The Law Society of Kenya¹⁰⁹ the applicant sought a declaration that Section 4 of the Law Society Act was inconsistent with Sections 70(b), 78(1), and 80(1) of the Constitution of Kenya to the extent that the objects of LSK violated the Constitutional rights to freedom and choice of association. The application was however struck out for failure of the applicant to rely on the relevant provisions of the Advocates Act namely Sections 21(1) and Section 23(1) which provide compulsion of membership to the Law Society. He had relied on section 4 of the Act which merely sets out the objects of the Society.

¹⁰⁶ Chapter 63

¹⁰⁷ Chapter 75

¹⁰⁸ Chapter 80

¹⁰⁹ H.C Misc. Civil Suit No 542 Of 1996

The Attorney General

Under Section 26 of the Constitution, The Attorney General is the principal legal advisor to the Government and until 2003 was the de facto Minister for justice. He is also the titular head of the Bar. The Attorney General plays a key role in the regulation of the legal profession. He sits on all policy making organs that regulate the profession including the Council for Legal Education and the Disciplinary Committee. Besides this, the Attorney General is in the current organization of Government, the Minister responsible for the Advocates Complaints Commission.¹¹⁰

The role of the Attorney General in the regulation of the legal profession generally and in the disciplinary process in particular has been the subject of criticism. It has been argued that ‘the Attorney General who is an appointee of the executive has got immense influence over the conduct of the process of the Commission. He is to appoint the secretary....provide staff...and make rules regulating the structure and operations of the Commission....we see a complete dominance and control of the disciplinary process by the Attorney General who is in the executive arm of the Government.’¹¹¹

2.6.0 THE DISCIPLINARY MECHANISM

The Advocates Act 1989¹¹² establishes a three-tier system for the enforcement of professional discipline of advocates. This system comprises the Commission, the Disciplinary Committee and the High Court. The legal framework and institutional set up as well as the distinct and overlapping roles of these institutions are discussed in detail below.

2.6.1 THE ADVOCATES COMPLAINTS COMMISSION

The Complaints Commission (hereinafter referred to as the Commission) was established in 1989 through an amendment to the Advocates Act¹¹³. Under Section

¹¹⁰ Presidential Circular No 1 of 2008, Organisation of Government, Office of the President.

¹¹¹ Ojienda, opcit p. 47

¹¹² Act No. 18 of 1989.

¹¹³ Part X of Act No.18 of 1989

53, the Commission is established for ‘the purpose of inquiring into complaints against any advocate, firm of advocates, or any member or employees thereof’.

The Commissioners are appointed by the President. The Act does not set the number of Commissioners who may be appointed. If a single Commissioner is appointed, such a person must be qualified to be appointed a judge of the High Court and where there is more than one Commissioner, then one must be so qualified¹¹⁴. The Commission operates under the Advocates (Complaints Commission) Rules made pursuant to Section 54(3) of the Advocates Act.

2.6.2 Institutional and organisational structure

The Commission currently operates as a department in the State Law Office (Attorney-General Chambers). The Attorney-General is required to ‘provide such public officers as are necessary for the proper and efficient exercise of the duties of the Commission’¹¹⁵. The Commission Secretary is appointed by the Attorney General. In practice however, the post of Secretary is filled by the Public Service Commission through normal recruitment procedures.

The Commission is currently served by two Commissioners; one of whom is the Chairman. It has thirteen legal officers who are State Counsel and 32 non-legal staff.

The role of the Commissioners is to formulate policy issues for the running of the Commission, investigating complaints, attending to the complainants and examining witnesses under Section 53(d) of the Advocates Act and preferring charges against advocates before the Disciplinary Committee. The Counsel on the other hand undertakes the technical work of investigation and prosecution of complaints.¹¹⁶

¹¹⁴ S. 53(2)

¹¹⁵ S. 54(2)

¹¹⁶ King’arui, J (2008) ‘The Advocates Complaints Commission: Experience, Achievements and Challenges.’ Paper presented at ACC Workshop on the Advocates Disciplinary Process, Nairobi, 22nd – 23rd April

2.6.3 Mandate and functions of the Commission

The Commission's mandate broadly covers receipt, investigation and referral of complaints to the Disciplinary Committee. Apart from this, the Commission is mandated to assist advocates and their clients arrive at amicable settlement of their disputes".

The Act has conferred on the Commission powers to enable it undertake the broad mandate. The Commission exercises its powers in discharging its mandate as follows:-

2.6.4 Receipt and consideration of complaints

The Commission is obligated to receive and consider a complaint made by any person, regarding the conduct of any advocate, firm of advocates or any members or employee thereof¹¹⁷. If it appears to the Commission that there is no substance in the complaint, it shall reject it¹¹⁸. Where a complaint appears to 'have substance and constitutes or appears to constitute a disciplinary offence, the same should be referred to the Disciplinary Committee¹¹⁹. For purposes of inquiry, the Commission is empowered to "require any person, whom it considers necessary for the purpose of carrying out such inquiry to assist it in so doing. This power is backed by a criminal sanction under Section 53 (3A) which makes it an offence for any person who without lawful excuse, fails or refuses to assist the Commission in its inquiry. The Act does not however attach a specific penalty to the offence of failing to assist the Commission. It instead provides a general penalty under Section 85(1) which reads 'any person who is guilty of an offence under this Act for which no penalty is otherwise provided shall be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or both' The provision of a criminal penalty for failure to assist the Commission has been criticized as being 'draconian',¹²⁰

¹¹⁷ S. 53 (4)

¹¹⁸ S. 53(4) (a)

¹¹⁹ S. 53(4)(b)

¹²⁰ Stobbs, M, (2002), LSK and ACC Report: 'Review of the Effectiveness of the Disciplinary Process'

In carrying out investigations, the Commission ‘shall have power to summon witness, require the production of necessary documents, examine witnesses on oath and generally take such steps as it may consider proper and necessary for the purpose of its inquiry. It is also empowered to hear any submissions from the parties’. The Commission is empowered to make such an order or award in which it considers just and proper in the circumstances of the case.¹²¹ Where the Commission considers that a complaint does not properly fall within its mandate or that of the Disciplinary Committee, it shall advise the complainants to refer the matter to Court for appropriate redress¹²².

2.6.5 Power to award compensation

The Commission is empowered to award a complainant compensation or reimbursement in cases where it is demonstrated that such complainant has suffered loss or damage by reason of the advocate’s conduct. Such compensation is limited to one hundred thousand shillings¹²³.

Orders made by the Commission pursuant to the power to award compensation under Section 53(6) ‘shall be registered with the Court and shall thereupon be enforceable in the same manner as an order to the Court to the like effect’¹²⁴.

In disputes relating to fees, funds or property, the Commission is vested with wide powers under the Act. These include power to order surrender of funds or property to the client¹²⁵; power to order production of a fee note for taxation of the bill of costs¹²⁶; power to order the production of all relevant books or documents¹²⁷; and power to levy distress and sale under warrant which is enforceable in the same manner as that issued by the Court¹²⁸.

¹²¹ S. 53(4) (d)

¹²² S. 53 (4) (e)

¹²³ S. 53 (6)

¹²⁴ S. 53 6(A)

¹²⁵ S. 53 6(B)

¹²⁶ S. 53 (D)

¹²⁷ S. 53 (E)

¹²⁸ S. 53 (7)

An advocate who is aggrieved by an order of the Commission under Section 53 may appeal to the Disciplinary Committee under Section 53 (6C) or to the High Court. It appears under S.53 (6C) and S. 62 that there is concurrent appellate jurisdiction vested in the Disciplinary Committee and the High Court.

At the time of its establishment, the Commission had less power than it currently enjoys. Initially it could only 'inquire into complaints against advocates and deal with those that were not of an aggravated nature while referring those of an aggravated nature to the Disciplinary Committee. In essence, the Commission had no teeth. In 2002¹²⁹ and again in 2007¹³⁰ the law was amended to give the Commission wide powers. Currently from a reading of the Advocates Act, 1989, as amended, the powers of the Commission can be summarized as follows:

- (a) Receive and consider a complaint regarding the conduct of an advocate, his firm and employees;
- (b) Institute investigations into the conduct of an advocate;
- (c) Require any person to assist it in carrying out its duties;
- (d) Summon witnesses in the process of investigations;
- (e) Summon any person or witness to assist it in carrying out its duties;
- (f) Examine witnesses on oath;
- (g) Order an advocate to produce all relevant books and documents;
- (h) Assess the advocate's fee in such sum as it deems fit;
- (i) Investigate the accounts of an advocate;
- (j) Engage an accountant to assist it with the investigation of an advocate's accounts;
- (k) Make such order or award as it shall consider just and proper within its mandate;
- (l) Award to a complainant compensation or reimbursement of expenses not exceeding 100,000.00;

¹²⁹ Statute Law(Misc. Amendment)2002

¹³⁰ Statute Law(Misc. Amendment) 2007

- (m) Order surrender to a client of all funds or property which is not disputed by the advocate;
- (n) Issue a warrant for the levy by distress or sale of the amount of any sum ordered to be paid by it on immovable and movable property of the person or firm so ordered to pay compensation;
- (o) Refer a complaint to the Disciplinary Committee;
- (p) Endeavour to promote reconciliation and encourage and facilitate amicable settlement between parties; and,
- (q) Generally to take such steps as it may consider proper and necessary for the purpose of its enquiry.

It is important to note that despite the powers given to the Commission has no enforcement mechanism besides the technical procedure through the courts. The order of the Commission must be registered in court and is enforceable in the manner provided by the Civil Procedure Rules. The Commission cannot move *suo moto* to investigate a complaint. It must wait to receive such complainants and grievances.

The establishment of the ACC in 1989 was done against the backdrop of a strained relationship between the Government of the day and the Law Society of Kenya. In a detailed account, Mwangi¹³¹, narrates that the strain in the relationship was caused by the Society's stand on the alleged violation of human rights by the Moi Government and the clamour for multi- party democracy in Kenya which had built up throughout the decade. This friction which saw the arrest and detention of several advocates was played out in the Council of the Society and particularly during the chairmanship of Paul Muite in 1991. It was alleged that the Moi Government had a stake in the leadership of the Society and tried repeatedly to interfere with its elections by fronting government friendly advocates. During this period the leadership of the Society became the subject of litigation in *Aaron Ringera & 3 Others v P.K Muite &*

¹³¹ Mwangi, P., *The Black Bar*, 2001 p. 172 (hereinafter Mwangi)

9 Others¹³² in which the applicants sought orders restraining the Council Of the LSK from issuing political statements.¹³³

The introduction of a government controlled Commission into the regulatory regime of advocates was seen as an encroachment by the Government on the independence of the profession. Since the establishment of the Commission, the regulatory regime can now be described as co- regulation in which the government and the profession play key roles in the disciplinary process.

This political context, against which the Commission was set up, influenced and continues to influence the perception of the Commission by advocates who see it as a government tool aimed at infringing on the independence of advocates. Lugulu,¹³⁴ has asserted that the establishment of the advocates' Complaints commission under the Advocates Act was a culmination of the various efforts by the State to keep errant lawyers in check. This perception has unfortunately subdued the enforcement of professional discipline to political considerations. Rautta- Athiambo ¹³⁵ has summed up the situation thus:

'When from the early 1980's a part of its membership became embroiled in political agitation, the LSK became seriously polarized. Very unfortunately, one of its objectives, the maintenance and improvement of the standards of services and conduct in the legal profession, became a major casualty.....the LSK could no longer regulate effectively the conduct of its members, as partisanship invaded its management and disciplinary machinery.....the public consumer of legal services began to suffer immensely at the hands of

¹³² H.C.C Civil Suit No. 1330 of 1991

¹³³ Mwangi, *ibid* p.174

¹³⁴ Lugulu, *opcit* p75

¹³⁵ Rautta – Athiambo, 'The Role of the Advocate in Public Legal Education and Protection of Human Rights', Seminar Paper , Mombasa : Second ACC Workshop on Honesty & Excellence In the Provision of Legal Services, , 14th May, 2001

rogue advocates.....The Government reacted by establishing the Complaints Commission to inquire into and investigate complaints.’

2.7.0 THE DISCIPLINARY COMMITTEE

The Advocates Disciplinary Committee is established under Section 57(1) of the Advocates Act, 1989. The Committee is the successor of the Advocates Committee established by the Advocates Act of 1961. It is empowered to receive and determine complaints of professional misconduct against advocates. Section 58 of the Act gives the DC quasi-judicial powers to sit as a tribunal to hear and determine complaints. The Committee may receive complaints from the Complaints Commission which have already been investigated, or directly from any person. It can be said that a central function of the DC is to uphold professionalism amongst advocates and rectify grievances that any person may have as a result of instruction or dealing with an advocate.¹³⁶ Section 55 specifically states that “every advocate shall be an officer of the Court and shall be subject to the jurisdiction thereof and subject to this Act, to the jurisdiction of the Disciplinary Committee.” The Committee and the Commission at times play overlapping roles in receipt, investigation and determination of complaints with the distinction that the Committee has quasi-judicial power and can deal with all categories of misconduct.

Advocates and lawyers have a calling to observe a strict code of professional conduct and etiquette in their dealings with clients, professional colleagues and members of the public. Under Section 60 of the Act, breach of the professional code may amount to professional misconduct for which advocates may be punished by the Disciplinary Committee or the Courts. Curiously, officers in the Attorney General’s office and Registrars of titles are exempted from the jurisdiction of the Disciplinary Committee. Such officers are however subject to the disciplinary jurisdiction of the Public Service Commission.

¹³⁶ Muigai, G, ‘The Functions of the Advocates Disciplinary Committee and its Capacity to Enforce its Orders’. Seminar Paper , Mombasa : ACC workshop, The Lawyer and the disciplinary Process, 22nd April 2008

The Committee consists of:

- (a) the Attorney General
- (b) the Solicitor General or a person deputed by the Attorney-General and
- (c) six advocates (other than the Chairman, Vice-chairman or Secretary of the Law Society of not less than ten years standing, one of whom shall be an advocate who does not ordinarily practice in Nairobi, all of whom shall be elected and shall hold office for three years and be eligible for re-election.

Previously, the number of advocates under paragraph (c) was three. This was changed vide amendment to the law in 2002.¹³⁷ The amendment also introduced a provision to include “three other persons, not being advocates, appointed by the Attorney General on the recommendation of the Society.”¹³⁸

2.7.1 Procedure for receiving and hearing complaints against advocates

A complaint against an advocate of professional misconduct may be made to the Committee by any person¹³⁹. The complaint is required to be introduced by way of an affidavit by the complainant setting out the allegations of professional misconduct which appear to arise on the complaint to the Committee. There is also a requirement that the complainant pays some fee to the Society.

The Committee sits largely as a Court and under S.58 (5) ‘all proceedings before the Committee shall be deemed for the purposes of Chapter XI of the Penal Code to be judicial proceedings and for the purposes of the Evidence Act to be legal proceedings.’ The proceedings of the Committee are regulated by the Advocates (Disciplinary Committee) Rules which are made under the Act.¹⁴⁰ The Rules detail the procedure relating to notification of the advocate against whom a complaint is made, summons to parties and witnesses and tendering and consideration of evidence. The law however

¹³⁷ Statute Law(Miscellaneous Amendment) Act No.2 of 2002

¹³⁸ Section 57 (d)

¹³⁹ Section 60

¹⁴⁰ L.N 458 of 1990

allows the Committee to relax or dispense with any strict rules of procedure “respecting notices, affidavits, documents, service or time, in any case where it appears to the Committee to be just or expedient to do so”.¹⁴¹ The Disciplinary Committee sits as a tribunal of either three or five members. The Attorney-General or Solicitor-General is designated Chairman of the Committee and “shall preside at all meeting at which he is present”. In the absence of the Attorney-General or the Solicitor-General, the person deputed by the Attorney-General under Section 57(1) (b) shall be chairman of the meeting.¹⁴² In general, the Committee exercises its powers under the principles of impartiality, fairness, natural justice and the rule of law.

An advocate against whom a complaint has been made is required to appear before the Committee. Summons in this regard are issued by the Disciplinary Committee’s Secretariat on a prescribed form contained in the Disciplinary Committee’s Rules.

2.7.2 Penalties/Sanctions for professional misconduct

After considering the evidence adduced before it, the Committee if it considers that a case of professional misconduct has been made against the advocate may order that the advocate:-

- (i) be admonished; or
- (ii) be suspended from practice for a specified period not exceeding five years; or
- (iii) has his name struck off the Roll of Advocates; or
- (iv) pay a fine not exceeding Kshs. 5,000,000
- (v) pay to the aggrieved person compensation or reimbursement not exceeding Kshs.5,000.000.

The Committee may impose one or a combination of these sanctions.

¹⁴¹ Rule 28

¹⁴² Section 58 (2) Advocates Act,1889

2.7.3 Execution of the Disciplinary Committee's orders

Section 60 (5) Orders of the Disciplinary Committee ' may be filed in the civil registry of the Court by any party thereto who shall, within 21 days of filing, give a notice to all other parties in writing of the filing of the order which shall bear the date, the cause number and the registry in which it has been filed and a return of service of that order'. This means that the Committee has no powers of enforcement per se. Once the order is registered in Court the procedure of execution is that provided for under the civil procedure rules. The challenges faced by the DC in this regard will be discussed in the following chapter.

2.7.4 Appeal against orders of the Disciplinary Committee

A right of appeal is provided under Section 62 of the Act. Any advocate aggrieved by an order of the Committee made under Section 60 of the Act may apply within 14 days after receipt by him of the order for an appeal to the court by giving notice of appeal within 30 days after giving to the Registrar notice of appeal and by filing a memorandum setting out his grounds of appeal within 30 days of the notice of appeal. A further right of appeal to the Court of Appeal is provided for under Section 67 (1). The powers of the Court is on appeal against the orders of the Committee is discussed under the role of the judiciary.

It appears there is no concurrent right of appeal for the complainant under this section implying that a complainant who is dissatisfied with the decision of the DC has to live with it.

2.7.5 Powers of court on appeal against order of the Disciplinary Committee

Under Section 64, Advocates Act, the court may report back to the Committee with directions for its findings on any specified point or confirm, set aside or vary any order made by the Committee. It may substitute any order made by the Committee as it deems fit. A right of appeal to the court of appeal is provided under Section 67 of the Advocates Act. The appeal will be processed according to the court's prescribed rules¹⁴³. The

¹⁴³ Court of Appeal Rules

appeal does not however act as a stay of execution of the decision appealed against, notwithstanding that the order concerned is not a final order¹⁴⁴.

2.8.0 THE ROLE OF THE JUDICIARY

The judiciary exercises regulatory control over advocates both administratively and judicially. Administratively, the Advocates Act gives the Chief Justice the power to admit advocates to the Bar¹⁴⁵. The Procedure for admission involves *inter alia* a petition and a statutory declaration addressed to the Chief Justice who hears the same in chambers. Admission is in open court – where the petitioner takes an oath as an officer of the court¹⁴⁶. A newly admitted advocate then signs the Roll of advocates in the presence of the Registrar of the High Court. The Registrar is mandated to keep the Roll of Advocates¹⁴⁷.

In disciplinary proceedings, any order made by the Disciplinary Committee under S 62 must be communicated to the Registrar who is obligated to make an entry against the name of the advocate in the Roll of Advocates. Under Section 21 the Registrar is mandated to issue a practicing certificate to an advocate upon application by the advocate in that year. The Registrar is required to cause to be published a list of advocates in the Kenya Gazette who have taken out a practising certificate for the said year. The Registrar maintains in similar manner the Roll of Notaries Public.

The Act¹⁴⁸ also gives the Registrar a role in the professional discipline of advocates. Where the Disciplinary Committee finds an advocate guilty of misconduct, a report of the committee is forwarded to the Registrar. The Registrar is duty bound to enforce the decision of the Disciplinary Committee in relation to suspension or striking off the advocate by making the necessary entry in the Roll of Advocates. Where an advocate

¹⁴⁴ Section 67 (2)

¹⁴⁵ Section 15

¹⁴⁶ Section 15(3)

¹⁴⁷ Section 16

¹⁴⁸ Section 66 and 68

who has been suspended or struck off has fulfilled the requirements for re-admission, the Registrar is obligated to reinstate the name of such an advocate on the Roll¹⁴⁹.

Judicially, the High Court has inherent power to discipline advocates for misconduct committed on the face of the court. Section 56 of the Act states that “Nothing in this Act shall supersede, lessen or interfere with the powers of the court to deal with misconduct or offences by an advocate, or any person entitled to act as such, committed during, or in the course of, or relating to, proceedings before the Chief Justice or any judge. Additionally, an advocate is aggrieved by a decision of the Disciplinary Committee may appeal to the High Court. The court may refer the report back to the Committee with directions for its findings on any specified point, or may confirm, set aside or vary any order made by the committee or substitute therefore such order as it may think fit. The court may also make an order as to costs payable by any person. An appeal against an order of the Disciplinary Committee must be heard by two judges. A further right of appeal lies to the court of appeal. Appellate proceedings both in the High Court and in the Court of Appeal ‘shall not suspend the effect or stay the execution of the decision or order appealed against notwithstanding that the order concerned is not a final order.’

Apart from exercising appellate jurisdiction over decisions of the Complaints Commission and the Disciplinary Committee, the High Court may also exercise jurisdiction through judicial review. Some advocates prefer to access the court in this manner as all they need to do is allege a want of the due process.

Finally a person aggrieved by the conduct of an advocate may bring the matter directly to the court. If such conduct occasions proprietary loss as in withholding funds, a client may commence a civil suit for the recovery of funds and damages under the Civil Procedure Rules. Further if an advocates conduct amounts to a criminal offence, a client may proceed to report the matter to the police for investigation and prosecution.

¹⁴⁹ Section 71

In *Rose Achieng' Jomo vs Cons. Matata Practicing and Cons. Matata & Co. Advocate & Another*¹⁵⁰, the plaintiff sought orders that the defendants as advocates should jointly and/or severally deliver to the defendant as client an account of money collected or received by them on behalf of the plaintiff on account of a claim of settlement, including interest and costs of the suit. The Court found that the defendants did indeed receive compensation funds and failed to remit the same to the applicant and that the discharge voucher allegedly signed by the applicant was a forgery by the advocates. The court noted thus '....by forging the discharge voucher on the strength of which they obtained the said sum(Kshs. 375,000) and then misappropriating the same, they are prima facie guilty of forgery and theft, which are criminal acts.' The court ordered the defendants to pay the plaintiff the settlement amount, interest at bank rates and the costs of the suit.

In conclusion, the court recommended that the plaintiff report the matter to the Complaints Commission and the Law Society of Kenya and that the Attorney General consider preferring charges for forgery and theft against the advocates as provided by Section 61(3) and Section 80 of the Advocates Act.

CONCLUSION

From a description of the substantive legal framework above, a conclusion can be drawn that there is need for a codified system which prescribes professional conduct by amplifying the statutory provisions and the written and unwritten ethical code. This would provide a comprehensive framework. This conclusion had been made by a past chairperson of the Law Society in stating 'The current Advocates Practice Rules are inadequatethey do not provide effective tools for the standardization of practice in modern day Kenya, nor do they sufficiently guide and supervise the lawyer in all his dealings with his client. Furthermore devices for the transparent and meticulous protection of funds entrusted to lawyers is wanting...'¹⁵¹ This notwithstanding, it is

¹⁵⁰ Nairobi High Court Civil Case No. 232 of 2004

¹⁵¹ Omamo, Raychelle, Op cit

argued that the training of advocates imparts them with sufficient knowledge and that cases of misconduct arise largely out of lack of respect for clients property as will be seen in the following chapter.

A conclusion can also be drawn that the law provides many technical procedures under both the substantive provisions and the Rules. This has capacity to introduce procedural complexities may leave aggrieved advocates clients helpless in the absence of legal representation.

It is concluded further that the law has created too many institutions for the task of regulating advocates. The multiplicity of institutions without a clear chain of accountability and responsibility gives errant advocates loopholes to escape justice on one hand, and leaves lay complainants confused on where to turn for the redress of the loss suffered as a consequence of the advocates misconduct. How these institutions work in reality is the subject of the next chapter.

CHAPTER THREE

3.0 ADVOCATES SELF-REGULATION IN ACTION: THE EXPERIENCE OF THE ADVOCATES COMPLAINTS COMMISSION AND THE DISCIPLINARY COMMITTEE

3.1 Introduction

The previous chapters outlined the policy, legal and institutional framework for the regulation of the legal profession generally and the professional disciplinary process in particular. This chapter takes the discussion further by examining how the disciplinary process works in reality. Using selected case studies and empirical statistical data, the chapter critiques the disciplinary process raising issues of its efficacy and the extent to which it delivers substantive and procedural justice to the parties and particularly the poor and vulnerable. The chapter also examines the effect of power balance in an advocate/client relationship on the disciplinary process. Finally, an examination of the role of law and ethics on professional discipline is discussed.

3.2 The nature of complaints.

As pointed out in the previous chapters, the complaints against advocates for professional misconduct may be made to the Complaints Commission¹⁵² or to the Disciplinary Committee.¹⁵³ A complaint may be made by any person. Currently the number of advocates in Kenya stands at approximately 6,000. This means that the disciplinary bodies have a higher number of advocates to deal with than it had in 1989 when the Commission was established.

¹⁵² Section 53 (1)

¹⁵³ Section 60 (1)

The Commission is concerned with two basic categories of complaints namely inadequate professional services and professional misconduct.¹⁵⁴ These have been classified into the following:-

- i) Failure to account or withholding client's funds
- ii) Failure to keep clients informed
- iii) Issuing cheques which are subsequently dishonoured
- iv) Failure to honour professional undertaking
- v) Delay or failure to take active steps to prosecute and finalize a client's matter
- vi) Failure to reply to correspondence or other communications from professional colleagues and the Commission.
- vii) Failure to comply with instructions from clients or acting contrary to instructions
- viii) Failure to release file/documents especially where instructions have been withdrawn from the advocate by the client
- ix) Overcharging (or failure to advise client on costs)
- x) Failure to attend court
- xi) Conflict of interest (where advocates act for two or more clients in the same matter without their permission)
- xii) Demanding legal fees from a person who is not a client; and
- xiii) Any other behaviour which may amount to professional misconduct (an expression which includes any disgraceful or dishonorable conduct incompatible with the status of an advocate).

3.4 Common categories of complaints.

The most common complaints received by the Commission and Disciplinary Committee arise from an advocates' dealing with the client's money or property. They arise out of failure to adhere to the rules prescribed by the Advocates' Practice, Accounts, Deposit Interest Rules and the Remuneration Order discussed elsewhere in this Paper.

¹⁵⁴ Legal Watch , opcit

In the last five years (between 2007 and 2003) the Commission has received a total of 3,370¹⁵⁵ complaints averaging 674 complaints per year. The Table below (Table1) shows the breakdown of the complaints by category.

TABLE 1: NUMBER OF COMPLAINTS FROM 2003 – 2007

NO.	NATURE OF COMPLAINTS	YEAR 2007	YEAR 2006	YEAR 2005	YEAR 2004	YEAR 2003	TOTAL
1	Failure to Account	56	55	57	228	89	485
2	Failure to keep Client Informed	49	114	29	203	142	537
3	Delay	6	27	55	399	230	717
4	Failure to render Professional services	83	96	63	260	129	631
5	Acting without instructions	10	11	3	12	22	58
6	Overcharging	8	9	7	12	36	72
7	Withholding funds	143	144	80	190	140	697
8	Issuing dishonoured cheques	4	4	5	7	7	27
9	Withholding documents	1	5	20	29	11	66
10	Others	8	14	7	28	23	80
	Total	368	479	326	1368	829	3370

From the statistics above, it is clear that the majority of complaints relate to advocate’s dishonest dealing with client’s money. A complaint of failure to keep a client informed about settlement funds acts as a prelude to misappropriating the same. This sets the stage for withholding of the same funds. From this categorization, failure to account, failure to keep clients informed, and withholding funds account for1719 which is 51% of the total number of 3370 complaints.

3.5 Manner of Disposal of Complaints

The Commission disposes of complaints in various ways. These include dismissal where the complaint is found not to be meritorious or not within the Commission’s mandate; promoting and facilitating settlement between the parties; and, referral to the Disciplinary

¹⁵⁵ These figures have been collated from the Commission’s Quarterly Reports for the period 2007 – 2003. The same are published quarterly in the Kenya Gazette.

Committee. Some complaints are withdrawn by the parties. Yet others are simply abandoned by the complainants. Table 2 below shows how complaints were disposed of over the five years (2003-2007) period.

TABLE 2: MANNER OF DISPOSAL OF COMPLAINTS BY THE COMMISSION IN THE YEARS 2003-2007¹⁵⁶

NO.	MANNER OF DISPOSAL OF COMPLAINTS	TOTAL
1	Abandoned	966
2	Settled	291
3	Closed. No misconduct disclosed	973
4	Dismissed	88
5	Withdrawn	104
6	Advocate Deceased	80
7	Advocate not in practice	21
8	Subjudice	11
9	Out of jurisdiction	23
10	Others	254
	Total	2905

A total of 990 complaints were forwarded to the Disciplinary Committee during the same period. It is important to note that the number of complaints received and those disposed off during the same period cannot tally as receipt and disposal of complaints is a continuous process and disposal depends on the merits of the complaint or completion of investigations whichever is appropriate.

Out of these complaints a few advocates repeat offenders with a very high number of complaints registered against them. Advocates with the highest number of complaints are AB 246; CD 169; EF 157; GH 118; IJ 106; and KL 80¹⁵⁷. Most of the complaints relate to the withholding funds, failure to account and failure to inform the clients as stated above.

¹⁵⁶ The Statistics have been collated from the Commission’s Quarterly Reports for the period.
¹⁵⁷ Source: ACC registry records. The identities of the advocates have been protected for confidentiality.

The above statistics demonstrate that the Commission is easily one of the busiest professional regulatory bodies in Kenya. This view which is of great concern was stated by the Attorney General in 2007 when addressing a lawyers' workshop organized by the Advocates Complaints Commission to sensitize them on professional discipline.¹⁵⁸

The high number of complaints is partly attributable to the high number of advocates – currently standing at over 6,000. However, even with such a number, the statistics raise serious questions about the standards of conduct in the profession as well as the efficacy of the disciplinary process. They demonstrate that the advocates in question have no real qualms about acts of professional misconduct and also that the chances of getting away with such acts are high. This observation leads to the inescapable conclusion that for one advocate to have so many complaints registered against them, the disciplinary system must be weak or is simply overwhelmed by the number of complaints.

3.6 Profile of complainants

The experience and observation of the Commission is that the majority of complainants who present complaints against advocates to it are often poor, semi-literate and lack legal literacy. Their complaints revolve around disagreement with advocates over fees charged, failure by the advocate to release to them compensation funds in running down cases or issuance of cheques which are dishonoured upon presentation. Disagreements over fees usually arise out of failure by the advocate to inform the client at the point of instruction of the likely costs of the matter in question and lack of a clear understanding that the agreed legal fee is payable irrespective of the outcome of the case. Sometimes too, clients expect advocates not to charge them reasonable fees or any fees at all when they fail to get a positive outcome in their matter.

3.7 Process, Procedural and Justice Issues in the handling of complaints by the Advocates Complaints Commission

3.7.1 Receipt of Complaints

¹⁵⁸ Wako, A. S (Attorney General) opcit

The Commission has developed processes and procedures for receipt, investigation and disposal of complaints. A complainant is required to put his complaint into writing using a form that has been designed specifically for the purpose. The form assists the Commission to understand the nature of the complaint and classify it accordingly. The information provided assists in deciding whether the conduct or action complained of amounts to professional misconduct that is within the mandate of Commission. A complainant is required to attach supporting documents to the form. The form and supporting documents are however received by registry clerks who have no legal training and may not be in a position to advise a complainant immediately. This leads to delays as the Commission will then call for such documents through correspondence.

3.7.2 Preliminary Enquiry

On receipt of and consideration of a Complaint, the Commission may either dismiss it if it has no merit or subject it to preliminary inquiry by calling the attention of the advocate to the complaint and also requiring the complainant to present more information or documentation. All the complaints without merit are dismissed at this stage.

On the face of it, the initial steps taken in the processing of complaints outlined above appear to be standard procedure. However, the procedure is cumbersome to disadvantaged complainants who may not be literate and may not have in possession any supporting document except the fact of the injuries suffered in an accident and a form which they signed instructing an advocate to pursue the compensation on their behalf. Such a form would have been in many cases presented to them by an “ambulance chaser”.

3.7.3 Investigation

The process of investigating a complaint begins with communication to the advocate against whom a complaint has been made to respond to the allegations. Persons and institutions that may assist in investigation for example the courts and the insurance companies are also contacted. The investigation is conducted by State Counsel. The

Commission has developed a Manual on Investigation and Prosecution of Complaints to provide standards and uniformity in investigation and prosecution processes.

The medium of investigation is usually through correspondence initiated by the Commission. Where the complainant or any other person discloses the involvement of other parties who may have useful information for the Commission, the officer handling the complaint shall simultaneously address such parties and require them to furnish the Commission with such and any other relevant information touching on the complaint. These will include insurance companies, banks, courts, police investigators, professional bodies and persons generally.¹⁵⁹ Where there is no response within a specified period (usually 30 days) the Commission sends a reminder invoking its power under Section 53 (3 A) which states that “any person who, without lawful excuse, fails or refuses to assist the Commission when required to do so shall be guilty of an offence”

3.7.4 In House Dispute Resolution

Section 53(5) of the Advocates Act mandates the Commission ‘in all cases which do not appear to be of serious or aggravated nature to endeavor to promote reconciliation and encourage and facilitate an amicable settlement between the parties to the complaint.’ This provision has enabled the Commission to summon parties and try to assist them resolve their dispute particularly in cases of withholding funds or overcharging fees. This system, which is now termed In-House Dispute Resolution (IHDR), is a form of Alternative Dispute Resolution mechanism that is alternative to prosecution of an advocate at the Disciplinary Committee. The procedures invoked are less formal allowing the complainant and the advocate to discuss the issues freely and where possible reach a settlement.

The Commission is now in the process of developing procedures for utilizing this process more effectively. This form of ADR is perceived by the Commission as being more sensitive to the power balance between advocates and their clients. This mechanism of

¹⁵⁹ ‘The Complaints Commission Manual on Investigations and Prosecution of Complaints’ p. 2. (unreferenced and undated)

dispute resolution is also increasingly being used by the Commission due to the backlog of cases at the Disciplinary Committee. It is a faster method which assures a client the better chances of recovering monies owed by the Advocate. Once the client is paid, however, the Commission ceases to pursue the advocate for the act of misconduct. This compromises the Commission's disciplinary power over advocates. It is also noteworthy that a subjective test is applied by individual Counsel in deciding what complaint is not of serious or of aggravated nature so as to qualify it for the ADR.

3.7.5 CASE STUDY ONE ON PROCESS, PROCEDURAL AND SUBSTANTIVE JUSTICE ISSUES

The following case study is presented as a platform to critique the various processes in the handling of complaints by the Commission.

Complainant X¹⁶⁰ sustained serious injuries in a road accident along Kapsabet/Eldoret road. The accident which occurred on 24th May 1990 involved a GK Land Rover and a Peugeot 504 Matatu in which she was a passenger. It is alleged that Advocate Y represented the complainant and three others in a compensation suit filed against the Government in Eldoret in 1991.

Judgment was entered against the Attorney General for Kshs.287,750. The complainant alleges that the compensation funds were paid to Y advocate. Although the advocate did not inform her, she made the discovery through inquiries which she made at the Attorney General's office in Eldoret. She therefore demanded the money from the Advocate both verbally and through correspondence. Her demand letter dated 9th June 2003 was copied to the State Counsel in Eldoret, the Director of Criminal Investigation Department, the District Criminal Investigation officer, Kapsabet and the Ministry of Justice and Constitutional Affairs. Her earlier demand letter dated 1st May 2001 was copied to the Attorney General. It was also copied to the Director, Kenya Anti-corruption Authority and the Chairman of the Law Society of Kenya. In response to the copy to the Attorney

¹⁶⁰ The names of the parties have been withheld to protect their identities and the confidentiality of the Commission's records.

General, the Complaints Commission wrote to the complainant on 9th June 2003 asking her to fill a complaint form. She duly obliged and the form was duly received by the Commission on 20th August 2003.

On 14th May 2004, the Commission wrote to the Advocate alerting him of the complaint made against him and seeking an explanation. He was given 21 days within which to respond. There was no response from the advocate.

On 13th April 2005, the Commission wrote a reminder to the Advocate drawing his attention to Section 53 (4) of the Advocates Act and Rule 7 of the Advocates (Complaints Commission) Rules, L N No 507 of 1991. There was still no response.

On 22nd March 2006, the Commission wrote to the complainant asking her to provide evidence of payment of the settlement amount to the Advocate as per her allegation. On 10th July 2006, the complainant wrote to the Attorney General requesting the office to confirm that the settlement amount was indeed paid to the advocate. The complainant copied the letter to the Complaints Commission appealing to it “to be more realistic in this case by speeding up the action without demanding prove of payment which is within the same building and department”

On 8th January 2007 the Complaints Commission wrote to the complainant further calling for evidence of payment from her. The letter also informed her that the Advocate had ceased practice and had not taken out a practicing certificate for some time. The same letter put the complainant on notice that the Commission would proceed to close the file in 30 days if there was no response from her.

On 5th November 2007, the Commission wrote to the Law Society of Kenya informing it that the Advocate “has over 80 complaints filed in this Commission against him many of them relating to withholding client compensation funds.” The Commission’s letter requested the Law Society to provide the advocate’s current address ‘to enable us pursue him’. The Law Society duly obliged by giving the last known address of the Advocate.

On 28th May 2008, the Commission referred the matter to the Disciplinary Committee. It preferred the following charges:-

- a) Failure to account for a sum of Kshs.287,750 awarded to the complainant in ¹⁶¹*SPMCC No ---- of 1991, Eldoret.
- b) Withholding a sum of Kshs.287,750.00 in *¹⁶²SPMCC No ----- of 1991, Eldoret
- c) Failure to respond to correspondence from the Commission.

The Advocate was served with summons by the Law Society and the matter was set for plea at the Disciplinary Committee on 28th July 2008. The Advocate did not turn up to take plea. Nonetheless, a plea of not guilty was entered and a hearing date set for 4th September 2008. The advocate did not turn up for the hearing prompting the Committee to proceed under Rule 18 i.e. by Affidavit evidence. It ruled that judgment would be delivered on 3rd November 2008.

The Case study highlights a number of issues. On the face of it, the initial steps taken in the processing of complaints outlined above appear to be standard procedure. However while the procedure of filling a complaint form is convenient to the Commission; it is cumbersome and technical to complainants who are disadvantaged either by distance or illiteracy. From the case study above the complainant had written a letter setting out her complaint. The insistence of the Commission on the form being filled caused a loss of two months before the form was received.

Delay in addressing complaints is a major problem at the Commission. This delay is manifestly clear from the time it takes for correspondence between the Commission and the persons who may have information relating to the complaint. In the case study correspondence between the Commission and the parties seems to have a lead time of one year. The Commission received the complaint form in August 2003 and it took almost a

¹⁶¹ It is acknowledged that court records are public and can be cited. However, the full citation of the case has been omitted to protect confidentiality of the parties and the Commission's records as the complaint case is on going.

year (2004) to write to the Advocate. The reminder was sent almost a year later in April 2005.

Investigation by correspondence is a key weakness in the disciplinary process. It appears the Commission can only wait for a response. In the present case, the advocate ignored all letters from the Commission. Yet another twist to the case was brought when the Litigation Department of the State Law office which had according to the complainant handled the payment of the compensation funds to the advocate did not respond to the inquiry from the Commission. Indeed this frustrated the complainant who understandably appealed to the Commission "to be more realistic". The complainant just could not understand why one department of the Attorney General was demanding information from her (an outsider) which was within the knowledge of a sister department. Delay in resolution of complaints is a common feature.

Table 3 below presents statistics which have been collated from a random analysis of twenty complaint files to demonstrate the period of time taken in investigation by correspondence. From the analysis, the average period taken is four to five years. There are also a few cases that stand unresolved dating seven to ten years ago where correspondence is still being done.

TABLE 3: PERIOD TAKEN IN INVESTIGATION AND DISPOSAL OF COMPLAINTS¹⁶³

File No.	Date of receipt of complaint	Current Status	Approximate Time Taken
CC/K/X/04	5/6/2004	Dormant. No response from the Complainant	4 yrs
CC/K/X/99	17/12/1998	Closed on 19/09/2008	10 yrs
CC/K/X/99	19/01/1999	Closed on 19/09/2008	9 yrs
CC/K/X/00	06/3/2001	Investigation in process	8 yrs
CC/K/X/01	23/10/2001	Referred to DCC on 24/10/2008	7 yrs
CC/K/X/03	14/02/2003	Referred to DCC on 5/4/2004	1yr
CC/K/X/03	18/11/2003	Referred to DCC on 5/4/2004	5 Months
CC/K/X/03	31/12/2003	Recommended for closure on 5/9/2008	5Yrs
CC/K/X/04	03/2/2004	Investigation in process	4yrs, still pending
CC/K/X/04	16/4/2004	Investigation in process	4yrs, still pending
CC/N/X/01	6/11/2001	Investigation in process	7 yrs, still pending
CC/N/X/02	27/6/2002	Closed on 4/9/2008	6 yrs
CC/N/X/03	29/10/2003	Recommended for closure on 4/9/2008	5 yrs
CC/N/X/03	10/11/2003	Investigation on going	5 yrs, still pending
CC/N/X/03	15/7/2003	Investigation on going	5 yrs, still pending
CC/N/X/04	19/8/2004	Investigation on going	4 yrs, still pending
CC/N/X/07	22/9/2006	Investigation on going	2 yrs, still pending
CC/N/X/03	16/6/2003	Investigation on going	5 yrs , still pending
CC/N/X/04	11/8/2004	Investigation on going	4 yrs, still pending
CC/N/X/05	1/9/2000	Investigation on going	8 yrs, still pending

AVERAGE MINIMUM PERIOD TAKEN IS APPROXIMATELY FOUR YEARS.

Investigation of complaints is hampered by several factors. Firstly, the State Counsel who undertake investigation are not trained investigators. Secondly, currently, there are only 13 State Counsel handling the large number of complaints. Though the Commission staff complement has provision for two investigators this establishment has never been filled leaving a big technical capacity gap.

¹⁶³ The file reference numbers have not been disclosed for reason of confidentiality.

In addition, the Commission documentation and registry system is manual. This makes the filing and retrieval of correspondence difficult and unreliable. It has in some instances led to duplicate entry and processing of complaints.

Finally, in most instances, the Commission is frustrated by long delays in getting response or a total lack of response to the inquiry. For instance if a complaint relates to failure to inform a client on the status of their case or withholding settlement funds, the Commission relies on the court to give proceedings relating to the case; on the insurance company to confirm payment to the advocate and sometimes on banks to confirm encashment of settlement cheques. In some cases, delay is caused by complainants when they fail to supply the necessary information. Such frustration has been documented by the Commission thus:-

“Delays occur in finalization of investigations when the Commission does not get the co-operation of either the advocate complained about or the complainant. Some advocates simply ignore communication from the Commission. In some cases the complainants fail to supply sufficient information to the Commission in support of their complaints”¹⁶⁴

The long delay in investigating complaints also frustrates complainants. Complainants write letters inquiring the status of their complaints while others visit the Commission offices periodically. Many a complainant who may wish to circumvent the delay by the Commission by taking the complaint directly to the Law Society of Kenya as allowed by the Act has suffered double frustration when the Society refers him back to the Commission for investigation of the complaint. In one case which is representative of many cases, a complainant made a complaint directly to the Law Society in 1998. The Society referred her back to the Commission for investigation of the complaint which the Commission duly obliged. The complaint was subsequently referred to the Disciplinary Committee in 2003 after investigation. It is yet to be concluded.

¹⁶⁴ King'arui, J opcit

3.7.6 Referral of complaints to the Disciplinary Committee

The law obligates the Commission to refer complaints that “constitute or appears to constitute a disciplinary offence” to the Disciplinary Committee. This can be done before or after investigation. In practice however, the Commission first investigates the complaint. What this means is that a lot of time lapses before a case of misconduct is referred to the Disciplinary Committee as the case study and the statistics presented above have already demonstrated. Indeed there are complaints registered as far back as 2000 which to date have not been referred for reason of continuing investigation or difficulty in getting the necessary evidence. While such delay happens the complainant is left with little choice but to patiently await the decision of the Commission to refer the complaint. This state of affairs leads to the incontrovertible conclusion that the delay amounts to denial of justice mainly for the complainant but also for the advocate in cases where the advocate is keen to have his name cleared from the complaints register. A random analysis of twenty complaints files was undertaken to research the average period taken by the Commission to refer complaints to the DC. The Table below (Table 4) which shows when the complaint was first received and when referred shows an average period of four years.

TABLE 4 : ANALYSIS OF PERIOD TAKEN TO REFER COMPLAINTS¹⁶⁵

NO.	FILE NO.	DATE OF RECEIPT OF COMPLAINT	DATE REFERRED TO DCC	PERIOD TAKED
1	DCC/X/07	3/1/2005	03/7/2007	2YRS
2	DCC/X/07	26/6/1997	10/4/2007	10YRS
3	DCC/X/07	22/2/2005	19/11/2007	2YRS
4	DCC/X/07	11/12/1998	23/7/2007	9YRS
5	DCC/X/07	09/3/2005	19/3/2007	2YRS
6	DCC/X/07	30/1/2003	19/3/2007	4YRS
7	DCC/X/07	12/7/2005	19/3/2007	2YRS
8	DCC/X/07	23/9/1999	19/3/2007	2YRS
9	DCC/X/07	15/8/2001	29/10/2007	6YRS
10	DCC/X/07	30/1/2004	19/3/2007	3YRS
11	DCC/X/08	28/5/2001	13/12/2007	6YRS
12	DCC/X/08	14/8/2003	13/12/2007	4YRS
13	DCC/X/08	31/10/2006	13/12/2007	1YR
14	DCC/X/08	7/8/2002	13/12/2007	5YRS
15	DCC/X/08	30/7/1999	13/12/2007	8YRS
16	DCC/X/08	30/1/2006	17/12/2007	1YR
17	DCC/X/08	24/4/2006	18/12/2007	1YR
18	DCC/X/08	30/3/2000	19/12/2007	7YRS
19	DCC/X/08	7/12/2004	10/3/2008	4YRS
20	DCC/X/08	20/12/2006	13/12/2007	1YR
AVERAGE PERIOD TAKEN IS APPROXIMATELY FOUR YEARS				

Reference of complaints to the Disciplinary Committee is by affidavit sworn by a Complaints Commissioner and commissioned by an external commissioner for oaths. The affidavit contains charges against the advocate or firm of advocates complained against. All documentary evidence available on file are attached to the affidavit and forwarded to the Disciplinary Committee secretariat. This procedure of referring complaints is provided for by the Disciplinary Committee Rules.

3.7.7 Prosecution of cases before the Disciplinary Committee

The Commission prosecutes the disciplinary cases referred by it before the Disciplinary Committee. The Law Society may also prosecute cases that it has taken up directly. Further, a complainant may mount a private prosecution. The dual role of the

¹⁶⁵ DCC stands for Disciplinary Committee Complaint. However, the full numbers have not been given to protect confidentiality of ACC and DCC records.

Commission in investigating and prosecuting complaints has been a subject of severe criticism by advocates who base their arguments on due process rights.¹⁶⁶ The Commission has tried to address this concern by ensuring that an investigating Counsel does not prosecute the particular case he or she investigated.

The Disciplinary Committee's procedure is regulated by Rules promulgated under the Act as highlighted in the previous chapter. The following case study provides a platform for analysis of the procedures and processes at the Disciplinary Committee.

3.7.8 CASE STUDY TWO ON PROCESS, PROCEDURAL AND SUBSTANTIVE JUSTICE ISSUES

Complainant B¹⁶⁷ filed a complaint against Advocate C at the Complaints Commission in February 2003 for withholding Kshs.405,584 being settlement funds arising out of an accident in which her sister perished leaving behind five minor children. The accident occurred on 1st December 1996. The Commission wrote to the advocate on 5th May 2003 alerting him of the complaint and seeking his response. It also wrote to the Insurance Company asking it to give information regarding the alleged settlement. The insurance company confirmed that it had paid compensation funds to the advocate. The Advocate did not respond to both the initial inquiry and subsequent correspondence from the Commission.

In March 2007, the Commission referred matter to the Disciplinary Committee and preferred the following charges against the Advocate:-

- (i) Withholding Kshs.405,584/=
- (ii) Failure to reply to correspondence from the Commission

The matter was listed for plea on 4th June 2007. On that day the advocate did not appear before the Committee. A plea of not guilty was entered and a hearing was set for 9th July

¹⁶⁶ Ojienda, opcit, p. 48 and Stobbs, opcit, Recommendation 60

¹⁶⁷ The citation of the case has been withheld to protect confidentiality of the parties.

2007. On the date of hearing, the advocate requested for time to prepare a Replying Affidavit and a statement of Accounts. The hearing was adjourned to 13th August 2007. On that date the advocate absented himself. The Committee proceeded with the matter by the way of Affidavit evidence under Rule 18 of the Committee's Rules. The judgment date was set for 1st October 2007.

Judgment was read on 1st October 2007 and the advocate was convicted as charged. A new date for mitigation and sentence was set for 8th November 2007. On that date the advocate was present. He was ordered to pay Kshs.15,000 in costs to the Law Society and to pay the complainant Kshs.30,000 being part of the money withheld on or before 13th December 2007. A mention date to confirm compliance was set for 13th December 2007. On that date the complainant who was present at the Disciplinary Committee sitting broke down and wept protesting the indulgence of the advocate by the Committee in her words "by postponing the case over and over". She narrated the experience she was going through raising her deceased sister's children without any support while the "advocate was sitting on the money".¹⁶⁸ The advocate failed to comply with the order. An order for execution was issued by the Committee. A further mention was set for 6th March 2008.

On 6th March 2008, the accused advocate appeared and requested for more time to pay. The committee duly obliged and set a further mention date for 17th March 2008. On that date the advocate appeared before the committee and paid Kshs.20,000 to the complainant. Further orders were made by the committee. It stayed its execution order of 13th December 2008 and ordered the advocate to pay Kshs.40,000 monthly by 17th of every month starting on 17th April 2008.

At the mention of 17th April 2008, the Committee was informed that the Advocate had defaulted on payment. The execution order was reinstated and a further mention was set for 22nd May 2008. On that day, the advocate did not appear. A further mention was set

¹⁶⁸ This incident was observed by the researcher at the DC sitting on 13th Dec. 2007

for 4th August 2008. The Advocate did not appear again. The Secretariat of the Disciplinary Committee reported that execution was in progress.

This Case Study which is representative of many similar complaints brings out several key issues. Firstly, it demonstrates that accused advocates do not take the Committee seriously. This can be seen from the failure of the advocate to respond to summons to take plea. In many instances advocates do not honour summons to take plea. In such instances, the Committee enters a plea of not guilty and makes a Ruling to the effect that the Advocate files a Replying Affidavit and Statement of Account if the charge relates to failure to account or withholding of funds. When hearing dates are fixed, the advocates turn up on the hearing date to seek adjournment to enable them file Replying Affidavits and Statement of Accounts where it had been so ordered. The lack of seriousness on the part of Advocates is also demonstrated by the many times they absent themselves from the Committee sittings particularly for mentions. When they do appear, they seek further adjournments. From the case study, the particular case was listed for mention six times and every time the advocate sought the indulgence of the Committee for more time before making payments, the Committee indulged.

The Committee's sittings consists of plea taking on new complaints or cases, mentions of on-going cases to review compliance with its orders, and delivery of rulings on concluded matters. As seen from the case study, from the time a plea is taken to the final ruling on a disciplinary cause, there are several adjournments. More mentions follow to monitor compliance with the orders after they have been given. As a result, the Cause List is often loaded with mentions to confirm status of compliance. Many a times, adjournments are granted with little consideration for the trouble the complainant has taken to attend the Disciplinary Committee sitting. The situation is worse when a complainant or witness has to travel from far flung areas outside Nairobi.

The many adjournments and mentions contribute to the backlog of cases before the Disciplinary Committee. The issue of backlog has been the subject of an earlier study which recommended that the DC take urgent steps to deal with it including introducing a

summary procedure, increasing staffing levels, and developing a case management system.¹⁶⁹ The Table presented above also shows cases dating back a few years. The large number of cases before the DC has made the Committee adopt a policy of not according parties a hearing to determining almost all cases through Affidavit evidence as per Rule 18 of the Disciplinary Committee Rules. The main problem with this approach is that complainants are disadvantaged. Firstly, the Affidavit that is sworn by the Commission preferring charges against the advocate is drafted by State Counsel on the strength of the information available on file. There is hardly any contact between the State Counsel and the complainant which would ensure that all relevant matters are deponed. The advocate on the other hand files a comprehensive Replying Affidavit in which he is well versed and instructed to depone all relevant matters. A hearing would remedy any gaps in the Affidavit evidence as the complainant would be able to back up their allegations in person.

Prosecutions before the Committee by State Counsel in most cases are hampered by the inadequate investigations as earlier discussed. In addition, prosecutors rarely meet the witnesses before the hearing leading to inadequate preparation. In cases of ill preparedness, Counsel would not be in a position to adequately assist the Committee arrive at a just judgment. On the other hand, accused advocates come to the Committee adequately prepared to defend themselves. In most cases, they even engage legal representation. This clearly tilts the balance against a complainant and particularly one who conducts a private prosecution without legal representation.

3.7.9 Penalties/sentences awarded by the Disciplinary Committee

The Disciplinary Committee may admonish, fine, suspend or strike off an advocate from the Roll. An analysis of the cases decided in the year 2007¹⁷⁰ shows a clear disparity between the charges and the sentences. In general, lenient sentences are given to advocates for serious charges such as withholding clients' money for long periods or issuing bouncing cheques repeatedly. On average fines ranging from five thousand

¹⁶⁹ Stobbs, M opcit, Recommendation No.18, 28 and 29 respectively.

¹⁷⁰ Source: ACC and DC Summary Records

shillings to thirty thousand shillings are imposed for withholding huge amounts in the range of hundreds of thousands. In one case for example, an advocate was brought before the Disciplinary Committee charged with withholding Kshs. 3,537,065.50 received on behalf of his client; issuing a cheque for Kshs. 3,537,065.50 to a client in an account not designated 'client' or 'trust' account contrary to Rule 9(1) of the Advocates (Accounts) Rules; and, issuing a cheque which was dishonoured. The DC fined him Kshs. 10,000 on each count and struck him off the Roll. There were no orders for restitution to the client.

In other cases, the Committee levies heavy penalties against advocates who have committed what can comparatively be termed 'lesser offences'. In one such case, which is representative of many, the advocate had withheld Kshs. 20,000 which the complainant had deposited with him for onward transmission to a third party and he was struck off the Roll. In another, an advocate who withheld Kshs. 119,600 was struck off the Roll. In yet another, the advocate withheld Kshs. 50,000 and was ordered to pay the fifty thousand with interest, fined Kshs. 10,000 and was struck off the Roll. In comparison, an advocate withheld 240,000 and was admonished. In another an advocate withheld Kshs. 254,000, issued a dishonoured cheque for 250,000 was admonished and fined only Kshs. 3000.

In other instances, the Committee's decisions have been outright contradictory. In one such case an advocate who failed to respond to correspondence from the Commission was fined Kshs. 7,000 while another who practiced without a practicing certificate was merely admonished.

From an analysis of the penalties, the inescapable conclusion is that the DC does not seem to have a coherent sentencing policy. It is also demonstrable that the Committee has not been sensitive to the needs of the client whose primary concern is to get their money back from the advocate and at least to see some restitutive justice. Rarely does the Committee offer any real compensation to the complainants beyond ordering the advocate to repay the money owed with a little interest. To make matters worse, orders

for repayment with interest are given on such lenient terms as easy installments. The Case study above lends credence to this assertion.

In the rare circumstances when a complaint goes into oral hearing, the hearing takes on the technicality of filing of affidavits, submissions (written or oral) and examination of witnesses. In cases of private prosecution where the complainant is not represented, they are clearly disadvantaged. Even in cases where the Commission is prosecuting, Counsel in most cases would not be as well prepared compared to the defendant advocate. In certain instances, the Committee appears held hostage to the technicality despite and in spite of Rules which enable it to relax its procedures. The Committee would in such instances have to consider that an advocate can file for judicial review in the High Court alleging a lack of due process at the DC.¹⁷¹

The jurisprudence from the Committee is not instructive on whether the Committee is keen to enforce professional ethics by punishing advocates for acts of misconduct or pursuing justice for the complainant where such client has suffered financial and other loss as a consequence of the advocate's misconduct. The Committee seems to be walking a tight rope trying in some cases to strike a balance. This study however draws the conclusion that the DC is lenient to advocates and insensitive to complainants.

3.8 THE COURT

An advocate aggrieved by the decision of the Complaints Commission or the Disciplinary Committee may appeal to the High Court¹⁷². The Court however has no jurisdiction to grant a stay of the order appealed against. In spite of this, the practice has been that once an advocate appeals no execution is effected by the Disciplinary Committee. Some disingenuous advocates have sought to circumvent the prohibition of stay by filing judicial review applications by alleging a want of due process in the Disciplinary Committee. The simple allegation has proven enough to obtain a stay of proceedings

¹⁷¹ This has been documented by Shah K, Advocate in 'The Role of the Judiciary in Disciplining Lawyers', Workshop Paper presented at ACC Workshop on Honesty and Excellence in the Provision of Legal Services, Mombasa: 14th – 15th May 2001

¹⁷² Advocates Act, Section 62,

from the High Court¹⁷³. Once an advocate secures a stay order, he does not prosecute the substantive motion. This leaves the matter in abeyance leaving a complainant with no reprieve. Neither the Complaints Commission nor the Disciplinary Committee makes any follow-up on judicial review matters.

3.8.1 Execution of Disciplinary Orders

The enforcement of disciplinary orders at all stages of the disciplinary process is the weakest point in the disciplinary mechanism. At the Commission level, it is not clear what the Commission would do if after exercising its powers under Section 53, an advocate merely ignores the orders. As discussed earlier, the Commission is required to register orders made pursuant to Section 53 in court “and such order can be enforced in like manner as that of the court”. So far the Commission has not been registering its orders in court despite the power to do so. For it is only then that the orders can be enforced ‘in like manner as that of the Court’. The option left for the Commission is to refer the matter to the Disciplinary Committee.

At the DC level, the Committee equally suffers frustration. As discussed earlier, the Committee does not have execution powers per se. Its orders are registrable in court before enforcement. Consequently, the Committee seems incapable of enforcing its orders. The following Case Study which represents many other cases is instructive.

3.8.2 CASE STUDY THREE ON PROCESS, PROCEDURAL AND SUBSTANTIVE JUSTICE ISSUES

A complaint for withholding Kshs. 1.5 Million was preferred against advocate KP at the DC on 14th November 2003. The advocate was not present to take plea. A plea of not guilty was entered and a ruling that the advocate files a Replying Affidavit and a Statement of accounts. The hearing was fixed for 19th January, 2004. On that date, the advocate appeared and admitted to the charge. He was ordered to pay Kshs. 450,000 by 8th March 2004 on the basis of a consent he reached with the complainant. Mention was set for 19th July 2004 to confirm compliance. On that date it was reported to the

¹⁷³ Shah, K, Ibid

Committee that the advocate was in jail for a different offence. Another mention was set for 2nd August, 2004. On that date the advocate asked to tax his bill in court. The Committee ruled that it would tax the advocate's bill. On 17th September, 2004, the advocate filed his bill in court. This was in spite of the Committee's orders of 2nd August, 2004 and in violation of Section 53 (6E) of the Advocates Act which empowers the Committee to tax an advocate's bill of costs. For three repeated mentions, the advocate informed the Committee that the bill was still pending in court for taxation. On 6th March 2006, the Complaints Commission applied for the taxation to be done by the Committee under its powers in Section 53(E) of the Act. The Committee ruled that it would tax the bill and ordered the advocate to pay Kshs. 529,900 plus interest and that the advocate be suspended. In April, 2008, before execution of the order, the advocate went to court seeking to review the orders of the Committee and to stay the order. He stated in his application that the Committee 'had disarmed him by taking away his tools of trade'. He got the stay order.

The Case Study demonstrates the weakness in the system. Firstly, an advocate is able to manipulate the system by using excuses to buy time, and using the provisions of the law to postpone the final determination of the disciplinary case. Once the Committee is slapped with a stay order the disciplinary cause remains in suspense. The frustration of the DC has been summed as follows:

'Once an order is made against an advocate, they rush to the High Court to apply for an order of certiorari to quash the disciplinary decision and apply for a stay of execution of the DC decision on the grounds that their rights have been infringed or rules of natural justice have been breached.'¹⁷⁴

Committee also has a weak execution machinery. Currently, the Committee utilizes the services of one advocate on pro bono basis. Clearly, one advocates working for the Committee on pro bono basis cannot be said to be an effective system. The sheer number of orders for execution must be overwhelming.

¹⁷⁴ Muigai, G, opcit

3.9 POWER BALANCE BETWEEN ADVOCATES AND THEIR CLIENTS

From the Case Studies already discussed, it is evident that the disciplinary process is influenced by power balance between advocates and their clients. Firstly, advocates are endowed with knowledge of both the substantive and procedural law governing virtually all areas of human endeavour. By virtue of their high level of education and training, advocates also acquire technical and professional competence and occupy a prestigious place in society. In contrast, the citizenry which make up the majority of advocate's clients (a part from corporate clients) generally lack knowledge of substantive and procedural laws. As highlighted in the previous chapter, the majority of complainants who present complaints against advocates are usually poor and vulnerable. The power imbalance between an advocate and client runs through the client/advocate relationship right from the time of instruction through to the disciplinary process and contributes in many ways to injustice.

Many of the complaints revolving withholding funds and overcharging have a genesis in the advocates' fees. A perusal of complaint files at the Commission shows that advocates rarely inform their clients on the likely cost of their case. In some instances, particularly in running down cases, the advocate and client agree that upon the successful pursuit of compensation in accident cases, the advocate would take thirty percent of the damages towards his fees. Some advocates use trickery by taking advantage of the client's lack of knowledge regarding advocates' fees to fleece the client of compensation funds. The experience of the Commission is that such an advocate is usually very reluctant to give the Commission his fee note or bill of costs to enable the Commission determine whether or not he has charged fees fairly. Another trickery that unscrupulous advocates use is the drawing and signing of a discharge voucher. This is a document that the advocate makes a client to sign acknowledging payment by and absolving the advocate from any further liability. Cases have been reported to the Commission in which a complainant alleges that they were made to sign a blank document.

Both the fees agreement and discharge voucher have a basis in contract law and can be set aside by the court. Bills of costs can also be set aside by the court. However, for a poor and vulnerable client, that would mean entering into an arena of legal technicality once again.

Poor and vulnerable clients who bring complaints to the Complaints Commission do so with the hope of getting redress through the Commission which is a government body. Once at the Commission however, complainants come face to face with State Counsel who due to their legal training question or interrogate them on the allegations or complaints against the advocate. For the State Counsel, such inquiry is a necessary and critical part of investigations while to the complainant it may arouse suspicion that yet another lawyer is out to frustrate them. Indeed some State Counsel use technical language in dealing with complainants. It can be stated that sometimes too, State Counsel find it difficult to make some complainants understand the processes and procedures of handling the complaints. The complex procedures involved in the processing of a complaint may at times contribute to a client's feeling of frustration.

3.10 THE ROLE OF ETHICS IN PROFESSIONAL DISCIPLINE

From the analysis of the nature and substance of complaints handled through the disciplinary process, it is evident that the ethical standards in the profession have fallen. Whereas the rise in the number of cases can partly be attributed to the rise in the number of practicing advocates, the nature of the complaints decidedly point to unethical dealing with clients' money. The disciplinary process seems incapable of enforcing discipline mainly because to errant advocates, the subject matter of the disciplinary process does not strike them as abhorrent, immoral or ethically untenable. From the kind of correspondence and defense that accused advocates put up, one can conclude that their only consideration is how to wriggle out of the consequences of the professional misconduct. There is no real remorse for the acts of misconduct. This conclusion is drawn from the fact that many accused advocates are repeat offenders with a few having over a hundred complaints registered against them. The manner in which such advocates resort to technicalities of procedure and take advantage of the law particularly in seeking

judicial review of the Committee's orders is telling and works to the disadvantage of the complainants and the frustration of the disciplinary bodies.

The disciplinary system is seemingly overwhelmed by the number of complaints and also by the need to try and assist complainants get back from the advocates whatever moneys is recoverable from them. This approach seems to subjugate the mandate of enforcing discipline on the basis of the unethical conduct of the advocate to merely trying to assist the aggrieved parties recover their money from the advocate. This points to a conclusion that the enforcement of professional discipline in Kenya is an uphill task because the grounding of the many errant advocates in ethics is wanting and a reliance on law alone to enforce discipline cannot yield the desired result. The conclusion here therefore is that law alone is incapable of enforcing professional discipline and that a solid grounding of advocates in ethics is a prerequisite to the success of cleaning up the profession.

CONCLUSION

This Chapter has mapped the disciplinary process right from the time a complaint is lodged to the time of disposal. It has identified challenges at various stages and examined issues of justice for the parties. From this, it can be concluded that the current disciplinary framework is faced with many challenges which subvert its efficacy in enforcing professional discipline among advocates. The following Chapter breaks down this key conclusion.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

Introduction

This study has examined the policy, legal and institutional framework for the regulation of the legal profession in Kenya at a general level, and in particular the enforcement of professional discipline. It has analyzed the disciplinary process by examining the role and inter-relationships of the three key institutions charged with enforcing professional discipline. These are the complaints Commission, the Disciplinary Committee and to a limited extent, the judiciary.

This chapter sets out in summary the conclusions and recommendations arising out of the study.

4.1 Policy and political considerations in the regulation of advocates

The study concludes that the historical, social and political environment in Kenya has influenced the development and establishment of the present policy, legal and institutional framework for advocates professional discipline thereby creating the present system of co-regulation by the State and the professional body, the Law Society. It further concludes that at the present moment the profession has not demonstrated a collective will to prioritise and enforce professional discipline among its members to the detriment of the public and that the State intervention in professional discipline of advocates has mitigated and continues to mitigate shortcomings in professional self-regulation.

The Study was not able to demonstrate whether or not co-regulation in professional discipline compromises the independence of the profession as all complaints registered are clearly categorized on the basis of the misconduct demonstrated.

Recommendation

The study therefore recommends that taking into consideration all factors and the peculiarity of the Kenyan circumstances; the regulatory mechanism which provides for co-regulation of the profession is at the present necessary and should be maintained.

4.2 Code of Conduct

The study concludes that there is need for a comprehensive Code of Conduct for advocates in Kenya. This is because the present prescriptive provisions on what constitutes proper conduct, and in the converse misconduct, scattered in various Statutes including the Advocates Act and the Rules made thereunder, the Penal Code and in the Law Society Digest of Professional Conduct and Etiquette (2000), does not present a clear and comprehensive picture of the do's and don'ts to sufficiently guide the practitioners, the disciplinary bodies and the public. The Statutory Law and Rules do not provide an adequate framework for supervising advocates' dealings with their clients and particularly in the handling of clients' money and other property.

Recommendation

It is recommended that the Law Society and other stakeholders develop a Code of Conduct incorporating all relevant law and ethical principles for the guidance of advocates and the public in matters of advocates' professional conduct. It is also recommended that such Code be publicized and popularized for the benefit of both the advocates and the public.

4.3 Efficacy of the disciplinary process

The study concludes that the disciplinary mechanism as currently established lacks efficacy and to a large extent fails to deliver substantive and procedural justice to the parties particularly the complainants who are poor and vulnerable. This is because of the multiplicity of institutions handling disciplinary cases, the use of procedural technicalities and the long delays in resolving complaints. The high number of complaints as well as the inability of the system to offer timely and substantive redress in the form of restitution to the complainants points to a lack of efficacy.

Recommendation

The study recommends a participatory comprehensive review of the system with a view to recommending a more efficacious system. The review should cover the policy, legal and institutional framework as well as systems, procedures, and processes of all relevant institutions.

4.4 Legal and institutional framework for the disciplinary mechanism

The study concludes that the legal framework for the regulation of advocates and in particular the disciplinary process is complex and confusing as it creates multiple institutions without a clear cut division of responsibility and accountability. The current institutions play overlapping roles and no institution is accountable to the other. Further, the study notes that there is a weak linkage and inter agency collaboration between the Commission, the Disciplinary Committee and the Judiciary. The weak linkage creates loopholes for errant advocates to defeat the disciplinary process and get away with misconduct.

Recommendation

The study recommends the development and implementation through legislation of a clear policy indicating the institution with over all responsibility and creating clear lines of responsibility and accountability for each agency concerned. In the short term, it recommends the strengthening of linkages and collaboration between the Complaints Commission, the Disciplinary Committee and the Judiciary. At policy level, the study recommends greater collaboration between the Attorney General and the leadership of the Law Society in designing and implementing more effective regulatory policies.

4.5 The Role of ethics in professional discipline

The study concludes that there has been a steady decline of ethical standards in the legal profession. This is because whereas the high number of cases may be attributable to the rise in the number of practicing advocates, the study found that many advocates are repeat offenders with large numbers of complaints registered against the same advocates

or law firms associated with them. The statistics provided earlier on in the study supports this conclusion. The study also found that lack of ethics in the profession was responsible for professional misconduct in the first instance, and in the second instance, for manipulation of the disciplinary system by those guilty of misconduct.

Recommendation

The study therefore recommends that a programme of inculcation of ethics and a sense of morality and public duty in advocates be undertaken urgently by all stakeholders in the legal profession. It also recommends that the disciplinary system be decentralized so that advocates face the disciplinary measures in the towns where they practice and are known. It is hoped that such exposure will bring about a deterrent effect.

4.6 Power balance in advocate/client relationship

The study concludes that the power balance between advocates and their clients (complainants) is heavily tilted against the complainant and influences the disciplinary process and its outcome in favour of the advocates. It also concludes that the disciplinary system is insensitive to the plight of poor and vulnerable complainants who rarely get substantive and procedural justice. Unscrupulous advocates use their positions of power to intimidate their clients with hefty fee notes by citing the legal provisions in the remuneration order. Further, using the technical process of taxation of bills, such advocates manage to get away with what may amount to unjustified fees because in such instances, an uninformed client may not understand the process and fail to challenge the advocates' bill.

Recommendation

In addition to the general recommendation made by this study on the review of the disciplinary system and its procedures and processes, it is recommended that the disciplinary process be linked to a legal aid scheme to assist poor and vulnerable complainants throughout the disciplinary process and particularly during taxation of bills and in the enforcement of orders where relevant.

4.7 Enforcement and Execution Mechanism

In Chapter Two, it was demonstrated that the Commission enjoys enormous powers under the law. It was however also shown that the Commission was incapable of exercising those powers due to a lack of procedures and resources. This study therefore concludes that the enforcement of orders emanating from the Commission is weak.

At the Disciplinary Committee level, the Committee also has a weak enforcement mechanism. Orders of the Committee must first be registered with Court. The other problem is caused by advocates who seek and obtain injunctions and stay orders from the High Court. Following from this, the study concludes that the enforcement and execution mechanism is weak. It further concludes that the weak enforcement mechanism makes a mockery of the entire disciplinary process as it brings to naught all the effort put into investigation, prosecution, determination of the complaints, and the delivery of judgment and orders of the Disciplinary Committee.

Recommendation

The study therefore recommends that urgent steps be taken to review the enforcement mechanism with a view to strengthening it. Suggestions for improvement include strengthening the Commission to be able to follow registration of awards in court, and strengthening the DC secretariat to be able to execute the orders of the DC through the Court process.

4.8 Conclusions and Recommendations specific to the Complaints

Commission

This section of the study presents conclusions and recommendations specific to the Complaints Commission. While some of the recommendations are long-term others are short term and can be implemented without much delay.

(i) The legal framework establishing the Commission.

The study concludes that the law establishing the Commission is inadequate because of its failure to provide for a specified number of Commissioners and to make specific provisions on the establishment of a technical secretariat. Another conclusion is that the Commission is poorly perceived by advocates as a partisan institution because of the

circumstances under which it was established as well as the appointment of Commissioners by the President.

Recommendation

It is recommended that section 53 of the Advocates Act be reviewed to provide a specified number of Commissioners appointed by the President through a consultative process with the Law Society, and to provide for the establishment of a technical secretariat. This, it is hoped, will cure the problem of poor perception and boost the confidence of advocates in the commission with the desired consequence of improving the effectiveness of the Commission.

(ii) Institutional, Organizational and Administrative Framework

Institutionally, the Commission is one of the seven technical departments of the State Law Office. This means that its staff and other resources are deployable across the departments and any shortage affecting the State Law Office affects the Commission as well. Secondly, although the Commissioners are presidential appointees, they fall within the organizational and administrative structure of the State Law Office. Within the Commission itself, the organizational set up as between the policy making arm headed by the Chairman and the technical secretariat headed by the Commission Secretary is blurred. The study concludes that these institutional, organizational, and administrative issues impact negatively on the operations of the Commission and consequently on the efficacy of the disciplinary process.

Recommendation

The study therefore recommends the de-linking of the Commission from the State Law Office for operational independence. It further recommends a clear internal policy and operational framework which will enhance the policy making mandate of the Commission distinct from the technical implementation role of the secretariat.

(iii) Powers of the Commission

The study concludes that the Commission as currently established has no capacity to exercise the extensive powers provided under section 53 relating to *interalia*

investigation of advocates accounts, levy of distress warrants, and awarding and enforcement of compensation. It is also concluded that the inability of the Commission to exercise its powers undermines the efficacy of the disciplinary process.

Recommendation

The study consequently recommends that urgent steps be taken by the Commission to apprise itself of its powers under the Act and assess its technical capacity needs in respect of the exercise of those powers. It is recommended that Rules be developed under the Advocates Act to give guidance on the procedure and processes for the exercise of these powers.

(iv) Overlapping mandate in investigation and prosecution

The study concludes that the overlapping mandate of the Commission in investigation and prosecution of disciplinary cases presents no danger or violation of the rights of the accused advocates as the matters in question have a basis in ethics and not strict criminal law. This overlapping role has been a cause of concern to advocates. The Commission has attempted to mitigate this by ensuring that Counsel who investigates a complaint does not prosecute it.

Recommendation

It is recommended that the arrangements in which an investigating Counsel does not prosecute the complaint at the DC suffices for the moment.

(v) Systems, procedures and processes used by the Commission

The study concludes that the manual registry system as well processes used by the Commission leads to inordinate delay in investigation, resolution, and referral of complaints to the DC. In particular, investigation by correspondence causes long delays and frustrates both the investigating Counsel and the complainant.

Recommendation

The study strongly recommends the immediate review of systems, procedures and processes, the computerization of registry records and the introduction of a case tracking system for greater efficiency in investigation and disposal of complaints.

(vi) Staffing needs and training needs

The study concludes that the human resource capacity of the Commission is grossly inadequate and does not match the extensive mandate and tasks. In particular, the technical investigative capacity including forensic accounting is lacking.

Recommendation

It is recommended that the number of legal officers be increased and accountants and investigators be employed. It is also recommended that the investigation and prosecution skills of the staff be enhanced through targeted training.

(vii) Enforcement of Orders of the Commission

The study concludes that the Commission has no mechanism for enforcing its orders under section 53 of the Advocates Act and that the powers under that Section were conferred without adequate provision for enforcement. The study therefore recommends that the Attorney General make Rules to provide for an enforcement procedure.

4.8 Conclusions and Recommendations specific to the Disciplinary Committee

The conclusions and recommendation relating to the Disciplinary Committee are borne out of the analysis of available literature and personal experiences of State Counsel (including the researcher) who prosecute complaints before the Committee .These conclusions and recommendations would have been enriched by interviews with members of the Disciplinary Committee and its secretariat. They are therefore subject to validation through follow up interviews.

(i) Membership of the Committee

The study concludes that the membership of the Attorney General and his influence in the Disciplinary Committee has largely remained theoretical. This is because since the passage of the 1989 Advocates Act, the Attorney General has never sat in the Committee and since 2004 the Solicitor General has also never sat in the Committee. Further, since 2005, the Attorney General has not deputed a person to sit in the Committee. The study however did not establish whether or not the absence of the influence of the Attorney General in the Committee has had any impact on the disciplinary process other than putting strain on the other members who have to manage the Cause List with fewer numbers.

(ii) Backlog of complaints before the Committee

The committee sits for an average of three hours twice a week. Members also spent some time outside the sittings to study complaints and write judgments. On average, in a sitting the Committee deals with twenty causes made up of pleas, mentions and hearings. As highlighted earlier, the current cause lists reflect matters dating back several years ago.

Recommendation

The study recommends, as it has been recommended before that the DC addresses the backlog as a matter of urgency¹⁷⁵

(iii) Procedures and processes

The study concludes that the procedures and processes used in the Disciplinary Committee need to be reviewed to provide for a faster way of disposal of complaints.

Recommendation

Specifically, it is recommended that a summary procedure be introduced to deal with simple and straight forward cases. This would apply where the facts and issues are not in dispute. It would be possible under such a procedure to finalise a complaint in one or two sittings only. Another recommendation is that the DC needs to take a serious view of

¹⁷⁵ See Stobbs, M Opcit , Recommendation No. 32

adjournments and mentions based on frivolous applications by advocates as they cause unnecessary delay.

4.9 Enforcement Mechanism

The study concludes that the DC lacks an effective mechanism for enforcing its orders. The enforcement procedure through the court requires resources. Secondly, the enforcement of the orders is sometimes frustrated by advocates when they seek judicial review to halt the orders of the Committee or nullify the entire disciplinary process.

Recommendation

The study recommends that the Committee reviews its capacity needs in respect of following through the registration and execution of its orders in court and enforcing compliance at the DC secretariat level. It is also recommended that the judiciary be sensitized on the necessity of not granting stay orders as stipulated by Section 62 of the Act.

4.10 Conclusions and Recommendations specific to the Judiciary

Administratively, and as discussed earlier, the judiciary plays a key role in the management of the Roll of advocates. The Registrar updates the Roll by making entries against advocates' names when they are struck off or are suspended as a result of misconduct. Failure by the Registrar to inform the public and the Courts of such suspensions and striking off enables the advocates to continue practicing.

Recommendation

It is recommended that the publication of names of advocates who have been struck off the Roll or suspended be published regularly as required by law to protect the public from such advocates. It is also recommended that inter institutional linkages between LSK and the Judiciary be strengthened for this purpose.

Judicially, the High Court exercises powers of judicial review over all inferior tribunals. As discussed earlier, advocates who wish to escape the orders of the DC rush to the High Court for judicial review. In a few cases, some advocates utilize the appellate procedure

and appeal to the High Court and to the Court of Appeal. In all instances, the Advocates Act provides that such application shall not stay the orders of the Committee. The study therefore concludes that the judiciary misinterprets the law by granting stay orders to advocates thereby defeating justice for the complainant in the disciplinary process.

Recommendation

The recommendation that the Judiciary be sensitized on the provision and application of Section 62 of the Advocates Act so as not to grant stay orders to advocates facing disciplinary action by the DC is underscored.

Way Forward

The study has mapped the disciplinary process in Kenya and highlighted various weaknesses in the system. It has made recommendations pertinent to the policy, legal and institutional reform of the disciplinary system. For emphasis and by way of proposing a Way Forward, it is recommended that the legal profession in general address issues relating to its poor public image and duty. In particular, the profession should take issues of professional discipline very seriously and weed out the bad apples from its midst. In so doing however, the rights of the clients who are often poor and vulnerable should be protected. The profession should therefore immediately take the challenge of establishing a professional indemnity fund and a client compensation fund to mitigate the consequences arising out of loss to clients through inadvertent acts, negligence or other misconduct. Without these safeguards the disciplinary process will continue being bogged down and clients will continue to suffer at the hands of rogue advocates. Finally, the question of who should regulate the profession should be subjected to further empirical study and debate so as to come up with a pragmatic policy, legal and institutional framework that serves the interests of both the advocates and the public.

BIBLIOGRAPHY

Brewerton P. Millward Lynne, 2000, *Organizational Research Methods*, London: Sage Publications

Cranston, Ross, (Eds), 1975, *Legal Ethics and Professional Responsibility*, Oxford: Clarendon Press

Ghai, Y.P., and McAuslan, J.P.W.B., 1970, *Public Law and Political Change in Kenya: a study of the legal Framework from colonial times to the present*, Nairobi: Oxford University Press

Harvey, William Burnett, 1975, *Introduction to the Legal Systems in East Africa*, Nairobi: East African Literature Bureau

Kailash Rai, 2002, *Legal Ethics, Accountancy for Lawyers and Bench-Bar Relation*, Allahabad: Central Law Publications

Kothari, C.R., 1990: *Research Methodology. Methods and Techniques*, New Delhi. Wish Prakashan

Lumumba P.L.O, 2005, “ The Legal Profession in Kenya: Towards a new Ethos”, in Franceschi G. Luis and Ritho M. Andrew(eds), *Legal Ethics and jurisprudence in Nation Building*, Nairobi : Law Africa Publishing Ltd

Lugulu J.A. Henry, 2005, “The Role of Legal Ethics in Achieving a just Society”, in Franceschi G. Luis and Ritho M. Andrew (eds), *Legal Ethics and jurisprudence in Nation Building*, Nairobi : Law Africa Publishing Ltd

Mugenda, O.M and Mugenda, A.G, 1999, *Research Methods: Quantitative and Qualitative*, Nairobi: Oxford University Press

Mason, J. K., and Laurie, G.T., 2006, *Law and Medical Ethics (7th ed)*, New York: Oxford University Press

Mercel , B., and Dyer C., 2000, *The Law Machine(5th ed)*, London: Penguin Books

Mwangi Paul, 2001, *The Black Bar. Corruption and political intrigue within Kenya's legal fraternity*, Nairobi: Oakland Media Services Ltd

Peter C.B., 1994: *A Guide to Academic Writing*, Eldoret: Zaff Chancery

PRACTICE MANUAL

East Africa Law Society, 1988, *Compendium of Codes of Legal Practice, Conduct, Ethics and Etiquette in East Africa*, Nairobi: LawAfrica Publishing ltd

The Canadian Bar Association Code of Professional Conduct,(Rev.2006), Canadian Bar Association

JOURNALS

Reynolds, F.M.B., (Eds).1998, *The Law Quarterly Review*. Vol 114. London: Sweet & Maxwell

Ojienda, T. O., 2005, "The legal Profession in 2015: Rethinking the challenges, Opportunities & Threats", in *The Law Society of Kenya Journal* Vol 1 No 2 LawAfrica

ARTICLES AND PAPERS

Armstrong. A, (ed) 1990, *Perspectives in Research Methodology*. Harare: WLSA working paper No.2

Barnett Hollander. "The English Bar A Priesthood, The Tribute of an American Lawyer", London: Bowes and Bowes.

Kronman, A. 1998, "The Law as a Profession" Chapman University, School of Law,

Stephen H. F., and Love, J H., 1999, "Regulation of the Legal Profession", in Frank H. S and Love, J H *Regulation of the Legal Profession* , Glasgow: University of Strathclyde Press.

U.N. PUBLICATION

United Nations Basic Principles on the Role of Lawyers,(adopted by the Eighth U.N Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, 27th August 1990)

UNPUBLISHED WORK

Omamo Raychelle. 2001, "Restoring Public Confidence In the Legal Profession", Workshop Paper, Mombasa: Honesty & Excellence in The Provision Of Legal Services, The Complaints Commission, 14-15 May.

Chunga, B.(Chief Justice),2001,Closing speech, Kisumu: ACC workshop on Honesty and Excellence in the Provision of Legal Services,4th December

Rautta-Athiambo. 2001, "The Role of the Advocate in Public Legal Education & Protection of Human Rights", Workshop Paper, Mombasa: Honesty & Excellence in the Provision of Legal Services, The Complaints Commission, 14 -15 May.

Shah K. 2001, "The Role Of The Judiciary In Disciplining Lawyers", Workshop Paper, Mombasa: Honesty & Excellence in The Provision Of Legal Services, The Complaints Commission, 14-15 May.

Aduma Esther. 2008, “The Place of Alternative Dispute Resolution in the Disciplinary Process”, Workshop Paper, Nairobi: The Lawyer and the Professional Disciplinary Process, the Complaints Commission, 22-23 April.

King’arui J.N. 2008, “Advocates Complaints Commission: Experience, Achievements and Challenges”, Workshop Paper, Nairobi: The Lawyer and the Professional Disciplinary Process, the Complaints Commission, 22-23 April.

Marienga J.O. 2008,”The Role Of The Advocates In Protecting The Poor, Marginalized And Vulnerable In The Society”, Workshop Paper, Nairobi: The Lawyer And The Professional Disciplinary Process, 22-23 April.

Namwambah Tom N, 2006, “Ethics: A Philosophical Inquiry, Academic Paper, Nairobi: The Kenya School of Law, Bar Examination students, 25 May

Tabaro, Justice Patrick, 1992, “The Lawyer’s Duty to the Court and the Public”. Uganda Law Society Review, Vol.1.No.2, pp 38-70, 22 October

Muigai, G, Seminar Paper, 2008, The Function of the Advocates Disciplinary committee and its Capacity to enforce its orders , Nairobi: ACC workshop, The Lawyer and the disciplinary process 22nd April 2008

Wako A.S, (Attorney General), 2008, Keynote Speech, Nairobi: ACC workshop, The Lawyer and the disciplinary process, 22nd April 2008

Kronman Anthony T, 1998,”The Law as a Profession”. Academic paper, Chapman University, School Of Law

“The Legal Watch”, The Advocates’ Complaints Commission.(unreferenced)

“Complaints Commission Manual on investigation and prosecution of complaints”, (unreferenced)

“Transformation of the Legal profession”, Discussion Paper: Policy Unit, Department of Justice and Constitutional Development, R.S.A, September 1999

REPORTS

Advocates’ Complaints Commission, 2002: Report of the Fourth Workshop on “Honesty and Excellence in the Provision of Legal Services”, Nyeri. 20 – 21 June,

Stobbs, Mark, 2002, The Law Society of Kenya and Advocates Complaints Commission Report : Review of the Effectiveness of the Disciplinary Committee.

POLICY DOCUMENTS

1. The State Law Office Draft Strategic Plan (2008 – 2012)
2. The Advocates’ Complaints Commission Service Charter.(un dated)

LEGISLATION

The Constitution of Kenya

The Advocates’ Act (Cap 16) Laws of Kenya

The Law Society of Kenya Act (Cap 18) Laws of Kenya

The Council of Legal Education Act (Cap 16 A) Laws of Kenya

The Penal Code (Cap 63) Laws of Kenya

The Criminal Procedure Code (Cap 75) Laws of Kenya

The Civil Procedure Act (Cap 51) Laws of Kenya

The Evidence Act Chapter 80 Laws Of Kenya

FOREIGN LEGISLATION

Attorneys Act 53 of 1979, Republic of South Africa

Advocates Act 1970 Chapter 267, Laws of Uganda

The Tanganyika Law Society Act, Chapter 307

Legal Practitioners Act Chapter 207 Laws of the Federation of Nigeria

INTERNET SOURCES

<http://www.solicitorstribunal.org.uk/constitution.html>, last updated 1st May 2008, accessed 8th December 2008

www.kybar.org/documents/obc/complaint, accessed on December 5th 2008

www.legalcomplaintsservice.org.uk last updated March 12, 2008, accessed 30th October, 2008

www.barstandardsboard.org.uk last updated May 5th, 2008, accessed on 8th December 2008

www.nzbr.org.nz last updated July 10th 2008, accessed 8th December 2008