

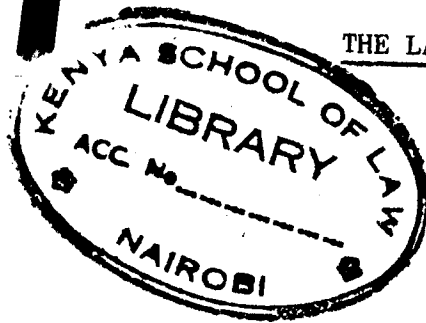
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1ST ANNUAL LAW SOCIETY OF KENYA CONFERENCE

THE LAWYER'S DUTY TO HIS COMMUNITY: THE WAY AHEAD?

(A SCOTTISH VIEW IN KENYA)

AUTHOR: R.M. WEBSTER R.D. B.A. (Cantab)

INTRODUCTION: THE CONSUMER SOCIETY



Often it seems that nobody loves lawyers - except perhaps our mothers and our spouses, who of course know better. However much individual lawyers may devote a considerable amount of time and care to their client's affairs and achieve great successes for them, it is a sad fact that our public image could be a great deal better.

Perhaps we do not help ourselves. Some of us delight in using obscure legal jargon in letters and documents. Despite our smart suits we wear old-fashioned wig and gown in court which make us seem different from ordinary people. Many of us take what seems an eternity to deal with details which appear unimportant to our clients and to go through procedures which they do not begin to understand, finishing up with a large bill with little to show for it. Maybe it is not suprising that we are unpopular, but can we do anything about it?

In Britain this attitude of the public has flourished in the present consumer society and the legal profession has come under severe attack from all quarters, principally over allegedly restrictive practices. This has had the result of forcing much change on the profession, some but not all of it welcomed by forward thinking lawyers. For example personal advertising, which many considered to be almost unthinkable, has for the last year been an established fact for the legal profession.

By way of introduction, I should explain that although I am now a parliamentary draftsman, I have been closely involved in professional practice and ethics for over 15 years, from the time when I was a full time Deputy Secretary of the Law Society of Scotland dealing with professional practice. I am still concerned in this field as the co-author with my wife of the current Scottish handbook on the subject.

I think it will be of interest to you to hear about the many changes in control of professional practice which have occurred in 15 years as a result of consumer pressure, which greatly heightens the public's expectations in every field of human activity, not least in the provision of legal services. What I am going to describe relates to Scotland, but the picture is broadly similar in the rest of Britain. Before you switch off mentally thinking that this does not concern Kenya, let me assure you that it certainly does. The Western consumer society is not standing still but is advancing all the time: it may take several years before its impact is felt in Kenya, but it will surely come in time and you will have no choice but to adapt and to take up new

measures to give increased safeguards for your clients. However I want to make it clear that I am not suggesting that you should adopt all or any of our solutions, indeed many of them may not be suitable for circumstances here, but it may provoke discussion to hear what we have done.

While the views which I shall express are entirely personal and do not represent those of either the British Government, my permanent employer, or the Kenya Government, to whom I am seconded, it is not entirely inappropriate that a member of the AG's Chambers should contribute on this topic at present. The Attorney-General and the Solicitor-General share the concern of the Council of your Law Society about the increasing number of cases of serious breaches of professional conduct which are coming before the Disciplinary Committee. If this alarming increase does not stop it is clear that drastic measures will have to be taken sometime in the near future to curb it.

Why should we follow good professional practice?

But quite apart from legislation, there are ample sound reasons why every one of us should follow good professional practice. We depend for our livelihood on public support and confidence in all members of the profession. If this public confidence falls there are many others such as accountants, bankers, surveyors, estate agents and building societies eager to seize our business and reduce our turnover. As the public are generally unable, because of the complexity of our tasks, to make informed judgments on what we do for them, we must at all times be absolutely scrupulous if we are to obtain and retain their support and confidence.

Standards of professional practice must be seen as a discipline and as ethical rules and restrictions which we have imposed on ourselves, sometimes to our own personal disadvantage but always designed to establish our probity and competence in the eyes of the public.

Standards rather than detailed rules

I know that your Council is considering how best to set out your rules of professional conduct in your present stage of growth and development. Let me commend to you the view which we take in Scotland, even though it comes from a Scots law background of dealing with legal problems on the basis of principles of law rather than precedent. It works well for us and I suggest it would work for you also. Our Law Society has always set itself against written rules and believes that it is much better that a few general rules should be observed in the spirit. Too many written rules would merely encourage some lawyers to think that by finding loopholes in them - at which of course lawyers are adept - they are avoiding committing professional misconduct. We also believe, through bitter experience, that it would be unrealistic and undesirable to attempt to legislate by rule against all the acts or defaults of solicitors which could be imagined - lawyers are much too devious and inventive to be able to foresee everything they may conceivably do.

There is ample legal authority, Scots and English, to support such an approach. There is an English case which has stood for over a hundred years in which it was said -

"There is no standard of conduct to suit all cases, but the legal duties of a solicitor to his client are of two kinds: First, positive - that is, to advise him as to his rights and claims, and to prosecute the same by all legal means and methods; secondly, negative, which are no less clear, namely, to abstain from all acts contrary to his positive duties."
(Barber V. Stone, 18th February, 1881, 50 Law Journal QB 297)

Then there are a number of cases over the years which make it clear that the test of professional misconduct is whether the actings would be reasonably regarded as disgraceful or dishonourable by fellow professionals of good repute and competency. A court would therefore be very slow to interfere with the decision of a disciplinary committee in such a case. Whether or not the conduct complained of is a breach of rules or some other actings or omissions, the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is made.

(Allinson V. General Council of Medical Education 1894 1QB 750, 1891-4 All ER Rep 768; McEniff V. General Dental Council 1980 1 All ER 461; Sharp V. Council of Law Society of Scotland 1984 SLT 313)

There do not appear to be any reported decisions in East Africa on this point, but I have little doubt that the High Court here would follow a similar approach, especially in view of Section 62(1) of the Advocates Act (Cap.16) which includes "disgraceful or dishonourable conduct incompatible with the status of an advocate" in the meaning of the expression "professional misconduct", but does not limit it to that.

Our Practice Rules in Scotland are therefore rather like the fig leaf and cover the bare minimum - touting, unfair attraction of business, advertising, consultants, employment of disqualified solicitors and industrial action. In writing the handbook of professional practice too, we have concentrated on first principles simply expressed, with examples of specific instances only for illustration rather than attempting to deal exhaustively with every possible situation or misdemeanour which could be imagined. We hope that this makes the book more readable and thus gets the message of the main principles home more successfully, especially to the young lawyer.

IBA International Code of Ethics

Until you do produce an expanded exposition of your guide to professional conduct, you might consider making available to Kenyan advocates the International Code of Ethics adopted by the International Bar Association, of which your Law Society is a member. It is a very useful succinct statement, particularly for the newcomer, of the general principles by which we should conduct ourselves.

Lay representation in professional bodies

One of the changes in Scotland in recent years which is to the good is the introduction of lay representation at various levels

in the system for dealing with discipline and complaints against lawyers. This helps to reassure the public that such procedures involve independent scrutiny and are not mere whitewash with lawyers looking after their own kind, and also brings a welcome breath of fresh air to our deliberations.

Discipline Tribunal

Right at the top of the pyramid there is our Discipline Tribunal, which is established by statute as an independent body beholden neither to the Law Society nor to the Government, though its expenses are met by the Society. Its members are largely solicitors appointed by the Lord President of the Court of Session (our Chief Justice) on the recommendation of the Law Society as representatives of the profession throughout the country, but 4 out of the 14 members are lay members and this arrangement has worked well for almost 10 years. There are several advantages in the discipline of solicitors being separated in this way from their professional society and in particular it shows the public that lawyers are trying to deal fairly with such serious matter.

The Lay Observer

Then, in an intermediate role, again laid down by Act of Parliament, there is a Lay Observer appointed by the Secretary of State for Scotland to examine any written allegation made by a member of the public about the Law Society's treatment of a complaint against a solicitor, with power to obtain information from the Law Society and examine their files on the case. The Society have to consider any recommendation made by the Lay Observer and notify her of the action they have taken on it, but the strongest weapon of the Lay Observer is that of publicity in her annual report to the Secretary of State, which gets a great deal of Press attention. The vast majority of cases referred to the Lay Observer are either rejected by her or she upholds the Society's handling of the complaint, so that her intervention provides a useful safety valve when a dissatisfied complainer can see that the Society's actions are publicly vindicated.

Complaints against lawyers

This leads on naturally to complaints to the Law Society about solicitors, and here again just this year the Council of the Law Society of Scotland has included - on its own initiative - in its Complaints Committee 3 lay members appointed by the Secretary of State. As I advocated such an initiative over 10 years ago I can only welcome it.

To set the scene I should like to give you a few statistics. With almost 5000 solicitors in private practice in Scotland, the Law Society receives a slowly but steadily growing number of about 1000 complaints a year, of which one-quarter are reckoned to be justified. Of these, 60 will end in informal reprimands by the Society and a further 20 will become the subject of formal complaints to the Discipline Tribunal. The remainder will be resolved and the piece of business concluded satisfactorily through informal

correspondence by the Society, so reaching the result which was probably the aim of the complainer in raising it. To handle these complaints the Society employs 3 solicitors with wide experience, along with appropriate secretarial and office back-up. Very demanding work it is too, I used to supervise it and it needs slick turnover of a large volume of correspondence based on intimate knowledge of legal procedures and making fine judgments, while trying to be fair to both sides. You cannot afford to get it wrong, even once, or the public image of the profession will suffer greatly. The Law Society of England and Wales found this out to their cost recently when there was a public outcry over their mishandling of a valid complaint against one of their own Council members.

The whole operation costs my Society £27 or 600/- per member each year, but we are in no doubt that it is worth it. Our Society, like yours (see Section 4(e) of the Law Society of Kenya Act (Cap.18) has among its objects the promotion of the interests of the public in relation to the profession. But even if that were not so, it would be money well spent. It is essential that the public should feel that if they are dissatisfied with the performance of their lawyer their complaint will be impartially investigated and this applies not only to the cases which catch the headlines - "Another lawyer on theft charge" - but possibly even more to the small complaints which are still so important to the client concerned. That any client should have cause to complain about his lawyer is unfortunate, even if some complaints from awkward customers are always inevitable. Many complaints would never be made if the lawyer had dealt with the client's dissatisfaction in a thorough way at an early stage. So much of our work as lawyers rests on our reputation that it is vital that the causes of any complaints should be put right, or if the grievance is misconceived that the client should gain a proper understanding of the situation. This is of the greatest importance in establishing and maintaining the mutual trust that must form the fundamental basis of a lawyer's relationship with his clients: and few of us can afford to lose business by lack of it. So often there are good reasons for a hold-up, and delay is by far the largest cause for complaint, but clients have not been told about them. To quote a sentiment frequently expressed by clients -

"If only Mr. McTavish had replied to my letters and explained the position, I would have understood."

A lawyer's work is perplexing and confusing to the lay client and you have to work hard to keep him in the picture with reports which are attractive, presentable, readable and understandable.

For many years the Law Society of Scotland felt itself hamstrung in what I shall call cases of intermediate professional misconduct. An informal reprimand was adequate in minor breaches and a complaint to the Discipline Tribunal was necessary in serious offences, but in between the one sanction was too weak and the other too much like taking a sledgehammer to crack a nut, as well as running the risk of being thrown out by the Discipline Tribunal for insufficient grounds. These intermediate cases almost always involved delay and an impasse was reached with a cat and mouse game of correspondence but no progress being made with the client's piece of business. So, following

our English brethren, we obtained statutory powers for the Society in cases of undue delay to require an explanation and if this is not forthcoming to take over the papers and monies connected with the complaint and pass them to a reliable lawyer for completion. In similar circumstances there is also power to refuse a practising certificate or to issue one subject to conditions as to practice. Both these new powers have worked well and have allowed the Society to take concrete action to produce real results.

Professional negligence

One of the other common grounds of complaint amounts to an allegation of professional negligence. To date the British view is that negligence is not a matter for the Law Society unless it also involves professional misconduct. Negligence need not be misconduct, though if it is gross or aggravated negligence it maybe misconduct. My Society have always considered that the courts are the appropriate place to determine allegations of negligence and consequent compensation, but in the consumer society of today they are under very great pressure to become involved. It is very difficult for the complainer to draw a distinction between negligence and professional misconduct: after all he sees a mistake as a mistake and nothing more nor less. However, there have been two recent innovations in this field of negligence.

Troubleshooters

In one innovation, the Society has established a scheme of troubleshooters throughout the country, or solicitors of good standing who are prepared to act for clients who consider that they have suffered loss through the negligence of their previous lawyer. In its own quiet way, this scheme has been immensely successful in defusing much of the anger against negligent solicitors - and thus ill-will against the profession as a whole - by giving a sympathetic hearing followed by positive action resulting in compensation. The calibre of those chosen as troubleshooters has been such that they have not flinched from tackling difficult jobs and have successfully overcome any possible embarrassment about suing a local colleague. Very often clients are directed to a troubleshooter in a neighbouring town to make this easier.

Professional indemnity insurance

The second change affects all lawyers in private practice much more fundamentally and directly. Arising from the difficulty experienced by solicitors in obtaining adequate professional indemnity insurance cover at reasonable cost over a period of years in the 1960s and 1970s, the Law Society sought and obtained statutory powers to make it compulsory for Scottish solicitors to take out specified insurance to cover their professional liability. This then enabled the Society to establish a scheme with a single Master Policy taken out by the Society for members, which covers every solicitor in private practice, so providing extremely wide insurance cover within set but high limits of indemnity. The scheme has been running since 1978 and has undoubtedly been successful in that it has allowed every lawyer to obtain the widest and most beneficial cover, better than the average practitioner could get on the open market. It is one of the best concepts ever introduced by the Society in the public interest as the public are protected from loss arising from professional error.

Members pay according to their experience but no lawyer is refused insurance, however bad his claims record may be. Premiums are fixed as a result of the track record of the legal profession in Scotland and there is no rub-off due to lawyers being lumped together with architects or engineers where claims are bound to be high because of the high values of the buildings, bridges or ships which they construct.

While the scheme is believed to be the best option available, like most good things it costs a lot and it has to be said that premiums have soared and it is difficult, even with 500% loading of premiums for bad risks, to avoid the good boys with no claims (50% of the profession) paying for the naughty boys or the foolish virgins. In an increasingly complex framework of ever-changing law, it is all too easy for lawyers to make mistakes even in good faith, particularly where without adequate experience they do a one-off job in an unfamiliar field and sadly get it wrong.

To try to avoid or at least minimise the main areas of risk, and thus claims arising from negligence or incompetence, the Society is now laying great stress on lawyers following methods and systems described as risk management. These can be summarised as -

1. Keeping a double-diary system.
2. Proper use of bridging loans.
3. Awareness of the dangers inherent in acting for both parties in a transaction.
4. Proper accounting procedures.
5. Keeping a proper filing system.
6. Keeping full and accurate records of telephone conversations and meetings.
7. Recognising the risks of inexperienced lawyers practising in complex areas of law.
8. Knowing the problems arising from inadequate supervision of -assistants and staff.

Personal advertising

The most profound change of all came this year. As I mentioned earlier, the bar on personal advertising was lifted by the Law Society itself after clear indications that the change would if necessary be carried through by primary legislation: in this way the Society retained some control of the change. A solicitor is now entitled to advertise himself and his services at his place of business, in newspapers, magazines or journals, on radio or television or by direct mailing, brochures, pamphlets or circulars. However there are restrictions on this apparent freedom and advertisements may not refer to the quality of a lawyer's practice, or claim superiority over other solicitors or specialist knowledge of any area of practice, or refer to his volume of business or fee income, or bring the profession as a whole into disrepute. The Law Society still has power to prohibit any particular advertisement which contravenes the Practice Rule, and the rule against touting and any of the many forms of unfair attraction of business also remains.

With the introduction of individual advertising lawyers will have to be on guard against concentrating on the image as opposed to the reality, which could distract them from their fundamental task of giving a good and honest service. The situation of lawyer and client

is, like that of doctor and patient, a highly intimate and confidential personal relationship; and it is no accident that such a relationship is associated with a man of professional skill and integrity. A commercial product is much easier to test, though even in that area the need for consumer protection is increasingly recognised. However, it has to be said that to date there has been neither the volume nor the type of individual advertising which provoked the darkest fears of the profession.

Lawyers and strikes

A more minor development, but worth mentioning because it results from the changing nature of society, is the provision which has had to be made concerning solicitors taking part in strikes. Solicitors working for large employers, particularly local authorities and the government, found that they were being drawn in to striking increasingly frequently, generally against their wills. As much to give them formal protection when it would be professionally improper for them to strike as to give strikes official blessing, a Practice Rule was made in 1981 allowing industrial action by solicitors subject to their duties to the courts or Parliament or any personal professional obligations undertaken by them.

Misappropriation of client's money

I have not so far mentioned the vexed question of clients' monies and their misappropriation, which I know troubles you also. This is principally because it falls outside my theme: one, because in Scotland we are accustomed to dealing with solicitors' accounts as a separate matter from professional practice, and secondly as in this area our system has been running for many years and there has only been fine tuning in the last decade. But that does not stop some lawyers running off with their clients' funds, which regrettably seems part of human nature. There are several more fundamental truths in this battle -

- Firstly, many lawyers drift into using their clients' funds for their own purposes rather than setting out to do so deliberately, normally through muddle and badly kept books of account;
- Then, if a lawyer is determined to misappropriate his clients' monies he will always find some devious way to do so and cover his tracks, generally a new variant that has not been tried before. You cannot stop this but can only make it more difficult for him and easier for others to spot by having tight rules about accounts. To this end my Law Society has found that it pays handsome dividends to employ a team of accountants to make sure that the books of every lawyer are inspected at least once each year, and in suspect cases much more frequently with regular visits to their offices;
- The last fundamental truth is that however sophisticated the fraud, it will be discovered sooner or later - regrettably often only after the rogue lawyer has spent the proceeds or has left the country with them.

To preserve the good name of the profession in such cases and to compensate members of the public who suffer financial loss in these circumstances as a result of the dishonesty of a solicitor or his

employees, there has for many years been a Scottish Solicitors Guarantee Fund, with compulsory annual contributions varying from £25 to £50. This is not cheap and has no element of insurance: it is simply the good paying for the dishonesty of the bad to keep our collective reputation, but it has been found to be essential in taking the sting out of the considerable ill-will to the profession as a whole engendered by these frauds.

Public relations

A paper about the lawyer and the community would not be complete without a reference to the increasing role of public relations in the work of the Law Society of Scotland - I could hardly avoid it as my wife is their Secretary for Public and International Relations. Stemming from the realisation that it could only benefit lawyers as a profession to have more corporate contact with the public, the Society now spends almost £130,000 each year on public relations. This is done in many ways - producing leaflets explaining the services provided by lawyers; giving comments to the Press on legal matters of topical interest; providing speakers for television and radio programmes; inspiring television series featuring lawyers as the stars; talking to schools and other groups about the law; providing free legal advice, through a newspaper, for members of the public with legal problems but no lawyer of their own; organising a Wills Week to encourage the public to make wills; running competitions to stimulate interest in the law; producing pens, key fobs and golf tees bearing slogans such as "Everyone should have a family lawyer"; and mounting a corporate advertising campaign to publicise the profession as a whole. It can take several years to build up the right sort of rapport with the media, largely by personal contact, but all these ventures are worthwhile in their own ways as they help to dispel the mystique about the law and put a human face on the profession.

Conclusion: Sharing problems across continents

I hope this brief survey has given you some idea of what the future may hold for you in the field of professional ethics and practice and that in doing so it has been of interest. May I conclude by mentioning that I know that the Law Society of Scotland would welcome the chance to share with you their experiences of the problems in the hurly burly of the consumer society on any of the subjects I have touched on in this paper. For a long number of years there have been many links between lawyers in Scotland and in Kenya and our Society would be keen to reinforce them in a suitable way.
