"No . . . unless the suits were air-conditioned!" Certainly, there is more to rules of conduct and etiquette than meets the eye. They serve to maintain a certain mystified status about lawyers and lawyering that may otherwise be hard to preserve. They operate much as an ideological and economic instrument for the preservation of advocates' interests as a body of rules prescribing ethical standards for the good of the public. In meeting these two ends, it is important to maintain a balance between them. But that balance should be one that ensures that the interests of clients and the public at large are given paramount importance. For, if well constituted and applied, rules of ethics are an important element for any socially responsible body of professionals.

13. Concluding Remarks

It may be concluded that many of the rules of ethics deserve to be acclaimed, based as they are on a sense of public duty and responsibility. But some are clearly meant to operate solely with selfish regard for the profession or a segment of it. Admittedly, the largest part of the body of professional conduct and ethics consists of high moral rules and ethical standards. A study of the professional practice leaves one with a generally good impression with regard to the standard of care and concern advocates exhibit in their day to day dealings with their clients. As shown above, however, there is still much to be desired in respect of some of the rules of ethics. There is also the paradox that the strict observance of some of the rules results in an unfair treatment to some clients, and may not auger well with the profession's duty to help the disadvantaged in society.

It has been shown above that some rules of professional ethics and etiquette are a formidable obstacle that stands in the way of greater provision (in terms both of quantity as well as quality) of legal services in Tanzania. Some have the obvious effect of promoting protectionism, closing doors to competition (from lawyers and non-lawyers alike), limiting the spread of information about the availability of legal services, keeping the costs of legal services high, and restricting the number of persons who can afford to hire advocates.

It is clear that the legal regime governing discipline within the profession of the law needs to be re-examined. The profession should do away with the unnecessary restrictions pointed out above. It should also not be oblivious of the inadequacies inherent in its rules of professional conduct and disciplinary procedures as by law presently established.

CHAPTER SEVEN

Professional Conduct, Ethics and Discipline

"Every Advocate must discharge his duties to his client, the court, members of the public and his fellow members of the profession with honesty, candour and honour."

– Tanganyika Law Society.[1053]

"The Code of Honour of the legal profession is at once its most cherished possession and the most valued safeguard of the public . . . To maintain a perfect poise amidst the various and sometimes conflicting claims is no easy task."

– Lord Aitkin.[1054]

1. Introduction

To be accepted as a virtuous profession by the public, an occupation must be above the average in terms of its conduct and ethics. It is not enough merely to profess integrity and uprightness. Professionals must themselves command respect in order to be respected. Towards that end, the legal profession has devised a set of rules to govern advocates' relations *inter se*, as between them and their clients, and the rest of the society at large.

This Chapter sheds some light on some of the Rules of Ethics, and suggests the changes required. It will be shown that certain rules of ethics are unnecessarily restrictive. Among their unfavourable results is a small supply of, and consequent high costs for, legal services. Ironically, and contrary to the supposed objectives of ethical rules, some of them even result in lower standards of professional behaviour. They are thus partly to blame for the lower-than-expected performance of the legal profession.

In Tanzania, some of the rules are imposed by statute. But the bulk of them is self-imposed by the profession, through the Law Society. Most of the present rules of ethics are commendable. There are, nonetheless, two points that need to be made about them in the context of this work: First, as in most other jurisdictions, there are some remnants of outdated principles, while some rules are inappropriate in their nature and effect. Secondly, there are some very important matters which are not covered by the rules. Without them, the canons

[1053] Rule 37 (1) of the Rules of Professional Conduct and Etiquette of the Tanganyika Law Society.

[1054] Quoted by Chenge, A. (1995), *op. cit.*, at pp. 6-7.

of ethics of the legal profession can be seen as a mere declarations of good intentions but devoid of teeth and claws; a body of rules that covers a lot of unnecessary matters but fail to address some crucial aspects of professional conduct and ethics.[1055]

Another theme advanced here relates to the powers of the Judiciary over the private legal profession. In line with the argument in Chapter Five, this chapter will further demonstrate the influence the Judiciary enjoys over the practice of law in Tanzania. It will be shown that even though in principle the situation may not be objectionable, practical reality demands that there must be checks and balances, and that the process must be fair to everyone concerned.

PART I : PROFESSIONAL CONDUCT AND ETHICS

2. An Overview

2.1. The Legal Regime

The legal framework that governs professional conduct, ethics and etiquette of the practice of law in Tanzania Mainland is mainly contained in the following legislations: One, the Advocates Ordinance,[1056] and subsidiary legislations made thereunder,[1057] such as the Advocates (Disciplinary) Rules,[1058] the Advocates (Accounts) Regulations[1059] and the Rules of Professional Conduct and Etiquette of the Tanganyika Law Society; and two, the Notaries Public and Commissioner for Oaths Ordinance. For Zanzibar, the applicable law is contained in the Legal Practitioners Decree,[1060] the Legal Practitioners Rules[1061] and the Notaries Public Decree.[1062]

The Mainland's Advocates Ordinance, being the principal legislation, is concerned more with matters of general nature and importance. It provides, for instance, for the establishment of the Advocates Committee,[1063] which is the main disciplinary body for the profession.[1064] It sets down the procedure under which disciplinary action against an advocate may be conducted.[1065] It also creates certain prohibitions against unauthorised practices by persons who are not admitted as advocates, and against such acts as touting and unlawful

[1055] Due to space constraints, and for the avoidance of mere descriptive work, no attempt is made here to discuss all the particular rules of ethics.

[1056] Chapter 306 of the Revised Laws. Before 1992, the Act was known as the Advocates Ordinance, Chapter 341.

[1057] Under section 14 of the Advocates Ordinance, Cap. 341.

[1058] G.N. No. 135 of 1955.

[1059] G.N. No. 207 of 1956.

[1060] Cap. 28 of the Revised Laws of Zanzibar.

[1061] G.N. No. 166 of 1923, vol. 4 of 1934, and G.N. 239 of 1946.

[1062] Cap. 29 of the Revised Laws of Zanzibar.

[1063] Section 4 of the Advocates Ordinance, Cap 341.

[1064] See Part III of the Advocates Ordinance, Cap 341.

[1065] Part III of the Advocates Ordinance, Cap 341.

solicitation of business.[1066] Furthermore, the Act provides for the establishment of the Advocates Remuneration Committee,[1067] and for matters connected with the remuneration of advocates.[1068] These are expanded and further explained by the subsidiary legislations.

Zanzibar's principal legislation, the Legal Practitioners Decree, is not as extensive in the above matters as its Mainland counterpart. Most of its ethical provisions, therefore, are contained in subsidiary legislations mentioned above. Suffice it to say, however, that in the main, the legal position in Zanzibar regarding professional conduct, etiquette and ethics is similar to that on the Mainland. To all intents and purposes, therefore, the discussion that follows applies to both sides of the United Republic, unless the context requires otherwise.

2.2. The Scope of Analysis

It is not possible to make a comprehensive examination of the entire body of legal professional ethics applicable to Tanzanian advocates in one chapter. That requires a thesis of its own. Consequently, the discussion that follows is necessarily narrow, in that it concentrates more on those rules that are, for certain reasons, objectionable. I will only throw a glance at some of the other rules. My particular concern here is centred on rules that I believe to be contrary to the interest of clients and the public. The emphasis would thus be more on those rules of ethics which have had an adverse effect on the provision of legal services and the administration of justice in the country. The chapter will also provide further proof for the argument advanced in Chapter Four relating to restrictions against lawyers who are not yet admitted–an element which plays a major role in the unsatisfactory performance of most candidates wishing to enter private practice. The combined effect of these factors has had adverse consequences on the provision of legal services in the country.

2.3. A Closed Commodity in an Open Market

The legal profession has all along presented itself as an advocate of freedom. In fact, the profession thrives in a free market economy. Because of the monopoly they enjoy over the production of legal services, and the fact that their consumers are relatively unorganised, members of the Tanzanian Bar have operated in a market in which they have wielded considerable economic power. This monopoly has been detrimental to the interests of consumers and the public generally.

Like other professions that enjoy the benefit of a private market economy, the legal profession in Tanzania has sought nonetheless to exempt itself from the rigours of the open market. As Dicey puts it in emphasising the uniqueness

1066 Sections 46, 47 and 48 of the Advocates Ordinance, Cap 341.

1067 Section 49 of the Advocates Ordinance, Cap 341.

1068 Part VI of the Advocates Ordinance, Cap 341.

of the legal profession, the rules of etiquette on circuit could be "summed up under one law–though shalt not hug attorneys".[1069] Professions, the legal profession included, purport to be an enclave within capitalism. It is a safe haven which professionals believe they deserve because of their "uniqueness".[1070] Their monopoly assures them of immunity from the pressures of competition, and their capacity to restrain greed, even though they cannot eliminate it. But such insulation from the market, argues Abel, is a precarious achievement.[1071] It often operates against the interests of lawyers' clients and the public–the very same interests it is alleged to serve.

3. Categories of Ethics and Professional Misconduct

3.1. Misconduct: Definition and Classification

There is no statutory definition of the terms "misconduct" or "malpractice" in Tanzanian law. Black's Law Dictionary, however, defines misconduct as a transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, wilful in character, improper or wrong behaviour, delinquency, impropriety, mismanagement, offence, but not negligence or carelessness. The term "misconduct" when applied to an act of attorney implies "dishonest act or attempt to persuade court by use of deceptive or reprehensible methods."[1072]

One can classify the various types of professional misconduct or malpractices into two major groups, depending on which persons they regulate: those which seek to control the character of advocates (and thereby compel advocates to do or not to do certain things under certain circumstances), and those that prohibit non-advocates from doing certain things connected with legal practice. The effect of these categories, both in scope and substance, vary from one rule to another. Rules against malpractices can also be divided into the effects they have: Those aimed at ensuring that the public is protected from any bad behaviour on the part of advocates; and those that have the effect of maintaining the profession's monopoly over its market and its member's financial and economic health, usually at the expense of the public.

3.2. The Application of English Rules of Misconduct

For a long time, the Tanzania legal profession did not have its own code of professional conduct. The applicable rules, therefore, were those which applied in England. This position was recognised in a number of court decisions. In *Jafferali & Anor. v. Borrison & Anor.*,[1073] Bramble, J., said:

[1069] Quoted in Abel, R. (1988) at p. 91.
[1070] *Ibid.*, argues (at pp. 95-96), that sometimes they truly are unique.
[1071] *Ibid.*, at p. 96.
[1072] Black, Henry Campbell (1983): *Blacks Law Dictionary*, abridged 5th edition, St. Paul, Minn.: West Publishing Co., at p. 517.
[1073] [1971] E.A. 165.

> There has been no code of practice in Tanzania as far as I am aware and the practice as laid down by the General Council of the Bar in England has generally been adopted as shown by certain decided cases.[1074]

However, the Tanganyika Law Society has recently adopted rules of conduct and ethics. They are published as the Rules of Professional Conduct and Etiquette of the Tanganyika Law Society (hereinafter called the Rules of Professional Conduct and Etiquette).

This study has established, like Luckham's research in Ghana,[1075] that from the point of view of advocates themselves, the Rules of Professional Conduct and Etiquette can be justified by two major premises: The principle of the market place, under which lawyers' services are subjected to the forces of supply and demand like any other commodity; and the profession's responsibilities as guardians of justice and the Rule of Law. These two principles are capable, in their very nature, of being mutually contradictory. But they are more than that: Each set of rules is self-contradictory. As already argued, the legal profession is insulated from market forces. Within the profession's canons of ethics are rules that put to question and even negate the very ideals and principles upon which they are said to be based, i.e., the interests of clients and society. We now propose to discuss some of these rules.

4. Advertising and the Ethics of Self-Promotion

The Advocates Ordinance and the Rules of Professional Conduct and Etiquette prohibit employing any kind of methods of making one's services known to the public through the media, or such other means, referred to as advertising or self-promotion by advocates.[1076] An advocate may not, directly or indirectly, invite business in a way that may amount to advertising or touting.[1077] It is considered an indignified form of attracting business, and likened to advertising legal talents "like shopkeepers wares".[1078] The Rules of Professional Conduct and Etiquette provide, *inter alia*, that:

> No advocate may directly or indirectly apply for or seek instructions for professional business, or do or permit in the carrying on of his practice any act or thing which can be reasonably regarded as touting or advertising or as calculated to attract business unfairly.[1079]

[1074] His Lordship cited the cases of *Gandesha v. Killingi Coffee Estate & Anor* [1969] E.A. 299 and *Safi Seed Ltd. v. Ecta (Kenya) Ltd & Ors*, Civil Revision No. 1/1967, H.C.T., Dar es Salaam.

[1075] Luckham, R., (1981b), *op. cit.*, at p. 116.

[1076] See Johnstone, Q. and Hopson, D. (1967), *op. cit.*, at p. 129.

[1077] See *Re a Solicitor* [1945] KB 368, [1945] 1 All E.R. 445.

[1078] Harris, G.B., "Ethics of the Legal Profession, 1836-1908" (mimeo), 1955, quoted in Carlin, J.E. (1962): *Lawyers on their Own: A Study of Individual Practitioners in Chicago*, New Brunswick, N.J.: Rutgers University Press, at p. 156.

[1079] Rule 5 (a) (1) of the Rules of Professional Conduct and Etiquette.

4.1. The Extent of the Rule Against Advertising

The Rules of Professional Conduct and Etiquette are very elaborate on the issue of advertising. Clearly, it is one of the items that has enjoyed considerable attention from the profession. In its scope, the rule against advertising is wide. In Common Law, it embraces not only self-promotion in newspapers, magazines, etc., as is ordinarily understood in business. In respect of an advocate or a firm of advocates it covers a much wider area. It includes such acts as an over-description of oneself on a nameplate, the use of an ostentatious nameplate, or displaying a nameplate elsewhere than at one's place of business. It even embraces putting the names of one's clients on one's own headed papers.[1080] An advocate is also considered to be advertising if he lets his photograph be taken for publication in newspapers while wearing his gown.[1081]

4.2. The Relevance of Advertising: The Lawyer Visibility Problem

The rules against self-promotion appear to be outdated and inappropriate for present circumstances. In a small town, where every one knows every one else, this poses no problem. Watched from infancy to adulthood, the lawyer is a usually a "home town boy", familiar to everybody. Word passes around very quickly. One does not really need to make announcements about one's services. But applying such principles to a large city,[1082] such as Dar es Salaam with its 1.3 million inhabitants, will have devastating results.

Thus, the Tanzanian advocate operates in what has been called an invisible market,[1083] where the public does not really know what is on offer in the legal field. This may be quite beneficial to one section of the profession: the old guards who have already established and built a name for themselves.[1084] On the other side are those constituting the younger generation of lawyers who find it hard to penetrate the upper echelons of the profession's business. But the biggest loser here is the lawyer's clients, potential clients, and the public as a whole. They will be completely ignorant of the kind of professional advisor in whose hands they are putting their lives, rights and freedoms. As Karl Llewellyn puts it:

1080 Cf. Graham-Green, G.J. (1981), *op. cit.*, at p. 325.

1081 Rule 4 of the Rules of Professional Conduct and Etiquette of the Tanganyika Law Society (hereinafter the Rules of Professional Conduct and Etiquette).

1082 Llewellyn, Karl, as quoted in Carlin, J.E. (1962), *op. cit.*, at p. 156.

1083 *Ibid.*, at p. 156. Carlin uses the term with reference to the United States.

1084 One senior lawyer told me in an interview: "The secret of success in this business, young man, is not how to attract clients; it's how to keep them!" As for German law, which as a general rule does not allow attorneys to advertise (section 60 of the *Richtlinien über Fragen der Ausübung des Rechtsanwaltsberufs*–Guidelines on Questions Relating to the Practice of the Profession of Attorneys–of 2nd/3rd May, 1963), nonetheless allows those who are just commencing practice to inform the public of this fact, and provide information about their location, telephone numbers, etc.: Cohn, E.J. (1961) *op. cit.*, at pp. 107-108.

> If a small client does not know to whom to go, he does his pondering through his brain–they over-reach, they over-charge, they are not even to be trusted. This means, in result, undone legal business. A-plenty. Or it means chancing it. If the client chances it, he very truly chances it: The conditions of legal business make it no simple thing to reach into the grab-bag and pull out a lawyer who is able, experienced in the case at hand, not too taken up with other matters, and also reasonable in fees.[1085]

The rule against advertising also contributes to the lowering of the quality of legal work. Some lawyers do have specialised knowledge of certain types of cases or a particular branch of the law. But the rule makes specialist lawyers insufficiently visible to those in need of their services.[1086] It is not easy for the public to know about their respective abilities. People are often unaware of the specialities and relative expertise of available lawyers. Consequently, they find it difficult to make an intelligent choice of a suitable lawyer for a particular case or even their general requirements. As a result, too much work goes to those less competent to do it. The quality of legal services is thus affected. And potential clients find themselves falling prey to touts and other solicitations, and are subjected to a process of trial and error–which some of them may never get a second chance to put right.

4.3. Curing the Lawyer Visibility Problem

Advertising can be a significant cure of the serious lawyer visibility problem. Much of the lay public when in need of lawyers have neither the knowledge, nor the trustworthy referral contacts, to make rational choices from among available lawyers. Yet in large measure, lawyers' efforts to alleviate this situation by self-promotion are proscribed by legal and professional rules of conduct. Some lawyers are willing to violate these rules. But such practices create problems of their own. The violators acquire a degree of monopoly privilege–an undue advantage over those who choose to remain ethically pure and honest. Consequently, the dishonest get a lot of the work in certain fields, which turn out to be the most lucrative. The temptation for others to follow their example is thereby increased. Persistent and known violations also tarnish the reputation of the legal profession. Violations imply the profession's disregard of its own standards, which it claims are in the public interest. Moreover, failure to enforce the rules relating to advertisement makes it more difficult for the profession to enforce other rules of ethics, because efforts at compliance are met with damaging accusations of hypocrisy and selective enforcement.[1087]

In England, solicitors were all along not allowed to advertise. But the rule was found to be very inappropriate. Since 1984, therefore, they can advertise in limited form. They can do so in the press, on the radio (but not on Television)

1085 Llewellyn, Karl, as quoted in Carlin, J.E. (1962), *op. cit.*, at p. 156.

1086 See also Johnstone, Q. and Hopson, D. (1967), *op. cit.*, at p. 8.

1087 Cf. Carlin, J.E., and Howard (1965), *op. cit.*, at p. 156.

by direct mail to present or former clients or in response to inquiries.[1088] Accountants are also allowed to advertise. In Tanzania, no category of professionals is allowed to advertise, including accountants, engineers, valuers and quantity surveyors, etc.[1089]

As for English barristers, who are still not allowed to advertise, the existence of the two branches of the profession makes matters easier. Barristers are instructed only by solicitors. It is therefore easier for solicitors to identify which barrister is knowledgeable in a certain area. Because their direct clients are professional men with whom they already have direct contact,[1090] barristers do not really need to be known to the public. But that is not the case in a fused profession as is the case in Tanzania, where practitioners have direct contact with the ultimate consumers of their services. Advertisement thus remains the only effective means by which the users of legal services could be informed of the state of the market for those services.

As in presumably any other country, new advocates in Tanzania need to make themselves known. Advertising is the most effective way of doing this. Indeed, with such a large, unsatisfied market, one wonders as to why these restrictive attitudes still persist. Perhaps it is because of the ease with which its established members control the market that the Law Society does not seem enthusiastic about the right to advertise. But, in doing this, the Society is denying its young members a chance to let themselves known to the public and to make a smooth take-off in their early practice. In Germany, for instance, new attorneys are allowed to notify the public that they are commencing practice and give their addresses, telephone numbers, and such other important information.[1091]

The Swahili saying that says: "a good thing sells itself, a bad thing advertises itself"[1092] aptly sums up the concern of the legal profession on the question of advertising. It is argued that if advocates were to be allowed to advertise their services, it would be degrading and shameful to the profession. But this is no reason why, for instance, sober advertisements in a reputable media should not be allowed. It may even be done by the Law Society itself, by publishing an annual or periodical "Law List" which will only give the necessary information about advocates and their business, addresses and locations, their specialisations (if any), etc. This way, the public will have lesser difficulties finding legal counsel when required. Such form of advertising may also help inform potential clients on specialisation, fees, and such other important matters.

[1088] Abel, R. (1988), *op. cit.*, at p. 191.

[1089] See, for instance, the Architects, Quantity Surveyors and Building Contractors (Registration) Act, No. 35 of 1972 and the Auditors and Accountants (Registration) Act, No. 33 of 1972.

[1090] Abel, R. (1988), *op. cit.*, at p. 92.

[1091] Cohn, E.J. (1961), *loc. cit.*, at pp. 107-108.

[1092] Translation by Farsy, S.S. (1993), *Swahili Sayings From Zanzibar*, Nairobi: Kenya Literature Bureau, at p. 7. Cf. "Good wine needs no bush".

4.4. Touting and Unauthorised Solicitation

Touting is the use of intermediaries (called "touts") to bring or attract clients to oneself. Apart from the provisions in the Rules of Professional Conduct and Etiquette as set out above, touting is prohibited by section 47 of the Advocates Ordinance, which provides:

> Any person who, on behalf of any advocate, or for his own account, acts as a tout shall be liable to a fine not exceeding one thousand shillings and to imprisonment for a term not exceeding six months.[1093]

Touting is, therefore, not only a professional offence. It is also criminal. In fact, touts are regarded with such aversion among legal circles that the law gives the Chief Justice powers to exclude them from the precincts of the courts.[1094] In one case, an aspiring advocate was removed from the list of applicants for enrolment after allegations of touting were levelled against him. He had to wait for an entire year before being admitted.[1095] The reasons given against touting have been two-fold: One, prohibiting touting protects the public against the more unscrupulous members of the profession and their hustling intermediaries;[1096] secondly, it strengthens the rule against under-cutting by making it a professional offence to reduce fees and exercising other types of "unfair competition" by less established lawyers *vis á vis* their more established colleagues.

Payment for touting, however, need not necessarily be monetary. It may be in a form other than direct commissions or payment for business brought. The mere good relations that a person may establish with an advocate, especially where that person is somehow involved in legal work, is a form of payment. Court clerks, and even advocates' clerks, for instance, do engage in the practice of luring clients to certain advocates, in the hope of some favour in the future from the advocate concerned. Some advocates have been getting clients even from Magistrates and Judges, although most advocates would rather not have such clients. For, the references are sometimes accompanied by "requests" for lower-than-usual fees, or even free services.

A distinction can be drawn, of course, between touting *strictu sensu*, which is done at a fee or a share in the proceeds, and "legitimate" uses of intermediaries. Here again, as Luckham argues, the distinction is much blurred, and is therefore somewhat theoretical in practice.[1097] Probably for this reason, the law in Tanzania does not make any distinction between touting for payment and

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1093 A prohibition with similar effects is imposed in Zanzibar under section 9 (4) and (5) of the Legal Practitioners Decree, Cap 28, and the Courts (Prevention of Touting) Rules, Cap 3.

1094 Section 46 of the Advocates Ordinance, Cap 341.

1095 File for Mr. C.K. Semgalawe, Office of the Registrar of the High Court of Tanzania, Dar es Salaam. The allegations were, however, subsequently dropped for lack of proof, and the candidate was duly admitted.

1096 Luckham, R. (1981b), *op. cit.*, at p. 116.

1097 *Ibid.*, at p. 116.

touting without payment.[1098] One may be guilty of touting even if one receives no payment at all.

4.5. Advertisement and Specialisation

Tanzanian lawyers are allowed to specialise. And a few of them indicate areas of specialisation on their letter-heads. But the Rules of Professional Conduct and Etiquette of the Tanganyika Law Society are silent about whether advocates may do so.[1099] However, as we have already seen, there is simply no specialisation as such among private practitioners.[1100] And most of those who indicate specialisations are in fact no specialists in the strict sense of the word, i.e., that they work mostly in the indicated areas of the law. They only use it as a form of attracting clients, especially big companies and businessmen. This appears to be the case because not a single advocate has indicated on his headed paper as being a specialist in criminal law, which is considered to be a not-so-lucrative area of practice.[1101]

4.6. The Realities of Self-Promotion

In reality, touting and solicitation is practised frequently in Tanzania. Many of the advocates interviewed candidly admitted having handled at least one case involving touting, even though most of them said they have never paid anyone for bringing clients to them. In any case, however, the rule against touting is largely unrealistic in the Tanzanian context. Not only is it honoured more in breach than in observance, its existence (especially when coupled with restrictions against advertising) also weakens some of the fundamental principles of justice and fairness.

Faced with such strict rules on their right to make their availability known, some advocates use other means of attracting clients. Some of these are within

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[1098] See Sections 46, 47 and 48 of the Advocates Ordinance, Cap 341.

[1099] A wide interpretation of the proviso to rule 5 (e) (iii) of the Rules of Ethics appears to allow such a practice. It states: "Where an advocate . . . possesses an academic distinction or a professional qualification additional to that by virtue of which he was admitted as an advocate he may indicate, in the manner and style commonly adopted, that he possesses such distinction or qualification personally." However, this does not include adding to or altering the title "advocate" as one advocate had purported to do by calling himself an "International Advocate". Mr. Justice Kyando was faced with that situation in *Mbaraka Salum v. The Editor, Watu Magazine & 3 Others*, Civil Case No. 66 of 1993, H.C.T., Dar es Salaam, and he said: " . . . I deplore in the strongest possible terms the use of the title 'International Advocate' [for it is] a title which is alien . . . to our legal profession . . . ." In Germany, an attorney can add a distinction to his official title only after he has obtained the approval of the Federal Chamber of Attorneys (*Bundesrechtsanwaltskammer*, in short BRAK): Section 69 of the *Richtlinien über Fragen der Ausübung des Rechtsanwaltsberufs*–Guidelines on Questions Relating to the Practice of the Profession of Attorneys–of 2nd/3rd May, 1963).

[1100] Item 6, Chapter Six, *supra*.

[1101] Before the introduction of government-sponsored legal aid schemes in England, criminal work was estimated to represent only 10% of the income of barristers: See Abel-Smith and Stevens (1967), *op. cit.*, at p. 32.

the bounds of professional ethics, some are on the borderline, and some obviously inconsistent with the present rules of ethics. There are those who advertise through foreign magazines and "Law Lists"; there are those who try to make sure that their cases are reported in the newspapers–especially by taking cases involving emotional public interest. Some of them accept very low fees or none at all in such cases just to get the opportunity to have their names appear on front pages. This has become even more common now that there is a proliferation of private newspapers in the country. Criminal cases get more interest from the media than civil cases. That is why advocates who take up criminal cases are better known than those who specialise in civil cases. Some take advantage of opportunities like liquidation and receivership procedures to have their names appear in the papers.[1102]

Another form of attracting business is to purchase favours from such personnel as court clerks. An occasional tip or gratuity of a few hundred shillings to a court clerk may bring a good client to a lawyer's office.[1103] The realities show, therefore, that self-promotion by way of touting and, perhaps in a lesser degree and more indirectly, of advertising, is not uncommon. Of course, the mere breach of a prohibitive rule or its non-enforceability is not, in itself, sufficient ground for it to be abandoned. Other strong reasons must exist to necessitate such a measure.

4.7. The Lesser of Two "Evils"

One of the major problems that people with legal problems face is how to find a lawyer. Touts and other intermediaries may help in making the services of lawyers known and thus avail those services to a greater section of the population than would otherwise be possible.[1104] It has been argued, rightly so in my opinion, that the right to be informed of the availability of legal services, is implied in the right to free speech, which is protected by the Constitution.[1105] Hence, the public has the right to be informed of the availability of such services where one is prepared to pay for them.[1106] Through touting, and especially

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1102 I have heard claims that some professionals may put a small notice in a newspaper on the loss of, say, a brief case, in order to have their names appear in newspapers, but this allegation has not been made in respect of advocates.

1103 This situation is not uncommon in other countries. For an account of the US position, see Carlin, J.E. (1962), *op. cit.*, at p. 159-160.

1104 Luckham R. (1981b), *op. cit.*, p. 116.

1105 Article 18 of the 1977 Union Constitution. In recognising the right to be informed, Mwalusanya J., agreed with Shivji that the right to information, or the right to know, was implicit in the right to freedom of expression: See *Khassim Manywele v. R., op. cit.*, at pp. 17-18 of the typed judgment, quoting Shivji, Issa, G., in a Foreword to Ndimara Tegamwage, *Who Tells the Truth in Tanzania* (1990): Dar es Salaam: Tausi Publishers Ltd. Prof. Shivji had cited the Indian case of *Gupta v. Union of India* (1982) S.C. 149, per Justice Bhagwati. See also *Visuvalingaa v. Liyanage* (1984) 2 Sri.L.R. Part I at p. 123.

1106 *Ibid.* In this respect, see particularly sub-Article (2).

advertising,[1107] a person may be better informed of the kind of advocates that are available, their areas of specialisation and expertise, etc.

It must therefore be admitted that despite the advantages argued above, touting may be the lesser preferred medium of information compared to advertising. Touting is capable of being quite undesirable if left unchecked. This may well be the result if it is allowed to operate freely. But so long as there are rules against advertising, touting will continue to flourish. It is the one less likely to come out in the open. It is therefore submitted that it is important that the public is given reasonable opportunity to be informed, through advertising, of the availability of legal services and advocates' specialisations, if any. Only then can touting be effectively tackled, and the rules against the practice be rendered capable of being respected.

The use of indirect ways of advertising such as those mentioned above are a direct result of the restrictions on self-promotion. Although most advocates may not be doing this deliberately as a way of attracting clients, they certainly benefit from such public exposures. On the other hand, there are those who do not indulge in such indirect means of self-promotion–a factor which gives an unfair advantage to those who do.

5. Monopoly and Restrictions Against Non-Advocates

5.1. Restrictions on Unqualified Persons

The law further makes several provisions restricting the actions of persons, referred to in law as "unqualified persons",[1108] to act as advocates. An unqualified person is any person who is not enrolled as an advocate or, being enrolled, does not have in force a Practising Certificate.[1109] It therefore includes unadmitted persons, those subject to suspensions or strikings-off, as well as body corporates.[1110] The restrictions include rules against appearing in court, pleading on behalf of a party to a case,[1111] pretending to be an advocate,[1112] or preparing legal documents.[1113] The rules, of course, do not apply to persons who, although not enrolled, act as advocates by virtue of their offices, as stipulated in section 3 of the Advocates Ordinance, so long as they act within the four corners of their public employment.

1107 In England, barristers have always resisted attempts to allow advertising. This position was unanimously and vehemently reiterated by the Northern Circuit in March, 1986. See: 1 (3) Counsel 8, Easter Term 1986.

1108 See section 39 (1) of the Advocates Ordinance, Cap 341.

1109 In Zanzibar, the exclusion of non-practising advocates is not expressly mentioned in law, although it can be inferred: See Chapter Eight, *infra*.

1110 Section 45 of the Advocates Ordinance, Cap 341.

1111 Section 41 (1) of the Advocates Ordinance, Cap 341. On the issue of representation by non-advocates, see discussion in item 6.3., Chapter Four, *supra*.

1112 Section 42 of the Advocates Ordinance, Cap 341.

1113 Section 43 (1) of the Advocates Ordinance Cap 341.

In addition to prohibiting non-advocates from enjoying the fruits of legal practice, the law imposes restrictions against persons who are not advocates from even conducting themselves as advocates. It is an offence[1114] for any person who is not qualified as an advocate to wilfully pretend to be or to take or use any name, title, addition, or description that he is qualified, or recognised by law as qualified, to act as an advocate.[1115] The penalties to which an offender of these rules may be subjected include denial of costs incurred,[1116] fines,[1117] and conviction for contempt of court.[1118]

5.2. Rules Against Remunerating the Unqualified

The law thus creates several limitations in the way of anyone who, being not an advocate, seeks to act as an advocate in any proceedings, or to draw and prepare documents which only an advocate is allowed to prepare.[1119] Section 43 (1) of the Advocates Ordinance makes it an offence for any unqualified person, in expectation of a fee, gain or reward, either directly or indirectly, to draw or prepare any instrument relating to movable or immovable property, any legal proceeding,[1120] the formation of any limited liability company,[1121] or the making of any deed of partnership or its dissolution.[1122] A similar provision applies in Zanzibar.[1123] Also, under the Notaries Public and Commissioners for Oaths Act, 1964, any person who, not being entitled to practise or act as a commissioner for oaths or notary public, purports to act as such, is guilty of an offence.[1124]

The scope of these provisions extend even to law graduates who are not yet enrolled. As we have seen, the prohibitions are backed up by criminal and disciplinary sanctions. Advocates themselves are also restricted. For instance, it is an offence for an advocate to assist an unadmitted person, in any way or manner whatsoever, in the preparation of such documents.[1125] This latter

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1114 Section 42 of the Advocates Ordinance, Cap 341.

1115 Section 41 of the Advocates Ordinance, Cap 341.

1116 *Ibid.*

1117 Sections 41 (2), 43 (1) and 45 of the Advocates Ordinance, Cap 341.

1118 Section 41 (2) of the Advocates Ordinance, Cap 341.

1119 Section 43 of the Advocates Ordinance, Cap 341. These include all legal documents with the exception of wills and testamentary instruments, an agreement under hand only which does not and is not intended to operate as a deed under section 6 (2) of the Land (Law of Property and Conveyancing) Ordinance, Cap 114, a letter or power of attorney, and a transfer of stock or shares containing no trust or limitation thereof: See section 43 (3) of the Advocates Ordinance, Cap 341.

1120 Subsection (1) (a) of section 43 of the Advocates Ordinance, Cap 341.

1121 Subsection (1) (b) *ibid.* See also Chapter Three, *supra.*

1122 Subsection (1) (c) of section 43, Cap 341.

1123 Section 3 of the Legal Practitioners Decree, Cap 28. However, the Zanzibar provision is even stricter, as will be seen in Chapter Eight, item 3.9.1.

1124 Section 6 (1) of the Notaries Public and Commissioners for Oaths Act, 1964.

1125 It would appear that this rule does not cover persons who are entitled to practice in other countries with whom advocates may even remunerate by way of a share in fees for work prohibition against advocates assisting non-admitted persons, therefore, extends to any person who performs the task of an advocate and acts as such, whether or not he is paid for so acting. Advocates are also prohibited from remunerating unadmitted persons by way of a share in the fee or charge for legal services.[1126]

The above prohibitions, which do not make any distinction between lay persons and lawyers who are not yet admitted,[1127] have negative effects on the latter's practical training. Legally speaking, they cannot understudy their admitted colleagues and are thus left to wander about in the wilderness. The restrictions, therefore, contribute to the already wide gap that exists right at the core of the country's system of legal education. They also have the effect of increasing the occasions when it may be necessary to use the services of an advocate, since non-advocates are prevented from offering even some of the less sophisticated services. This in turn increases the demand for professional services, which are, as we have seen in Chapter Four, very much in short supply in Tanzania.

5.3. The Rule of Exclusion

The Rules of Professional Conduct and Etiquette also prohibit lawyers from forming partnerships or even sharing an office with non-advocates or other professionals.[1128] This Rule also has its undesirable consequences. A client who, for instance, needs advice on taxation, may require information about both the *legal* as well as the *financial* aspects of his problem. If he could find a firm of lawyers and accountants or tax consultants, he could have instructed this one firm and pay one bill. Even though there would have been two items, it is reasonable to expect that the costs would be lower because of the advantages of economies of scale, etc. But the ethics of the lawyer's profession do not allow this.[1129]

The reason given for the rule is that sharing of offices will lead to unfair attraction of business, and compromise the advocate's independence. But no such danger has been apprehended in other countries, especially with regard to tax consultants.[1130] Moreover, similar arguments can be given for law firms, where lawyers work as a team. Also, the rule clearly does not help at all in the minimisation of costs. To the contrary, it ensures that costs are kept high, to the detriment of the public. It is one of the rules which simply helps to maintain, as Weberian theorists argue,[1131] the high prestige of the legal profession. This is

done. See, for similar position in England and Wales, *The Law Society Guide to the Professional Conduct of Solicitors*, 1974, at pp. 114-117.

1126 Rule 32 of the Rules of Professional Conduct and Etiquette.

1127 However, see Chapter Five, footnote 796, *supra*, on the new requirement that applicants for admission to the Roll must do six months of articles with a practising advocate.

1128 *Ibid.*

1129 Rule 8 (b) of the Rules of Conduct and Etiquette.

1130 In Germany, for instance, attorneys are allowed to share offices with tax consultants: BGH E 49, 244. See also Karl, F., (1972), *op. cit.*, at p. 57.

1131 See "Introduction" in Abel, R., (1989), *op. cit.*, at p. 2.

what prompted one hypothetical layperson to remark: "The lawyer is more concerned about the welfare of other lawyers than the welfare of me and others like me."[1132]

6. The Ethics of Costs and Remuneration

6.1. The Remuneration Rules

The Advocates Ordinance provides for the formation of the Advocates Remuneration Committee to be elected by the Law Society.[1133] The Committee or the Chief Justice may make orders providing for the remuneration of advocates in the various services they offer to their clients.[1134] The law provides for taxation of fees and costs, whereby the court can determine the appropriate fee for any work done by an advocate.[1135] But this procedure is rarely used, and only in cases where an advocate who has won a case seeks for payment of fees from the losing party. I have not found any instance in which the procedure for taxation has been used in non-contentious matters.

Furthermore, on the face of it, the law seems to harbour potential conflict between the Remuneration Committee and the Chief Justice. The use of the word "or" would mean that any of the two can make orders with regard to the remuneration of advocates. However, such conflict is avoided by placing the final say on the promulgation of Remuneration Rules on the President of the United Republic.[1136] So far, there has been no conflict between the Remuneration Committee and the Chief Justice. This is possibly because–considering their practical irrelevance–the present remuneration rules are of little significance, as we shall soon see. Their practical utility has therefore been greatly diminished. Also, it has been the practice of the Committee to confine itself to making recommendations, leaving to the Chief Justice the role of making the final decision before the Rules can be sent to the State President.[1137]

The fees have been based mainly on an *ad volerem* scale. However, certain items are chargeable on the basis of "folios" which are determined by the lengths of documents. Advocates are not allowed to agree or accept

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1132 Brown, L.M. (1986), *op. cit.*, at p. 128.

1133 Section 49 (1) of the Advocates Ordinance, Cap. 341. The Committee's powers are confined to costs in all courts where advocates are given audience with the exception of the Court of Appeal, where the relevant provisions are contained in the 3rd Schedule to the Tanzania Court of Appeal Rules. The Rules are made by the Chief Justice pursuant to section 11 of the Appellate Jurisdiction Act, 1979. Even though I do not make reference to the Court of Appeal Rules on matters of remuneration, the arguments made here in relation to scale of fees are basically true in respect of the Court of Appeal as well.

1134 Section 49 (2) *Ibid.*

1135 Part VI of the Advocates Ordinance, Cap 341.

1136 Section 49 (3) of the Advocates Ordinance, Cap 341.

1137 This appeared to be the approach of the Chairman of the Remuneration Committee when he presented his Report at the Annual General Meeting of the Law Society at Arusha on 28th January, 1995.

remuneration above that which is provided by the Remuneration Rules.[1138] However, this rule is somewhat watered down by other rules[1139] under which, as between client and advocate,[1140] additional remuneration may be allowed where a job requires and receives exceptional dispatch,[1141] or where it is of exceptional importance or unusual complexity.[1142] Judges of the High Court are empowered to certify that the costs are to be taxed on a higher scale than that provided for in the Rules.[1143] In one extreme instance, an advocate filed a Bill of Costs amounting to TShs. 3 billion,[1144] (about US $ 6.5m).[1145] In fact, if there is any rule of conduct that is flouted more than any other by legal practitioners in Tanzania, it is the law against over-charging. This is one example where the rule has become the exception, and the exception has become the rule.

Thus, if the client agrees with his advocate, it is possible to set their own mutually agreed fee for a particular job. Most advocates have attributed their non-compliance with the maximum rates of remuneration to the fact that, as one prominent member of the Tanganyika Law Society put it, the rates are simply not "useable",[1146] meaning that they are utterly out-dated, out of touch with reality,[1147] and largely incoherent. The following scale of charges set by the Remuneration Rules will illustrate the point:

[1138] Rule 12 of the Advocates Remuneration and Taxation of Costs Rules, 1991 (G.N. No. 515 of 6 December , 1991), states that "no advocate shall agree or accept remuneration more than that provided by these Rules."

[1139] Rule 13 and 14 of the Advocates Remuneration and Taxation of Costs Rules, 1991.

[1140] Except under special circumstances can it be allowed as against a third party: See Rule 13 (2) of the Advocates Remuneration and Taxation of Costs Rules, 1991.

[1141] Rule 13 (1) of the Advocates Remuneration and Taxation of Costs Rules, 1991.

[1142] Rule 14 of the Advocates Remuneration and Taxation of Costs Rules, 1991.

[1143] Rules 45 and 69 of the Advocates Remuneration and Taxation of Costs Rules, 1991.

[1144] See the *Daily News* (Tanzania), 11 October, 1993, p. 2. The Bill of Costs was a result of the decision of the Court of Appeal in Civil Application No. 18 of 1993, in which it ruled against the plaintiff/applicant in *Transport Equipment Ltd. vs. Devram P. Valambia* (application for review of the decision in Civil Reference No. 7 of 1992, C.A.T., Dar es Salaam).

[1145] Exchange rate is based on the *Bureau de Change* rate as at 11th October, 1993.

[1146] The Chairman of the Remuneration Committee of the Tanganyika Law Society, at the Annual General Meeting of the Society, Arusha, 28th January 1995.

[1147] Cf. Ismail, M.A. (1994), *op. cit.*, at p. 3.

TABLE F : SCALE OF CHARGES ON SALE, PURCHASES AND MORTGAGES

Vendor's Advocate:	**Scale Fees**
(i) For negotiating a sale of immovable property by private contract	3% of the subject matter
(ii) For deducing title to immovable and perusing and completing conveyance (including preparation of contract of conditions of sale, if any) . . . . Between 1 million - 3 million	3% of the subject matter

Source: Extract from Schedule I of the Advocates Remuneration and Taxation of Costs Rules, 1991.

These scales relate to non-contentious matters regarding a property valued at TShs. 3 million, as extracted from Schedule I of the Advocates Remuneration and Taxation of Costs Rules, 1991. The purchaser's advocate's fees are the same as above. In respect of contentious matters, the Rules provide that where the property's value is TShs. 3 million, an advocate may charge up to 3% of the value of the subject matter. Hence, if the dispute relates to a house worth 3m/-, the fee should be no more than TShs. 90,000/-. On the other hand, a transaction involving the sale of the house would entitle the advocate to a total of 6% of the value (i.e. TShs. 180,000/-). If the same advocate acts for both seller and buyer, he will be entitled to 3% in addition to the initial 6% of the value of the house.[1148] That would add up to 9% (i.e. TShs. 270,000/-) as his total remuneration. Most advocates estimate that litigating the client's case would require at least 10 times more time and professional input than the sale. Yet the rules allow for only one-third of what an advocate may charge for the much simpler sale transaction.

The situation here is not only illogical; it also leaves so much room for unfairness to both parties. In the first instance, the advocate must not only prepare and file the necessary papers in court, but must also appear on his client's behalf in court. This would of course entail its consequential preparatory work, etc. It undoubtedly requires much greater expenditure of time and skill and a higher degree of professional care than where he only has to conduct a search, prepare a few pages of paper work, negotiate and arrange for a transfer. Most likely the paperwork may simply be a page or two of a standard form contract. Why then should the latter be allowed better remuneration defies all reason.

1148 Rule 31 of the Advocates Remuneration and Taxation of Costs Rules, 1991.

Furthermore, the advocate may agree with his client on the fee payable, in both contentious[1149] and non-contentious business.[1150] This provision is double-edged. In as far as it allows for mutual agreements between advocates and clients, it makes it possible for them to agree on any amount of remuneration, whether or not it is within the prescribed scales. However, when read together with the rule prohibiting agreement for fees higher than those prescribed, it would appear that the agreement can only be for a fee which is less than that prescribed. However, because the Remuneration Rules are part of a subsidiary legislation, many advocates believe that the Rules should be interpreted subject to the provisions of the parent statute. Hence, the right to enter into a mutual agreement is the main escape route invoked by advocates when faced with the allegation of excessive fees. Since the Remuneration Rules are practically unenforceable, they do not see why they should not apply the exception which they believe the law provides.

It is thus recommended that the law should make the position on this matter clear. The preferred situation would be to adopt more practical and "useable" Remuneration Rules, accompanied by the incorporation of the prohibition against over-charging into the Advocates Ordinance. When that is done, measures should be taken to ensure that the law is enforced.

6.2. Undercutting

Undercutting is the charging of fees and remuneration at a rate which is lower than that set out in the Remuneration Rules. It is usually done in transactions where the prescribed rates are unrealistically high, especially in respect of conveyances. It may very well be argued that the provisions of sections 53 and 54 were meant to enable advocates and clients to agree on fees which are lower than those set out in the Remuneration Rules. In reality, however, they are applied to enable advocates to do exactly the opposite. For, they also do not expressly prohibit advocates from agreeing to accept higher remuneration. But such a provision exists in the Remuneration Rules.[1151]

An examination of the law on undercutting may at first confuse the analyst. The apparently favourable purpose of the two provisions quoted above is defeated by another provision in the Rules of Professional Conduct and Etiquette under which advocates are prohibited from holding themselves out as being prepared to do business at less than the scales prescribed by the Remuneration Rules.[1152] In short, the law says undercutting should not be made

1149 Section 54 of the Advocates Ordinance.

1150 Section 53, *ibid.* The agreement is required to be in writing, but this requirement is rarely complied with in practice. In Germany, a written agreement is required where fees agreed are higher than the statutory fees: See Kötz, H. (1985): "The Administration of Justice" in Horn, N., Kötz, H. and Leser, H.G., *German Private and Commercial Law: An Introduction*, London: University Press, at p. 43.

1151 Rule 12 of the Advocates Remuneration and Taxation of Costs Rules, 1991.

1152 Rule 5 (a) (2) of the Rules of Professional Conduct and Etiquette.

public. Here is an issue of high legal significance in the administration of justice. But it is covered by various provisions, each one appearing to twist the law its own way. One is thus compelled to ask oneself: What exactly is the position of the law on this matter? The answer is not easy to find. It is safe, however, amid all the legal confusion, to draw one particular conclusion: That the law does not prohibit undercutting. This is one favourable aspect in the law on advocates' remuneration in Tanzania. In Kenya, for instance, ethical rules expressly define undercutting by an advocate as an "unprofessional, dishonourable, or unworthy conduct", rendering an offending advocate liable to disciplinary action.[1153]

In my opinion, any prohibition against undercutting is unfair, goes against the cardinal principles of a free market, and is inherently unjust. It eliminates the operation of another form of legal aid–one that would have benefited the middle class. Its negative effects are even more pronounced in a society which lacks an effective legal aid scheme.[1154] For, these are people who cannot afford to pay the prescribed fee, but at the same time are considered ineligible for legal aid. They are thus effectively denied the right to legal counsel and representation. In Kenya, when tighter restrictions against undercutting were being introduced in the Legislative Council in 1961, it was made clear that the prohibition was also intended to apply to undercutting as a form of unofficial legal aid.[1155]

6.3. Case Law on Costs and Remuneration

The issue of costs for legal work is one area that has received much attention from the courts in Tanzania and East Africa generally. The principles by which the awarding of costs in civil cases is governed were set down by the East African Court of Appeal in *Premchand Raichand Ltd. & Anor v. Quarry Services of East Africa Ltd. & Ors (No. 3)*.[1156] These principles are:

1. That costs should not be allowed to rise to such a level as to confine access to the courts to the wealthy;
2. That a successful litigant ought to be fairly reimbursed for the costs incurred;
3. That the general level of remuneration of advocates must be such as to attract recruits to the profession; and
4. That so far as practicable there should be consistency in the awards made.

1153 Rules of Professional Practice, Conduct and Etiquette of the Law Society of Kenya, Part 1 (n). In Germany, too, undercutting is a breach of ethics: Kötz, H. (1985), *op. cit.*, at p. 43.

1154 See Chapter Four, *infra.*

1155 Legislative Council, Debates, volume 88 (12th December, 1961) cols. 1209-1229, at cols. 1225-1226 (Webb), cited in Ghai, Y.P. and McAuslan, J.P.W.B. (1970), *op. cit.*, at p. 393.

1156 [1972] E.A. 162. These principles were adopted by the High Court of Tanzania in the case of *In the Matter of Africa Marble Co. Ltd.*, Misc. Civil Case No. 128 of 1980, H.C.T., Dar es Salaam.

In addition, the court held that it was irrelevant that an overseas lawyer was instructed. The fact that English barristers were briefed was of no consequence in assessing fees. East African conditions must be taken into account. The court cited with approval the following passage from the English case of *Simpsons Motor Sales (London) Ltd. v. Hendon Corporation*[1157] where Pennycuick, J., said:

> One must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particularly high fee sometimes demanded by counsel of pre-eminent reputation. Then one must estimate what fee this hypothetical character would be content to take on the brief.

In the case of *Mayers & Anor v. Hamilton & Ors*,[1158] Spry, Ag. P., held that where the case or matter is unfinished, an advocate is not entitled to the whole of the fee he may ultimately claim. How much he is actually entitled to depends on the tasks he has already discharged. In respect of unfinished work, some problems are likely to occur. The client is more often inadequately protected. If he pays his lawyer in advance, and the work is not finished, he may find that he has paid more than the work done. And he may not be able to recover his money.

Sometimes, however, advocates are also the losers in such instances–where no advance payment is made. Some clients may reach a settlement with the opposite party without involving their advocate. Where an advocate has not yet been paid, an out-of-court settlement may mean either less fees (where only part of the fees have been paid) or no fee at all (if the client has not yet paid anything). Most advocates have come across this problem in their practice. But this does not necessarily mean that advocates have a strong incentive to litigate to the very end. Most lawyers would prefer an out-of-court settlement with a small amount of money to a full trial that may mean two or more years of protracted litigation–with its obvious risk of an unfavourable result. In a legal aid case, the temptation to settle out of court may be even greater. For, it is more likely than not that the advocate will not get his fees any way.[1159]

The Tanzanian advocate is allowed to sue for fees,[1160] as is the case in Kenya and Uganda.[1161] This does away with the hypocrisy, so revered in earlier times of the profession in England, that financial gain was of little or no importance[1162]–a rather strange rule that was believed to enhance the status of

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[1157] [1964] All E.R. 833.

[1158] [1975] E.A. 13 at p. 16.

[1159] As we saw in Chapter Four, *supra*, advocates in Tanzania do not get paid for legal aid work in civil cases, and in a criminal cases, they are paid a fee of TShs. 500, which is not enough to cover even the costs of an inland letter.

[1160] Section 53 (4) of the Advocates Ordinance, but see section 9 (1) of the Legal Practitioners Decree, for the position in Zanzibar.

[1161] See *Kiwanuka & Co. v. Walugembe* [1969] E.A. 660-63.

[1162] The myth was expressed in the phrase that a gentleman should not work for his living: See Prest, W.R. "Why the History of the Professions is not Written" in Rubin, G.R. and Sugarman, D. (1984), *op. cit.*, at p. 316.

the Bar.[1163] However, probably because of the customary apprehensions, Tanzanian lawyers do not appear to be particularly bent on invoking this provision. They prefer instead to apply for taxation. I have not come across any case in which an advocate is suing a client for fees.

6.4. The Ethics of Contingency Fees

6.4.1. The Law on Contingency Fees

Contingency fees are what are sometimes called "no-win-no-fee arrangements."[1164] Section 59 of the Advocates Ordinance states, *inter alia*, that no agreement in respect of fees payable to an advocate shall be valid if it concerns:

1. any purchase by an advocate of the interest or any part of the interest, of his client in any action, suit or other contentious proceeding; or
2. any agreement by which an advocate retained to prosecute [any contentious] proceeding stipulates for payment only in the event of success of that proceeding.

These provisions invalidate any remuneration agreement which make payment of advocates fees contingent upon the results of litigation, either in terms of the success or failure of the case or of a share in the award to be granted. This is what is known as the rule against champerty[1165] and contingency fees. Zanzibar has similar provisions.[1166] They render the advocate legally incapable of taking financial interest in the subject matter of the action, though he may take security on it.[1167] The rule as to contingency fees was first created in England by the Statute of Westminster of 1275. Since then, it has been inculcated into generations of common law practitioners as a cardinal principle of professional ethics that contingency fees are not merely unlawful[1168] but in the words of some Judges, "inherently immoral", "deeply corrupting" and "definitely sinister".[1169] In Germany, an agreement for the payment of contingency fees is not only contrary to professional ethics, but has been held void for being contrary to public policy.[1170] It would appear, however, that the reality (at least in the Tanzanian situation) may not be as bad as it is painted.

1163 To date, an English barrister cannot, in law, hold the solicitor or the client liable to pay his fees. See, e.g., *Re Le Brasseur and Oakley* [1896] 2 Ch. 487; and *Wells v. Wells* [1914] at p. 157.

1164 Crossley, J., "Whingeing Britain", *Reader's Digest*, vol. 148, February, 1996, 35 at p. 37.

1165 *Wedgefield v. De Bernady* 1 (1908) 25 T.L.R. at p. 21.

1166 Section 13 (a) and (b) of the Legal Practitioners Decree, Cap 28.

1167 Section 51 (i) of the Advocates Ordinance, and the Advocates Remuneration and Taxation Rules.

1168 See *Wild vs. Simpson* [1919] 2 K.B. 544 at 563, applied in *Re Trepca Mines Ltd.*, [1963] Ch. 199, CA, [1962] 3 All ER 351.

1169 Cook, M. (1995), "No Win, No Fee, No Charity", *The Times*, London, 6 June, 1995, p. 35.

1170 See BGHZ 39, 142.

6.4.2. Arguments For and Against Contingency Fees

Given the strong abhorrence within the legal brethren against contingency fees, it is perhaps in order to consider what are the main reasons behind the rule prohibiting the practice.

6.4.2a. The Case Against Contingency Fees

There have been several vain attempts in England to allow conditional fees. However, they have always been met with considerable opposition. In July, 1989, the British Government published a White Paper in which it proposed such fees as a way of enabling more people to have access to lawyers services. The paper said that its previous Green Paper proposals were not well-received by the profession:

> There was a clear consensus that it would not be right in principle, and would be likely to have a number of undesirable side-effects, for a lawyer to be permitted to undertake a case in return for some percentage of whatever damages might be received.[1171]

The worry has been that to allow for contingency fees might create an unacceptable degree of conflict of interest between the lawyer and his client, which could result in his being unable to give the client or the court, advice of the required degree of impartiality. [1172] It was felt that contingency fees are likely to gravitate against an advocate looking at a client's case dispassionately and will temper with his ability to advise objectively and in his client's interests.

6.4.2b. In Defence of Contingency Fees

Presumably, it is for similar reasons that we still have the same legal position in Tanzania. But its operation is an unhappy circumstance. It often denies people the ability to pursue their rights in law. One plaintiff at a District Court in Dar es Salaam had a very good tort case against a defendant, but who did not know how to go about pursuing his claims.[1173] He had received severe burns that left him 25% incapacitated due to the negligence of the defendant's employee at work. The employee had been convicted of criminal negligence and imprisoned. It was thus a very good civil case for the plaintiff, the criminal conviction being conclusive evidence of all the relevant facts for the civil case.[1174] The plaintiff's problem was that he could not prosecute the case himself and neither could he pay for an advocate. This was a fit case for a no-win-no-fee arrangement.

[1171] Cited by Judge Cook, M. (1995), *op. cit.*

[1172] *Ibid.*

[1173] Civil Registry, Kisutu R.M.'s Court, Dar es Salaam.

[1174] Section 43A of the Evidence Act, No. 6 of 1967.

My personal experience in the practice of law in Tanzania[1175] leads me to the conclusion that, given the fact that many would-be litigants are unable to pay legal fees in advance of litigation, the prohibition against contingency fees is entirely unsuitable. It is a pity that most members of the profession support it. Having inherited the rule from our predecessors, we feel that there must be good reason for it, even in the face of its clear impropriety under our conditions![1176] In fact, even in England itself the law has already been changed. Since July, 1995, following the enactment of the Contingency Fees Order,[1177] solicitors are allowed to accept instructions on no-win-no-fee basis.[1178] But even if the English position had remained the same, the impropriety of the rule would still exist.

If the fear is that contingency fees are bound to create too much of an interest in the advocate, then what about cases in which an advocate has interests other than of financial nature? There have been cases in which an advocate who was a member of a political Party and one of its senior officials, appeared for the Party as an advocate.[1179] Doesn't the question of impartiality arise in such a case? Is this situation any different from the one involving financial interest? Why are there no rules against such representations?

Despite the suspicions against contingency fees, there is no reason why a lawyer in such a case will be prevented from dealing and negotiating with his colleagues in a spirit of professional co-operation, in the interests of their respective clients. The experience of other countries, such as the United States,[1180] where contingency fees have been allowed for a long time now, is proof of this fact. This might have been one of the reasons that prompted the English profession to abandon the restriction in 1995.

As demonstrated by the case mentioned above, contingency fees may have one important advantage: They will help those who do not have the capacity to pay for lawyer's services, but are willing to pay from a percentage of any award that may be won in the event of successful litigation. Contingency fees are clearly a way of widening access to legal services.[1181] The problem here is that

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1175 I have come across several such persons in my own practice and in the course of this study, who are willing to make a promise to pay advocate fees from whatever award they may ultimately get. Most of them, however, end up being refused legal assistance, for want of ready cash.

1176 Joseph Glanville once charged: "We reverence grey-headed doctrines, though feeble, decrepit and within a step of dust; and on this account maintain opinions which have nothing but our charity to uphold them", as quoted in Sawyerr, A. and Hiller, J. (1971), *op. cit.*, at p. vi.

1177 Crossley, J. "Whingeing Britain", *Reader's Digest*, vol. 148, February, 1996, p. 35 at p. 37.

1178 See also "'No Win No Fees' Deals Given Go-Ahead", *The Independent* (UK), 20th July, 1989, at p. 4.

1179 This has happened several times in the multi-party era in Tanzania: See, for instance, *The Guardian*, (Tanzania) 23rd November, 1995.

1180 Cook, M., *loc. cit.*

1181 *Ibid.*

many lawyers are still not in favour of contingency fees. The worry among Tanzanian lawyers, however, seems not to be that it is ungentlemanly, but that most clients would not be prepared to pay once the case is finalised–even if they won. But this problem could be avoided if there was a rule that enjoined the court to inquire, before issuing an order of execution of judgment,[1182] as to whether the advocate for the judgment creditor had any claims as to fees against his client.

Middle income earners will benefit from contingency fees. Some clients may not like using legal aid advocates, even though it is for free. There is a feeling among some of the people I interviewed that the standard of services in legal aid cases may be relatively lower because of the lack of material gain for counsel. Admittedly, taking into account the risk involved, contingency fees may be relatively higher. But they also have their advantages: While normal fees for an advocate may exceed the damage recovered, contingency fees are invariably less, because they are always a percentage of the damages actually recovered. Also, they are only payable where the case has been won, while in normal instances a litigant may lose both the case and the fees.

It is therefore suggested that the rule against contingency fees should be removed. There is surely no solid justification for its retention. Many countries have found it necessary to allow such an arrangement, at least in appropriate cases, if not generally. Among them is the United States and some European countries. In Germany, where generally they are not allowed, the Federal Supreme Court has found it meaningful in certain matters to allow them.[1183]

7. The Ethical Dilemmas of Advocacy

There is often a sharp conflict between the official requirements of the canons of professional ethics and the practical demands of the practice of law. The conflict exists in all areas of advocacy: in the process of getting business, in dealing with the courts and other official organs, in relations with clients,[1184] opposing parties,[1185] and colleagues within the profession. In Chapter Two, we considered the ethical problem that arises in the application of the cab-rank rule, under which the advocate is required, when accepting a case, to pay no regard to the character of his client, his own opinion of him nor of the offence he is charged with. This section looks at similar problems of ethical conflict in respect of other rules of ethics.

1182 A simple amendment to the Second Schedule to the *Civil Procedure Code*, 1966, will be sufficient.

1183 Cohn, E. J. (1961), *op. cit.*, at p. 109. Cohn cites *Official Reports and Decisions of the Federal Supreme Court in Civil Matters* (BGHZ) 22, 162; 83, 11; and 115, 141.

1184 Carlin, J.E. (1962), *op. cit.*, at p. 155.

1185 *Mbiu v. Thairu* [1969] E.A. 133 (K) at p. 136.

7.1. The Extent of Support

An inquiry into the extent of support for rules of ethics among advocates shows that advocates generally agree with the existing body of rules. There is also not much disparity in the degree of support among advocates with different length of experience. Moreover, the support that lawyers give to particular rules of ethics is closely related to their compliance with those rules. However, there is great disparity in advocate's support for, and compliance with, different rules of ethics. Most of the advocates interviewed support the rules against advertisement and contingency fees. But almost all of them do not agree with rules on costs and remuneration. Very few of them, if any, strictly comply with the rules. Why is this so? I now turn to consider this question.

7.2. Remunerating the Unadmitted

There are, already, signs that the legal profession is succumbing to pressures to disregard rules against paying unqualified persons. A good number of practitioners today hire unadmitted law graduates as legal assistants in their offices. Apart from conducting research, these lawyers perform most of the solicitor's side of the advocate's work, such as drafting pleadings and conveyances–the very same tasks that the law prohibits, even though the actual document goes out in the name of the advocate. And, since they are paid for doing the work, they are surely offending the legal provisions in question. But the demands of reality seem to be taking precedence over legal rules–even within the legal profession itself.

7.3. The Remuneration Rules Ignored

As a result of the incoherence shown above, advocates have long ceased to apply the Remuneration Rules. In fact, most advocates admit that when fixing fees they never consider the Rules at all, while only a few have said they apply some of them on rare occasions. None has claimed to have applied them strictly on all occasions. As one advocate put it, they apply the "rules of reality". Consequently, there are considerable variations in the fees charged–from one advocate to another and sometimes even by one advocate from case to case–in both contentious and non-contentious matters. The application of "rules of reality" means charging either below, or above the prescribed fee,[1186] as the circumstances require. The Rules are therefore honoured more in breach than in observance. And there is no mechanism at the moment to police the minimum fee schedules.

Perhaps a more important fact is that even the public law agency, the Tanzania Legal Corporation, is involved in an apparent breach of the relevant provisions. For example, it remunerates its counsel by way of a share in the fees

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[1186] Rule 12 of the Advocates Remuneration and Taxation of Costs Rules, 1991. See G.N. No. 515 of 6th December, 1991. As for undercutting, see item 6.2 in this Chapter.

realised. For the past few years, it has been paying its lawyers 10% for every work successfully completed by them. While I think the corporation's initiative is a very good one and needs to be emulated, I have a feeling that the practice may be against canons of ethics. The Corporation also pays a percentage to those who bring business to it. In my opinion, it offends against two major principles of professional ethics: the prohibition against percentage remuneration to unadmitted persons,[1187] and the rule against touting and unprofessional solicitation of business.[1188]

The practice of the TLC blows to the surface the urgent need to get rid of these out-dated and inappropriate provisions. It serves as a reminder that the law is in need of reform. Of course, there is the question, touched upon in Chapter Six, of whether the TLC is a law firm and whether its counsel, all of whom are not on the Roll, can be subject to the ethical rules of the legal profession. Whatever may be the case, however, problems still persist. One is inclined to think that the TLC is to be judged not to be subject to the Advocates Ordinance. If that be the case–and it is allowed to advertise, practise touting, and pay in terms of percentage to non-enrolled persons, while others are not–then it surely holds an unfair business advantage over their competitors within the professional market.

The Law Society recently charged its Remuneration Committee with the task of looking into the matter and draft new, more "useable" rules for consideration by the Society and recommendation to the Chief Justice.[1189] The Committee, headed by Moshi-based advocate Eric Ng'maryo, has already completed its work. Its report was approved by the Society and has now been presented to the Chief Justice for consideration.[1190] Given the present legal position, it is imperative that the new Rules should be accompanied by amendments to the Advocates Ordinance to allow for exceptions to be made for non-enrolled law graduates. Accordingly, the new Rules should contain not only more realistic scales of fees, but also provide advocates with an option to remunerate law graduates who are not yet enrolled but working with or under them.

8. Negligence and the Standard of Professional Care

To my knowledge, there has so far been no civil case decided in Tanzania in which an advocate is sued for the tort of negligence or breach of contract in his professional capacity.[1191] But one can seek guidance from cases involving

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1187 Section 39 (1) of the Advocates Ordinance.

1188 Sections 47 and 48 of the Advocates Ordinance.

1189 Established under section 10 of the Advocates Ordinance.

1190 Information given by the President of the Tanganyika Law Society to the Society's Half-Annual General Meeting held at Moshi on 10th June, 1996.

1191 At least two of them were subjudice as at end of October, 1996: See note 242, this Chapter, *infra*.

other professionals. As regards professional care in advice and information that doctors must exercise in dealing with their patients, the standard in Tanzania was set in *Theodelina Alphaxad, Minor s/t Next Friend v. The Medical Officer In Charge, Nkenga Prison.*[1192] Mr. Justice Katiti cited with approval the rule laid down by Lord Templeman in 1985[1193] where it was held that it was settled English law that when a doctor decides what he ought, or ought not, to tell his patient about the risks of the proposed procedure, the lawfulness of what he does will be principally judged by tests founded on the evidence of appropriate contemporary standards of professional care. Justice Katiti was therefore of the opinion that the position in Tanzania was similar to that in England. He said that the rule should be:

> That when the doctor and patient relationship exists, and the doctor decides to give his patient information about his/her ailment, such information must be such as to enable the said patient to make a balanced judgment in respect of his/her ailments, or signs pertaining to the same, and such information must, circumstances permitting, be consistent with contemporary standards of professional medical care.[1194]

Thus, in legal practice, it is to be assumed that the rule will be, *mutatis mutandis*, the same as in medical practise: that the advocate must exercise reasonable skill and care, in line with current professional standards.

PART II : THE DISCIPLINARY PROCESS

In their personal capacity, advocates, like everybody else, are liable for both civil and criminal wrongs. In their professional capacity, however, their liability is wider. They have the obligation to conduct themselves with the utmost good faith in their dealings with their clients, the courts, and others. In addition, the advocate undertakes an implied duty, upon retention, to bring to the exercise of his profession a reasonable degree of care and skill,[1195] and to protect his client's

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1192 Civil Case No. 14 of 1991, H.C.T., Tabora.

1193 *Sidaway vs. Board of Governors of Bethlem Royal Hospital and Mudsley Hospital* (1985) A.C. 871; (1985) 1 All E.R.643 (H.L.).

1194 Per Katiti, J. in *Theodelina Alphaxad, supra.*

1195 *Noctorn v. Lord Ashbburton* [1914] AC 932 at p. 956. However, failure to discharge this duty does not amount to professional misconduct: See *Y.A.S. Mchora v. The Advocates Committee*, Misc. Civil Appeal No. 13 of 1985, H.C.T., Dar es Salaam. Hence, the advocate's liability can, presumably, only make him liable to an action in tort or contract, or lead to his condemnation for costs or disallowance of items on taxation. See also, *Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp* [1979] Ch. 384, [1978] 3 All ER 571, in which Oliver, J., likened the solicitor's duty to take care to that described in *Hedley Byrne & Co. Ltd. v. Heller & Partners, Ltd.*, [1964] AC 465, [1963] 2 All ER 575.

interests.[1196] The duty extends to both contentious and non-contentious business.[1197] This part concerns the existing mechanism for dealing with recalcitrant behaviour among advocates.

9. Disciplinary Authorities

There are two main bodies charged with the task of overseeing the disciplinary aspects of the private legal profession in Tanzania. All advocates on the Roll are subject to the disciplinary authority of the Advocates Committee and the higher Judiciary.[1198] I shall begin with the powers of the Judiciary.

9.1. The Powers of Judicial Censure

The jurisdiction of the Advocates Committee in matters of disciplining advocates is not exclusive. Section 22 of the Advocates Ordinance gives the Chief Justice and all the Judges of the High Court certain powers of discipline over advocates.[1199] It would appear that these powers are not exercisable by other Judges of the Court of Appeal (apart from the Chief Justice), since only "Judges of the High Court" are mentioned. Under subsection (2) (a) of section 22, a Judge may admonish, suspend, or even order that the advocate's name be removed from the Roll of Advocates, if he is of the opinion that the advocate's conduct amounts to professional misconduct. Indeed, the powers enjoyed by Judges under section 22 are even greater than those of the Advocates Committee. For, they need not follow any procedure, and no hearing of any sort is necessary. In a word, these are powers of summary discipline.

An appeal against such an order may be made, within thirty days, to the Advocates Committee (where it is made by a High Court Judge)[1200] or the Court of Appeal (from an order of the Chief Justice).[1201] Furthermore, a High Court Judge may choose to make an order temporarily suspending an advocate from practice, pending a reference to, or disallowance of such suspension, by the High Court.[1202] If the allegations are not proved, the advocate will be restored to practice.[1203]

1196 As shown in Chapter Three, *supra*, the advocate's duty to his client is wide and varied. It is difficult to define its exact scope. See also *Groom v. Crocker* [1939] 1 KB 194, at 222, [1938] 2 All ER 394 at p. 413, per Scott, L.J.

1197 See Graham-Green, G.J. (1981), *op. cit.*, at pp. 151-163.

1198 The Council of the Law Society also exercises some disciplinary functions over advocates. Its primary aim is to look for possibilities of settling matters before they are sent to the Advocates Committee. If no settlement is reached, the matter is referred to the Committee. However such exercise is not provided for in law. I shall thus only throw a glance at them in item 9.2.2., below.

1199 Subsection (1) of section 22 of the Advocates Ordinance.

1200 Section 22 (2) (c) (i) of the Advocates Ordinance.

1201 Section 22 (2) (c) (ii) of the Advocates Ordinance.

1202 Section 22 (2) (b) of the Advocates Ordinance. It would appear, however, that the provisions of subsection (4) of section 24 A (the section was added by Act No. 12 of 1990), are erroneously drafted. Otherwise, they are open to legal challenge. The section relates to

The feeling among the private Bar towards these provisions is overwhelmingly in the negative. As one of them put it, the provision is prejudicial against the advocate. It presumes his guilt before proof. It is therefore both a contravention of rules of natural justice and an unnecessary infringement upon the constitutional rights of the advocate.[1204] However, a similar rule exists in most legal professions in common law jurisdictions.[1205] The power is a judicial power, not an administrative one, even though the Judge acts in a disciplinary capacity.[1206] The rationale for the rule is rooted in the fact that the advocate is an officer of the court.[1207] As such, it is incumbent upon the Court to see to it that its officers' conduct is beyond reproach, and to punish those who do not adhere to the set standards.[1208] However, as the Principal Judge opines, the legitimate exercise of the powers of judicial censure should be limited to cater only for the necessity for the Judge to exercise full control over court proceedings, and is not applicable to matters taking place outside the courtroom or Judges' chambers. A Judge would then be empowered to discipline an advocate only where he has misbehaved in the Judge's presence in court. It is submitted that this is the correct position of the law. It will reduce the instances whereby every High Court Judge has concurrent jurisdiction with the Advocates Committee over advocates' conduct, regardless of where or how the issue arises. An even more consummate position would be for the Judges' powers (even in court) to be only of temporary effect, subject to results of investigations to be conducted by the Advocates Committee, just like in other disciplinary proceeding.

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the composition of the High Court in appeal proceedings. However, it only talks of appeals made under the same section (24A), while its proviso refers to appeals under section 22 (2) of the Act. The main provisions stipulate that the Judge whose order of suspension under paragraph (a) of section 22 (2) is the subject of appeal should not sit to hear the appeal. It can thus be implied (according to the maxim *expressio unius est exclusio alterius*) that the Judge who made an order of suspension under paragraph (b) of section 22 is allowed to sit as a Judge when the matter is heard on appeal. This position would, in my opinion, be contrary to the principle that nobody should be a Judge in his own cause. The correct position, I presume, is that the reference to "appeals under this section" should have read "appeals under this Part" (i.e. Part III of the Act), which would have included both sections 22 and 24A, and also that the reference to "paragraph (a) of subsection (2) of section 22" should have included paragraph (b) too.

1203 Any order made by a judicial officer under section 22 is to be noted on the Roll of Advocates, and has the same effect as an order made by the Advocates Committee: See Section 24 of the Advocates Ordinance.

1204 Such rights can be inferred from the following Articles of the 1977 Union Constitution: Article 13 (6) (right to a fair trial and to be presumed innocent until the contrary is proved) and Article 24 (right to work).

1205 For the position in England and Wales, see section 50 (2) of the Solicitors Act, 1974. For Cameroon, see Anyangwe, C. (1989), *op. cit.*

1206 *Attorney-General for Gambia v. N'Jie* [1961] AC 617; [1961] 2 All ER 504.

1207 See section 66 of the Advocates Ordinance, and Chapter Three, *supra.*

1208 See *Sittingbourne and Sheerness Rly Co. v. Lawson* (1886) 2 T.L.R. 605, per Lord Esher, MR, who said: "The summary jurisdiction of the courts over solicitors exists for the maintenance of their character and integrity."

9.2. The Advocates Committee

The Advocates Committee is the main disciplinary authority for advocates. It is established under the provisions of Part I of the Advocates Ordinance.[1209] It is composed of:

1. A Judge of the High Court of the United Republic to be nominated by the Chief Justice. He acts as the Chairman of the Committee;[1210]
2. The Attorney-General, or the Deputy Attorney General or Director of Public Prosecutions;
3. One practising advocate nominated by the Tanganyika Law Society.

9.2.1. The Jurisdiction and Powers of the Advocates Committee

The Committee is charged with the task of hearing and determining any application by any person to remove the name of any advocate from the Roll, and to hear and determine any allegation of misconduct made against any advocate by any person.[1211] The proceedings of the Committee must be in camera.[1212] The Advocates Committee, therefore, is the main body with original jurisdiction in matters concerning advocates' discipline. Appeals from the decisions of the Committee lie to the High Court of Tanzania,[1213] sitting as a Full Bench of not less than three Judges.[1214] The Advocates Committee must be made a party to the appeal, and has a right of audience.[1215] As in all other matters dealt with by the High Court, a person aggrieved by its decision has a right of further appeal to the Court of Appeal.[1216]

The Advocates Committee has powers to hear and determine any allegation of misconduct made against an advocate.[1217] It can also handle applications made by an advocate himself who wishes to have his name removed from the Roll.[1218] The proceedings of the Committee are deemed to be judicial

[1209] Section 4 (1) of the Advocates Ordinance, as amended by Act No. 39 of 1969 and Act No. 22 of 1983. The composition of the Committee is provided for in section 4 (1) (a) of the Advocates Ordinance.

[1210] The practice has been that the Principal Judge of the High Court is nominated.

[1211] Section 13 (1) of the Advocates Ordinance.

[1212] Rule 16 of the *Advocates (Disciplinary) Rules*, G.N. No. 135 of 1955. But see Chapter Eight, *infra*, for the procedure in Zanzibar.

[1213] Section 24A (1) of the Advocates Ordinance, as amended by Act No. 39 of 1969.

[1214] Section 24A (4) of the Advocates Ordinance.

[1215] Section 24A (3) of the Advocates Ordinance.

[1216] Article 117 (3) of the 1977 Constitution, as amended by section 8 of Act No. 14 of 1979.

[1217] Section 13 (1) (b) of the Advocates Ordinance, and Part I (Rules 3 to 10) of the *Advocates (Disciplinary Proceedings) Rules*.

[1218] See section 13 (1) (a) of the Advocates Ordinance, and Part II (Rules 11 to 15) of the Advocates (Disciplinary Proceedings) Rules, under which an advocate wishing to have his name removed from the Roll must specifically apply for such removal, which application is subject to the "hearing and determination" of the Advocates Committee. Moreover, in the prescribed form of the affidavit he is required to swear and submit with his application, an advocate must state that he is not making the application "for the purpose of evading any adverse application, or of defeating any claim" against him as an advocate. This suggests that proceedings for purposes of the law relating to perjury and contempt of court.[1219]

9.2.2. The Procedure of the Advocates Committee

The lodging of complaints with the Advocates Committee is covered by the provisions of the Advocates (Disciplinary) Rules, 1955. An application against an advocate must be made in prescribed form, supported by an affidavit,[1220] and sent to the Secretary of the Committee.[1221] However, the Attorney-General may move the Committee into action by any complaint made against an advocate brought to his notice in any manner whatsoever, whether or not in prescribed form.[1222]

In principle, any person can complain to the Committee directly, or through any one of its members. The practice, however, has been that most complaints are channelled through the Secretariat of the Tanganyika Law Society. The Secretariat will then forward the complaints to the Council of the Society, which will make a preliminary inquiry to ascertain whether the matter should be forwarded to the Secretary of the Advocates Committee.[1223] This is done after taking into account factors such as to whether the allegations sufficiently disclose a misconduct, and whether it is possible for the matter to be settled before reaching the Advocates Committee. It would appear, however, that only a few of the grievances are actually expressed in the form of official complaints. This study has found out that only 25% of clients and former clients know of the existence of the disciplinary procedures. Many of those who know of their existence are reluctant to complain, even to their own advocates. Most of those who complain to the Law Society do so upon advise from the Judiciary or the Attorney General's Chambers, where they would first have sent their complaints.[1224]

If the Council considers the allegations to contain sufficient facts pointing towards professional misconduct, it will inform the advocate concerned about the nature of the complaint against him. He will be given time to respond. However, applications for removal of an advocate's name from the Roll on account of any defect in his admission and enrolment can only be entertained

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no one is allowed to opt out of the profession at will before all matters touching his practice until then have been settled. The option is therefore open only to those who may wish to do so for personal reasons, such as those retiring from practice or leaving the country permanently, and not as a way of avoiding professional responsibilities or impending disciplinary proceedings.

[1219] Section 14 (3) of the Advocates Ordinance, Cap 341, which refers to Part XI of the Penal Code, Cap 16 of the Revised Laws of Tanzania.

[1220] Section 12 of the Advocates Ordinance. For the form of the affidavit, see Form I of the Schedule to the Advocates (Disciplinary) Rules, 1955.

[1221] Rule 3 of the Advocates (Disciplinary) Rules, 1955.

[1222] Section 11 of the Advocates Ordinance.

[1223] Appointed under section of the Advocates Ordinance.

[1224] Information from former Secretary of the Tanganyika Law Society, Dar es Salaam.

within six months following his admission,[1225] unless the enrolment was secured by fraud.[1226] In other words, such an application will automatically fail if it is brought after six months of his being called to the Bar have elapsed.

With regard to matters not covered by the Advocates Ordinance, especially in the hearing of applications,[1227] the Advocates Committee has powers to regulate its own procedure.[1228] If the Committee considers that an application discloses no *prima facie* case against an advocate, it may refuse to hear the application without giving audience to the applicant and without requiring the advocate to answer the charges.[1229] If the Committee considers that a *prima facie* case has been made out against the advocate, it shall proceed to hear and determine the matter. Thereafter, the Committee will give its judgment.

10. Sanctions Against Misconduct

Upon proof of an allegation of misconduct, the Committee may choose among several options. It has the power to order that an advocate's name be struck off the Roll, or that he be suspended for a specific period of time. Or, it may admonish him, fine him, order him to pay costs, or otherwise make any order it may deem fit under the circumstances.[1230] This section discusses the after-effects of a verdict of guilt following disciplinary proceedings against an advocate.

10.1. Suspensions and Strikings-Off

It may be deduced from the above that a guilty verdict against an advocate can have far-reaching consequences. An advocate who has been found guilty of professional misconduct may be ordered to be suspended from practice for a certain period of time. Worse still, he may have his name removed from the Roll. His Practising Certificate is then deemed to have been cancelled.[1231] He thus loses all the powers, rights and privileges he previously possessed as an advocate. In effect, he becomes an unqualified person.[1232] He cannot do any of those things which the law allows only advocates to do throughout the period of his suspension, or, if there is an order for removal from the Roll, throughout the rest of his life.[1233]

Where an advocate enrolled in Tanzania Mainland who is also an advocate or legal practitioner in any other East African jurisdiction (Kenya, Uganda, or Zanzibar) and is suspended or his name is struck off the Roll in such other East

1225 Section 27 of the Advocates Ordinance, Cap 341.
1226 Proviso to Section 27 of the Advocates Ordinance, Cap 341.
1227 Section 13, especially Subsections (1) and (4) of the Advocates Ordinance, Cap 341.
1228 Section 13 of the Advocates Ordinance, Cap 341.
1229 Proviso to section 13 of the Advocates Ordinance, Cap 341.
1230 Section 13 (4) of the Advocates Ordinance.
1231 Section 26 of the Advocates Ordinance, Cap 341.
1232 See section 39 (1) of the Advocates Ordinance, Cap 341.
1233 Section 26 of the Advocates Ordinance, Cap 341.

African territory, the effect of such striking-off also applies to his enrolment in Tanzania Mainland. This is provided for under section 25 of the Advocates Ordinance, whereby reciprocal enforcements of suspensions and strikings-off[1234] apply to the whole of East Africa. Only the Chief Justice is empowered to order, in appropriate cases, that such suspension or striking-off should not have effect in Tanzania.[1235]

9.2. Re-Admission and Expiry of Suspension

The pronouncement of a guilty verdict against an advocate may thus signal the end of a person's professional life as an advocate. But it need not necessarily be so. A suspension is, by definition, temporary in nature. But even a striking-off is not final.[1236] It may be removed upon proof of subsequent good conduct. An advocate may be returned to the Roll after "serving his sentence" for some time. A person who had been suspended or barred from practice may apply for the order to be varied, so that he can be returned to the Roll, or have his term of suspension reduced.[1237]

10.3. The Procedure for Restoration

When the term of suspension expires, or if he is re-admitted, an advocate must follow a certain procedure before his Practising Certificate can be returned to him or before he can be restored to the Roll. He must give a six months notice to the Registrar of the High Court of his intention to apply for a Practising Certificate.[1238] The Chief Justice also has powers to refuse to renew an advocate's Practising Certificate upon certain grounds. Section 36 of the Advocates Ordinance is the operative provision in this respect. It gives the Chief Justice powers to refuse a first application made by an advocate after having completed his period of suspension or having been readmitted to the Roll. In one instance, the Chief Justice refused to renew the advocate's Practising Certificate after he won an appeal against an order for removal of his name from the Roll for misconduct. This power was purportedly exercised pursuant to section 36 (1) (c) of the Advocates Ordinance. The facts in this case, *Y.A.S. Mchora vs. the Advocates Committee*,[1239] were as follows:

> On 4th April, 1985, Mr. Mchora was convicted of professional misconduct.[1240] An order was made by the Advocates Committee to have his name removed from the

1234 Subsections (1) and (2) respectively of Section 25 of the Advocates Ordinance, Cap 341. There is no similar provision in Zanzibar: See Chapter Eight, *infra.*

1235 Section 25 (3) of the Advocates Ordinance, Cap 341.

1236 See *Re Ssesanga* [1969] E.A. 345-348 (Ug.), and *Re Brandreth* (1891) 60 L.J.Q.B. 501. See also, The Law Society (England and Wales), *Guide to Professional Conduct of Solicitors*, 1974, at p. 133.

1237 Sections 28 and 31 of the Advocates Ordinance, Cap 341.

1238 See section 36 (1) (c) of the Advocates Ordinance

1239 Matters arising out of the case of *Y.A.S. Mchora vs. the Advocates Committee, op. cit.*

1240 Cause No. 1 of 1984, Advocates Committee, Dar es Salaam.

Roll of Advocates. He appealed to the Full Bench of the High Court.[1241] On 12th November, 1985, his appeal was allowed. The High Court set aside the conviction and quashed the order for removal of his name from the Roll. Mr. Mchora then continued to practise until early 1986 when he applied for renewal of his Practising Certificate for that year. This was granted. Later on, however, the Chief Justice invoked the provisions set out in section 36 (1) (c) and ordered him to follow the procedure of giving to the Registrar of the High Court six weeks notice of his intention to apply for a Practising Certificate. Mr. Mchora obliged. He surrendered his Certificate and, upon following the procedure, the Chief Justice, invoking his discretion under the section, refused to renew Mr. Mchora's Certificate.

Some time later, Mr. Mchora wrote to the Chief Justice, pointing out that the application of the provisions of section 36 (1) (c) to his case was wrong in law. His interpretation of the provisions was that "the operative characteristics" for the application of the section were:

1. That there was completion of the sentence meted out to the applicant, or re-admission after having been removed from the Roll;
2. That the application for Practising Certificate was done when there was no pre-existing unexpired Certificate, i.e., that it was a first application after completion of sentence and not a renewal.[1242]

It would appear that Mr. Mchora's interpretation of the law was correct. For, the effect of the High Court's finding was a complete acquittal. He could not, therefore, be said to have made a first application after re-admission. In the eyes of the law, there was no question of re-admission in his case, since there was no effective removal. The earlier order for removal had been quashed on appeal. The High Court stated so in no uncertain terms.[1243] The Chief Justice returned Mr. Mchora's Certificate, noting that the refusal to renew it was never intended to be permanent.

It is clear from the provisions of section 36 that the powers of the Chief Justice must be construed within the limits of the conditions therein mentioned. He can only act where an advocate has been pronounced guilty of misconduct by a final decision of the appropriate tribunal. Yet it is also true that the Chief Justice wields enormous powers, which are capable of being abused. It is unfortunate that in Mr. Mchora's case the Chief Justice' views about the correct interpretation of the above provisions could not be obtained. Perhaps it is the discretion vested by paragraph (c) of the subsection which might have caused the confusion in the case. It is however submitted that the discretion is to be exercised according to law, which stipulates clearly in which cases it can be invoked.

[1241] The jurisdiction and composition of the High Court in such matters is provided for under section 24A of the Advocates Ordinance, Cap 341, as amended by Act No. 39 of 1969.

[1242] Quoted from Mr. Mchora's letter to the Chief Justice dated 8th October, 1986.

[1243] In its judgment, the High Court said (at p. 13 of the typed Judgement): ". . . we set aside the [advocates] Committee's order to remove the appellant's name from the Roll of Advocates."

Moreover, another comment on the discretion vested in the Chief Justice by section 36 is pertinent. The effect of the exercise of the power to refuse to grant an application for a Practising Certificate by an advocate who had completed his sentence of suspension[1244] means that a person who (upon conviction for misconduct) had already served his sentence, is subjected to serve a further sentence at the pleasure of the Chief Justice. With due respect, this is tantamount to imposing double punishment against him. If the Committee (or an appellate court) had already determined, considering the gravity of misconduct proved against an advocate, that a suspension from practice for a certain period of time is enough to meet the justice of the case, there is no justification for a further extension of the sentence at will. Such powers could have been reasonable if they were made subject to proof of further misconduct, or lack of reform, against the advocate concerned. Otherwise, their propriety is highly questionable.

PART III : OBSERVATIONS AND COMMENTS

11. Addressing the Shortcomings of the Disciplinary Process

Generally speaking, the Rules of Professional Conduct and Etiquette are not explicit enough. They leave out some very important matters and instead deal with some trivial ones. In addition, there are certain drawbacks within the system of disciplining advocates that need to be rectified. In addition to a few matters already mentioned above, it is pertinent to add the following.

11.1. The Contours of Professional Misconduct

An act or omission must fall within the recognised category of matters that amount to misconduct to be the subject of disciplinary proceedings against an advocate. Hence, to be able to act against an advocate's misbehaviour, one needs to prove particular elements of fact which are essential in determining whether the conduct complained of is misconduct in the eyes of the law, and which may justify disciplinary action against the advocate in question.

11.1.1. The Elements of Misconduct

Many complaints are made to the Law Society and other bodies against advocates. But only a few of these manage to reach the stage of reference to the Advocates Committee, which acts as the disciplinary body of the Bar.[1245] One reason has been that most of these complaints amount to much less than allegations of professional misconduct. Questions of negligence, for instance,

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1244 C.f. the English position in section 141 of the Solicitor's Act, 1974, and Graham-Green, G.J. (1981), *op. cit.*, at p. 342.

1245 In 1994, for instance, only three cases found their way to the Committee: Annual Report of the Advocates Committee presented at the Annual General Meeting of the Tanganyika Law Society, 28th January, 1995.

may not amount to misconduct unless they involve professional misconduct.[1246] But to most lay complainants this sort of distinction, as are many other such distinctions which to the lawyer may be very clear, is extremely difficult to draw. To the lay person, a mistake is a mistake–nothing more, nothing less. Also, some complaints relate to matters beyond the control of the advocate, such as adjournments of cases due to the Magistrate's illness, or a prolonged period before the start of a case because of preliminary procedural steps necessary for litigation to commence, etc.

Some of the acts and omissions mentioned above are actually covered by the Rules of Professional Conduct and Etiquette.[1247] However, the Rules themselves are silent on what may happen to an advocate who falls short of the standards set therein. Thus, they are reduced to mere declarations of good intentions, lamentably lacking the necessary legal force. As a result, it has been left to the Advocates Committee and the courts to enforce discipline. However, as is clear from the case law, these disciplinary bodies have only been prepared to give the category of professional misconduct a narrow platform indeed. For instance, in the above-mentioned case of *Y.A.S. Mchora v. Advocates Committee*, the High Court held that an advocate's lack of skill or even negligence[1248] do not amount to professional misconduct.[1249] Hence, most of the behaviour that produces client dissatisfaction goes unpunished as professional misconduct. Apart from those mentioned in *Mchora's Case* are such matters as delays, inefficiency, incompetence,[1250] lack of interest, discourtesy, insensitivity, lack of information and communication. It is submitted that the profession should begin to take seriously client complaints about forms of negligence and discourtesy that are not sufficiently weighty to justify formal disciplinary measures. For, it is not easy to find an entirely satisfactory rationale for the

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[1246] *Y.A.S. Mchora vs. The Advocates Committee, op. cit.*

[1247] See, e.g., rules 1, 17 and 37. See discussion in item 11.4. below.

[1248] Negligence is defined as the omission to do something which a reasonable man would do, or the doing of something which a reasonable man would not do: *Blyth v. Birmingham Waterworks Co.* [1856] 11 Exch. 781. According to the case of *Rondel v. Worsley, op. cit.*, English barristers are also immune from liability for negligence (neither for lack of skill nor non-attendance in court). Solicitors, however, are liable–even in litigation where a barrister could have done the job.

[1249] At pp. 12 and 13 of the typed judgment. The court referred, with approval, to *Halsbury's Laws of England* 3rd edition, vol. 31, para 319 at p. 297, and *Strouds Judicial Dictionary*, vol. 3 at p. 1803 and stated that the position in Tanzania was the same. However, the English position is only in respect of barristers. Solicitors, on the other hand, are not immune to claims for negligence, even where the matter at issue involved litigation and a barristers could have been done it: *Cf. Rondel v. Worsley, op. cit.*

[1250] See *Champion Motor Spares Ltd. vs. Phadke & Others* [1969] E.A. 42-5 [Uganda] in which it was held that an advocate's ignorance of a statute which is constantly being invoked constitutes incompetence. See also the Nigerian case of *Mosheshe General Merchants Ltd. v. Nigeria Steel Products Ltd.* (1987) All N.L.R. at p. 318, where it was held that an unskilled advocate bears the burden of being unskilled to the point of causing an unfair trial.

policy considerations which determine the court's restricted approach to the issue of qualifying offences.

As a consequence of the above, the grounds upon which an advocate may be visited with professional sanctions are different from what the lay client expects of him. Given this divergence between grievances and the disciplinary process, most lay complaints are rejected by the Council of the Law Society or the Attorney General before even reaching the Advocates Committee, because they turn out to be either unfounded at the outset, or are built upon factors which, even if they were to be proved, do not constitute a *prima facie* case against the advocate concerned. For, as stated in the Zimbabwean case of *S. v. Hartmann & Another*,[1251] conduct which may be neither wise nor judicious may still be legally permissible, even though practitioners are expected to follow the wisdom of professional custom not to behave unwisely or injudiciously.

11.1.2. The Standard of Proof

In the case of *Re Advocate v. Advocates Committee*,[1252] it was held that the standard of proof applicable in cases of professional misconduct is the same as in criminal trials, i.e. proof beyond reasonable doubt. The Court of Appeal for Eastern Africa said:[1253]

> We agree that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities.

In *Y.A.S. Mchora v. Advocates Committee*,[1254] the High Court reaffirmed the rule in *Re Advocate v. Advocates Committee* and *Charles Mwailunga v. Advocates Committee*[1255] on the question of standard of proof in professional misconduct. In this connection, the court in *Mchora's Case* went a step further. It held that the mere suspicion of misconduct, however strong it may be, could not justify an inference of ill-motive, which must be proved by evidence.[1256] Hence, case law requires that there must be proof not only of an act of misconduct, but also of an evil intent to engage in misconduct before a conviction of professional misconduct can be entered against an advocate.

1251 1983 (2) *ZLR* 186, at pp. 196-197, per Georges, C.J.

1252 (1955) 22 *EACA* 260.

1253 At p. 262.

1254 Misc. Civil Appeal No. 13 of 1985, H.C.T., Dar es Salaam.

1255 (1955) 22 *EACA* 260 and Misc. Civ. Appeal No. 15 of 1980, respectively.

1256 At p. 11 of the typed judgment.

11.2. The Constraints of Self-Discipline

11.2.1. Procedural Constraints

The ultimate test of a system of social control is the extent to which it punishes those who have committed offences.[1257] By this criterion, the process of disciplining advocates is rather suspect. First, it is entirely reactive. It relies on complainants to institute the process of investigation and hearing. The number of complaints is extremely small. For instance, only four complaints were entertained by the Advocates Committee in the whole of 1994. Only one of these reached the stage of judgment.[1258] In 1995, only two cases came before the Committee.[1259] It is feared that the system is heavily in favour of the advocate and that the Committee has not been addressing the question of misconduct with the seriousness it deserves. The main aim appears to be to settle the dispute between the advocate and his client. So, if the advocate settles the claim before judgment is handed out, the Committee simply drops the case. This makes the process appear somewhat too lenient, in as far as it allows the advocate to pay his way out of disciplinary proceedings pending against him. It might well be for this reason that some advocates have been subject to several complaints. This attitude breeds a propensity to commit misconduct. An advocate would wait for the eleventh hour before he seduces the complaining client into dropping his complaints by settling the account. Since most clients are relatively poor, they are more than prepared to accept such a settlement, however unfavourable it may be to them, than to embark on an all-out war against their more powerful opponent.

One major problem that can be detected here is that of a client who, having lost a case possibly due to his advocates' non-appearance on the day set for hearing, is content with merely a refund (or even part thereof) of the fee paid to the advocate! The client gets no compensation for losing the case at the fault of the advocate. This graphically illustrates the precarious position the complainant occupies in the disciplinary process. Complaints against advocates have been dropped without inquiries being made as to whether the misconduct complained of has actually been committed or not. While a refund of fees to the aggrieved client may be taken as evidence of the advocate's desire to make amends to his client, it should only count as, at most, a mitigating factor for a lenient sentence at the end of the trial, and not as a reason for dropping the charges

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[1257] Abel, R. (1988), *op. cit.*, at p. 135.

[1258] Report of the Advocates Committee for the Year 1994, Proceedings of the Annual General Meeting of the Tanganyika Law Society, Arusha, 28th January, 1995.

[1259] A total of six complaints were received by the Committee in 1995: Interview with the Secretary of the Advocates Committee, August, 1996, Dar es Salaam. One of them is still pending, because the complainant had decided to institute a civil case in the High Court. See item 11.3.4. below.

altogether.[1260] Furthermore, in line with the recommendations given below,[1261] where the client has lost a case due to the advocate's act or omission, the advocate must be made responsible for all the losses the client has incurred as a result. The mere repayment of fees is not enough. Perhaps a prosecution before the Advocates Committee by a State Attorney from the Directorate of Public Prosecutions may go a long way to alleviate some of these and other similar shortcomings in the disciplinary process.

11.2.2. The Composition of the Advocates Committee

The panel which presently sits as the Advocates Committee consists only of lawyers:. A Judge of the High Court, the Attorney-General (or Deputy Attorney-General or the Director of Public Prosecutions), and a legal practitioner. Lawyers are, therefore, entirely their own Judges. Even though the majority are not members of the private legal profession. To borrow from an age-old adage, they are birds of the same feathers. The fact thus remains that they are all lawyers, and are therefore members of the same professional group. They are all members of the same clan, and some of them have been on the same side of the intra-professional divide for a long time. Non-lawyers can therefore be excused for questioning their impartiality.

One is inclined to think that the Committee's exercise of disciplinary powers, given its composition, will be heavily in favour of the advocate. This may nonetheless be true only in some of the cases. In some cases, the committee may lack objectivity against an advocate brought before them. Paradoxically, therefore, this aspect of the Committee's procedure may affect both the accused and the accuser. The Advocates Committee usually acts as the investigator, prosecutor and Judge. There is a real likelihood that sometimes the combination of these roles may have resulted in a miscarriage of justice even against the accused advocate. That appears to have been the case at least in *Y.A.S. Mchora v. the Advocates Committee.*[1262] It was the view of the Full Bench of the High Court on appeal that the Committee appeared to have failed to weigh and analyse with sufficient objectivity the evidence that was tendered before it. In this connection, one is reminded of the following passage, which forms part of the Canons of Judicial Ethics of the American Bar Association: "And I charged your Judges at that time, saying Hear the causes between your brethren, and Judge righteously between every man and his brother, and the stranger that is with him."[1263]

1260 It has been reported that this is the procedure the Committee has now decided to adopt in dealing with cases where the wrong complained of has been put right–even where the complainant is no longer interested in pursuing the complaint.

1261 See item 11.3.5. below.

1262 *op. cit.*

1263 Deuteronomy, XVI, adopted on 9th July, 1924, and published in Trumbull, W.M. (1957), *op. cit.*, at p. 388.

It is hard indeed for any person who sits in judgment on his own kith and kin to strictly adhere to the ideal contained in the passage quoted above. It is respectfully submitted, however, that the ideal is not incapable of being achieved. The Advocates Committee can improve matters by adopting the changes suggested herein. Professional independence as the main reason for the preference of self-discipline is achievable without being too inward-looking. Besides, it does strike one as being strange that while lawyers are so fond of the application of the maxim *nemo judex in causa sua* (no one should be a Judge in his own cause), they should restrict its application in respect of their own profession. Charity, so the saying goes, begins at home. Lawyers should make sure that the rights of the people they serve are upheld, even as against their own selves. Impartiality and objectivity is of paramount importance. Towards this end, the Committee's composition should be changed to allow for lay representation. The English Law Society's Disciplinary Committee now consists of a lay majority. It has so far been functioning without problems.[1264] Moreover, if the prosecution were done by a State Attorney as already suggested, it would eliminate the present anomaly whereby it is conducted by the Committee or by the complainant himself.

11.2.3. The Lay Complainant's Problem

Although in principle anybody can file complaints against an advocate, almost all complaints are brought forward by lay clients. Individual practitioners do not seem to have much involved themselves with ensuring discipline of colleagues through the process. Potential lay complainants, however, are necessarily constrained in their actions. They are ignorant of the law, the rules of etiquette, and the standard of performance. Some of them even harbour a misguided belief that lawyers are beyond reproach in law.[1265]

One other problem faced by lay clients is that an advocate can only be disciplined where he has broken certain rules of conduct. Not all rules of conduct are subject to disciplinary action. Also, the law requires high standards of proof before a verdict for professional misconduct can be entered.[1266] Under these circumstances, a trained and experienced prosecutor is required. The ordinary lay person cannot be expected even to have a general knowledge about the relevant legal terminology, let alone appreciate their practical meanings, and far less apply them against two trained and experienced legal practitioners (an advocate who is represented by another advocate–which is mostly the case). The lay man finds it difficult (or even impossible) to frame a complaint and to collect relevant evidence. However, I envisage this procedure to be optional rather than obligatory. Where a complainant elects to prosecute on his own, he should be allowed to do so. This would help avoid a situation whereby a litigant may feel

1264 See *The Financial Times* (London) 13th October, 1991.

1265 See Ismail, M.A. (1994), *op. cit.*, at p. 3.

1266 See, e.g. the case of *Y.A.S. Mchora v. The Advocates Committee, op. cit.*

confronted with a legal dilemma–that of being compelled to discipline a lawyer through the aid of another lawyer.[1267]

Although there is no concrete evidence of this, it may well be that the small number of complaints is a result of the lay clients' inability to pursue the claims, or lack/loss of faith in the process. Or, it may even mean that there are very few valid complaints anyway. In any case, however, public education is of the utmost importance in order to ensure that as far as possible, all those acts that require investigation are brought to the notice of the relevant authorities, and that the public is reasonably aware of the acts and omissions that constitute professional misconduct.

11.2.4. Tilting the Scales Towards Fairness

Most advocates appearing before the Advocates Committee are represented. The lay complainants, however, are not. They have to rely on their own selves. The Attorney-General likened this procedure to asking the complainant to jump from the frying pan into the fire![1268] Can the profession really say that the scales of justice here are evenly balanced? One of the present members of the Committee identifies this as an anomalous situation, and argues that:

> . . . the present procedure is rather one-sided. The three members of the Committee act both as prosecutors and Judges; and complainants are in most cases ordinary citizens who do not feel at ease in the company of so many senior legal persons.[1269]

He thus suggests that in order to ensure fairness the Director of Public Prosecutions (D.P.P) should be the prosecutor and act on behalf of the complainant. He further advises a change in the composition of the Advocates Committee, in that a teacher from the Faculty of Law should be one of its members.[1270] If the D.P.P. becomes the prosecutor, then the Attorney-General should no longer sit as a member of the Advocates Committee, to avoid any inference of bias on his part. It is not an easy task to balance the various functions in which the public interest should be paramount, such as administering the legal aid scheme and disciplining advocates, while vigorously advocating the interests of advocates. Full powers of self-regulation renders discipline more lenient.[1271] In England, several local law societies have urged that

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1267 In the English case of *Re McKernan's Application*, 135 *NLJ* Rep. 1164, 1985, a litigant tried to apply directly to have a solicitor struck off the Roll. He found himself face to face with a catch-22 situation: He was told he had to be represented by a barrister, who had to be briefed by a solicitor!

1268 Chenge, A. (1995), *op. cit.*, at p. 8.

1269 Ismail, M.A. (1994), *op. cit.*, at p. 2.

1270 *Ibid.*

1271 Abel R. (1988), *op. cit.*, at p. 250, shows that English courts punishes 83% of erring solicitors–mostly severely, while the Law Society punishes only 36% of them, mostly leniently.

the English Law Society cease administering legal aid and disciplining solicitors and concentrate on representing the profession.[1272]

In the Tanzanian context, I think it is neither the time, nor is it, perhaps, necessarily desirable, to do away completely with the task of self-discipline within the legal profession. Hence, a slight change in the composition of the Advocates Committee would suffice. It is time to let non-lawyers also sit in the Advocates Committee. The Committee's composition should be modified to include lay members, such as other professionals, who should form at least half of the committee's membership. This way, the principle of *nemo judas in causa sua* will be put into operation in the very heart of lawyers' own disciplinary body. It would ensure, as lawyers themselves are so fond of saying, that justice is not only done, but is manifestly seen to be done.

11.3. Notable Omissions and Shortcomings

The rules of ethics of a profession are supposed to regulate a very sensitive area in the profession's relationships with the people they serve and society generally. It thus needs to be as extensive as possible. Some of the matters that are conspicuously lacking in the present Rules of Professional Conduct and Etiquette are:

11.3.1. Absence of Clear-Cut Offences and Sanctions

One of the main shortcomings of the present legal regime is that there is no statutory definition of what amounts to professional misconduct.[1273] Worse still, neither is there an ascertainable body of rules from which one can clearly discern what acts or omissions may constitute professional misconduct. Consequently, the Rules of Professional Conduct and Etiquette have been termed a toothless instrument, since they do not provide for penalties for behaviour they pronounce as unprofessional on the part of an advocate.[1274] This is probably one of the factors that contribute to the mystery and misunderstandings the legal profession has found itself in.

A study of the relevant law shows that there are only three kinds of misbehaviour which the law expressly pronounces as professional misconduct capable of rendering the advocate concerned to be subject to disciplinary action. These are: omission to keep a separate clients account,[1275] the issuance of dishonoured cheques,[1276] and failure to reply to correspondence after two reminders.[1277] All the other provisions that govern conduct or etiquette may or may not amount to professional misconduct, since it is quite clear that not all the provisions in the Rules of Professional Conduct and Etiquette create

1272 134 *NLJ* 468, 1984; 81 *LSG* 1914, 1984. Abel, R. (1988) *op. cit.*, at p. 245

1273 See *Y.A.S. Mchora v. the Advocates Committee*, discussed later on in this Chapter.

1274 Tanzania Government, The Law Reform Commission (1985), *op. cit.*, at p. 15.

1275 Regulation 7 of the Advocates (Accounts) Regulations.

1276 Rule 13 (b) of the Rules of Professional Conduct and Etiquette.

1277 Rule 17 (b) of the Rules of Professional Conduct and Etiquette.

professional offences. Furthermore, since there is no clear distinction between mere rules of etiquette and rules of conduct, it is not possible to say which of the many provisions amount to professional misconduct and which are not. There is also the danger that the express naming of a few acts as misconduct to the exclusion of many others may be interpreted, by invoking the maxim *expressio unius est exclusio alterius*,[1278] that all those which are not described as professional misconduct or to be subject to disciplinary measures are not misconducts but mere rules of etiquette.

It is therefore submitted that these uncertainties should be expressly clarified by the relevant legislations and the Rules of Professional Conduct and Etiquette. This is one area where the law should be more explicit. It is essentially the duty of the Advocates Committee. So far, the Committee has failed to adequately exercise the powers vested upon it by section 69 of the Advocates Ordinance.[1279] It is high time it made appropriate provisions in this regard. The provisions need not be exclusive, for that might entail its own disadvantages. But a general guideline, along the lines of the Rules of Professional Practice, Conduct and Etiquette of the Law Society of Kenya,[1280] is both desirable and necessary. Alternatively, the adoption of an expanded version of section 9 (6) of Zanzibar's Legal Practitioners Decree would suffice.[1281] This would lay matters in the open for all to see. It would therefore be of benefit not only to the advocates themselves (and those who aspire to become advocates), but also to their clients and the public at large.

11.3.2. Absence of Express Sanctions on Criminal Convictions

Because of the non-existence of statutory offences amounting to professional misconduct, there is also no rule that makes criminal convictions professional misconduct. Admittedly, such a rule exists at common law.[1282] It is submitted, however, that it is a matter of some importance that conviction of a serious criminal offence (whether connected with one's professional activity as an advocate or not) be made a professional offence by way of statute.[1283] The convicted advocate should have his name struck off the Roll. This will not amount to double punishment. Rather, it will be based on the fact that the person concerned is not a proper person to be a legal practitioner.[1284]

[1278] Literally meaning "the mention of one thing excludes all others of the same kind". It is sometimes stated in the form *expressum facit cessare tacitum* (that which is expressed puts an end to that which is unspoken): Cf. Bell, John (1987): *Statutory Interpretation*, London: Butterworths, , at pp. 138-139.

[1279] See, specifically, paragraph (ii) of section 69 of the Advocates Ordinance.

[1280] See Rule 2 (a) to (z) of the Rules, which are made by the Kenya Law Society pursuant to section 83 of the Advocates Act, Chapter 16 of the Revised Laws of Kenya, with the approval of the Chief Justice.

[1281] See Chapter Eight, *infra*.

[1282] See, e.g., *ex parte Brounsall* (1778) 2 Cowp 829; *Re Weare* [1893] 2 QB 439.

[1283] Cf. section 7 (2) of BRAO (Germany), which specifically provides for such a rule.

[1284] *Anon's Case* (1815) I Chit 557, n.

11.3.3. Inadequacy of Remedies for the Complainant

Lawyers are, in the final analysis, humans. And like all human beings, they are not infallible. The lawyer is amenable to error just like any other mortal. Instances of such errors, both intended and unintended, are not uncommon.[1285] So, the erring or dishonest lawyer would be subject to the disciplinary procedure which governs his profession. If found guilty, he will be punished. He may even be suspended or struck off the Roll. But what does the aggrieved client get? Usually, he ends up getting nothing–unless he goes further to sue on tortuous or contractual liability.[1286]

As observed in one study, in professional negligence cases the Advocates Committee and the courts do not seem to concern themselves with the issue of refunding the client's money, even where misappropriation is proved.[1287] To pursue rights to compensation, one would have to seek redress in an ordinary civil case. Attorney General Andrew Chenge finds the present situation to be manifestly unsatisfactory:[1288]

> This would rarely be what the client wanted! Having just had a false start with one advocate he was being invited to start with another . . . and to add insult to injury, because of the advocate's lien,[1289] he would generally find that the first advocate would insist on being paid before releasing the file.

Thus, an action in tort would necessarily involve a new and prolonged period in the courts, and with lawyers! It will be costly in terms both of time and money. It will also be a shot in the dark. There will be no certainty of compensation, especially where the lawyer has been struck off the Roll–thereby rendered jobless and therefore impecunious. Many laypersons, especially the indigent, would simply give in to the demands of such a cumbersome and unpredictable circumstance. As the Chaggas used to say: "It is no use claiming a cow from a person who doesn't have one".[1290] This statement amply epitomises

1285 See, e.g. *Charles Mwailunga v. Advocates Committee*, Misc. Civ. Appeal No. 15 of 1980. See also *Bugerere Coffee Growers Ltd., vs. Sebaduka & Anor.* [1970] EA [Ug.]147-155, at 154-155.

1286 The principles of *autrefois acquit, autrefois convict, subjudice* or *res judicata*, do not apply in respect of disciplinary proceedings under part III of the Act: See section 31 of the Advocates Ordinance. In fact, section 55 (2) of the Ordinance pronounces as void any agreement which seeks to relieve an advocate from liability for negligence. The position in Uganda as set down in *Champion Motor Spares Ltd. vs. Phadke & Others* [1969] E.A. 42-45 appears to apply to Tanzania as well. However, in the English case of *Rondel v. Worsley*, [1969]1 AC 191, the English Court of Appeal decided that barristers were immune from civil liability for malpractice with respect to their conduct in the course of litigation. But the court commented, by way of *obiter dicta*, that they might be liable for conduct outside litigation. This rule does not apply to solicitors, who are liable in negligence.

1287 Lymo, P.A. and Mdamu, S.P.N. (1990), *op. cit.*, at p. 81.

1288 Chenge, A. (1995) *op. cit.*, at p. 8.

1289 See rule 14 (b) of the Rules of Professional Conduct and Etiquette.

1290 Moore, S.F. (1992): "Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running 'Their Own' Courts", vol. 26, *Law and Society Review*, No. 1, p. 11 at p. 29.

one of the reasons for what is an almost complete non-existence of suits based on advocates' negligence in Tanzania.[1291] The injustice of such a system may thus not be very clear from the records and statistics. But its existence must be acknowledged.

11.3.4. Absence of Obligatory Professional Insurance

One of the measures that would help ensure that the client is not left without a remedy is a system of professional insurance. Professional indemnity has existed among solicitors in England for about a century,[1292] and indemnity insurance became compulsory in 1976.[1293] It guarantees that no client of a member of the Bar Association would suffer loss through the defalcations of his lawyer. Similar recommendations have been made by the Attorney-General and a senior practising lawyer.[1294] They have stressed the need for the protection of lawyers' clients through the introduction of a compulsory insurance policy scheme for every practising lawyer. This is another area (apart from cases of death or incapacity of advocate)[1295] where compulsory insurance should be provided for.

The National Insurance Corporation of Tanzania is already offering a policy for professional negligence. Individual lawyers can take up a "Lawyer's Indemnity Policy" with the Corporation.[1296] But, as one of the senior officials of the Law Society said, the only way to ensure that every advocate is insured is to make the policy compulsory for each and every one of them.[1297] I agree with this proposition. I would also add that a similar type of insurance which cover other perils such as death and prolonged illness should also be made compulsory, especially for advocates engaged in solo practice. It is time the Law Society adopted this as a matter of high policy concern–for the betterment of its own public image and, more importantly, for the good of the public it seeks to serve.

[1291] Apparently, there is so far no decision given by a Tanzanian court on the liability of advocates for professional negligence in tort. But I have been informed that there is presently one case in the High Court at Dar es Salaam and another one in Arusha in which the same advocate (based in Dar es Salaam) is being sued on tort by clients. Unfortunately, I could not obtain the citations. Also, the law does not rule out the possibility for civil and even criminal action against an advocate on the basis of the same facts relied upon in disciplinary proceedings. Many of the people I interviewed, especially non-practising lawyers, have expressed concern about the Advocates Committee's lack of power to order compensation for those who can prove to have suffered as a result of an advocate's misdoings. It is my opinion that the law should give the Advocates Committee powers to order compensation in favour of an aggrieved client where it deems proper to do so.

[1292] See Abel, R. (1988), *op. cit.*, at p. 257.

[1293] *Ibid.*, at p. 258.

[1294] Chenge, A. (1995), *op. cit.*, at p. 8, and Ismail, M.A. (1994), *op. cit.*, at p. 2.

[1295] See 7.6., Chapter Six, *infra*.

[1296] See *The Lawyer, Tanzania*, September-December, 1994, inside of the back cover page.

[1297] Ismail, M.A. (1994), *op. cit.*, at p. 2.

11.3.5. Absence of Remuneration Provisions for Criminal Matters

There is one other major omission in the Remuneration Rules: No provision whatever is made as to how much an advocate may charge a client accused in a criminal case. Criminal proceedings are not "contentious proceedings" in terms of the Remuneration Rules. That is the position as stated in the old case of *Chitale vs. Vittabhai Patel*,[1298] and reaffirmed more recently in *Keeka vs. Dhanji*.[1299] In actual fact they are not even non-contentious matters, since they do not fall within those prescribed as such by the Rules.[1300] It is thus left to the individual advocate to fix his own fees for this type of cases. The law of the market is left to operate unimpeded. It is submitted that this area also needs to be looked into. For, in a monopolistic market, and where supply is far outstripped by demand, it is the consumer who bears the brunt of the absence of effective regulation of costs. It is thus important that while considering changes in the present Rules, the Remuneration Committee should also consider introducing provisions in respect of criminal cases as well.

11.3.6. Absence of Regulations on Fees in Uncompleted Work

One other notable omission in the Remuneration Rules is the absence of a provision for uncompleted work in contentious proceedings. While a rule exists in respect of non-contentious matters,[1301] the law is silent on contentious matters, which are more likely to end without completion, and thus unlikely to come before a Taxing Master for taxation. There should therefore be express provisions for remuneration where only part of the case has been done. In Germany, for example, the various stages of a lawyer's task in litigation are ordinarily divided into three "basic units": the first one becomes payable when the action begins, the second when the oral submissions start, and the third when evidence is taken.[1302] The absence of such a rule in Tanzania has led some advocates to believe that they are entitled to the full fee whether or not the case is concluded to the end. It would be quite unfair if the full costs were to be allowed in law. It would amount to treating the remuneration agreement as an ordinary contract. The client would have to carry out his obligations therein to

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1298 (1921) 1 T.L.R. at p. 559.

1299 [1968] E.A. 91 (T) at pp. 91-92.

1300 See Schedule I to the Advocates Remuneration and Taxation of Costs Rules, 1991.

1301 Rule 17 (c) of the Advocates Remuneration and Taxation of Costs Rules, 1991.

1302 See *Bundesgebührenordnung für Rechtsanwälte* (Federal Statute on Attorneys' Fees) of 1957, and *Gerichtskostengesetz* (Statute on Court Costs) of 1975. An alternative position was laid down in Kenya in the case of *Mayers & Anor. v. Hamilton & Ors.* [1975] E.A. 13 at p. 16, where Spry, Ag.P. held that ". . . the moment an advocate is instructed to sue or defend a suit, he becomes entitled to *an* instruction fee but . . . an advocate will not ordinarily become entitled at the moment of instruction to the whole fee which he may ultimately claim . . . . The entitlement under the instruction fee grows as the matter proceeds."

the full. Otherwise, he will be punished for its breach.[1303] As Ghai and McAuslan observe:

> . . . [T]o view the provision of legal services by a profession having a monopoly of their supply, and the power to lay down the terms upon which they are supplied, in such simple terms, is to weight the balance heavily against the consumer of those services, and in this situation it converts a *de jure* profession-wide monopoly into a *de facto* single advocate monopoly–the client has little option but to continue making use of an advocate with whom he is dissatisfied, because he is going to have to pay him the full amount of the agreement in any case.[1304]

11.3.7. Absence of Continuous Inspection

At present, there is no provision in law for continuous inspection to ensure that advocates continue to adhere to professional ethics and admission conditions. It is thus submitted that post-admission follow-ups should be made to ensure that advocates continue to adhere to the conditions imposed upon them for the protection of their client's interests. There should be permanent enforcement mechanisms, instead of the present arrangement which is merely reactive, rather than preventive. In suggesting such a mechanism, however, I am not at all envisaging a bloodhound for the legal profession. Rather, it should be an effective watchdog, ensuring, by being effective, high observance of professional ethics within the legal profession. It is also nonetheless equally important that change be introduced into the categories of professional ethics aimed at making them not only more enforceable, but also capable of being complied with by legal practitioners.

The only express exception to the above-mentioned legal shortcoming is in respect of the keeping of clients accounts. The law enjoins advocates to keep clients' money separate from their own.[1305] According to the Advocates (Accounts) Regulations, it amounts to a professional misconduct if a cheque drawn by an advocate on his client's account is dishonoured.[1306] Under regulation 13 (b), the Advocates Committee has powers to cause to be inspected any advocate's accounts in order to satisfy itself that the Regulations as a whole are complied with. However, there seems to be little interest in ensuring that the Regulations are followed, despite the clarity of regulation 13 (b). This is one unfortunate omission with regard to follow ups on the question of clients' accounts. Many advocates do not maintain separate accounts for their clients. And most of those who do not strictly adhere to the requirements of keeping every cent that belongs to their clients on those accounts. The major reason for this could be that there is just not enough pressure from the disciplinary

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1303 See Ghai, Y.P. and McAuslan, J.P.W.B. (1970), *op. cit.*, at p. 392.

1304 *Ibid.*, at p. 392-3.

1305 Regulation 2 of the Advocates (Accounts Regulations), 1956.

1306 Rule 13 (b) of the Rules of Professional Conduct and Etiquette.

authorities. The keeping of clients accounts is one area in which the law is adequate but there is no follow-up in practice.

Under the present practice, a question would only arise when something goes wrong in the financial relationship between an advocate and his client, who then lodges a complaint. A disciplinary action would then be commenced. By that time, the client may already have suffered significant loss. Hence, nobody appears to take up the responsibility for ensuring that such practices are prevented before they can cause any harm to clients. It is submitted that the Advocates Committee be more active in applying the law, including all aspects concerning continued adherence to professional ethics, especially those that are for the benefit of lawyers' clients and the public.

11.4. Corruption

Charges of corrupt behaviour have been levelled against members of the Tanzanian Bar, as well as those of the Bench. It has been argued, for instance, that advocates conspire with offenders to fabricate evidence and pervert the truth in order to achieve favourable outcomes in court.[1307] It has also been claimed that conspiracies are made between advocates and judicial officers to obtain judgments in favour of advocates' clients.[1308] However, there has so far been no evidence of widespread practices of this nature as is usually alleged. Also, apart from some hints of corruption sounded by some interviewees, this research failed to come up with any concrete incidents in which claims of corruption against the legal profession could be proved.

But there have been a few cases in which members of the profession have been involved in corrupt practices and consequently penalised. One can cite, in respect of the Judiciary, the recent matters concerning two Judges of the High Court who were retired in public interest in 1991.[1309] As regards the private Bar, one finds the case of *Charles Mwailunga vs. the Advocates Committee*.[1310] Admittedly, these are isolated incidents, representing the exceptional sheep in a generally straight breed. Studies into this aspect of the profession are proof of this.

The Judicial System Review Commission reported that it did not, in its country-wide inquiry, find any "palpable, or even particular, evidence . . . to substantiate the accusation."[1311] Then the Private Practice Reform Committee found such allegations to be mere street talk, lacking any serious evidence to

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1307 See, e.g., the *Msekwa Commission Report* (1977), *op. cit.*, at p. 153.

1308 Tanzania Government, The Law Reform Commission of Tanzania (1985), *op, cit.*, at p. 6.

1309 See "Mwinyi Removes Two Judges", *Daily News* (Tanzania), 11th May, 1991. See also *Moses J. Mwakibete v. The Principal Secretary (Establishment) and the Attorney General*, Misc. Civil Application No. 11 of 1992, H.C.T., Arusha, and Civil Appeal No. 27 of 1992, C.A.T., Arusha.

1310 *Op. cit.*

1311 *The Msekwa Commission Report* (1977), *op. cit.*, at p. 154. See also, Tanzania Government, Law Reform Commission of Tanzania (1985), *op. cit.*, at pp. 15-16.

support them.[1312] However, the fact that no evidence seems to be forthcoming should not make the profession complacent about this most serious allegation. For, the absence of evidence is not necessarily the evidence of absence. Purity within the profession is a matter of so much importance that the profession has been likened to Caesar's wife, who must be beyond suspicion.[1313] In this connection, we find useful guidance in the statement: "Thou shalt not wrest judgment; thou shalt not respect persons, neither take gift; for a gift doth blind the eye of the wise, and pervert the words of the righteous."[1314]

In the circumstances, therefore, the profession must do everything possible to ensure that there is not even the slightest possibility or reason for suspicion, let alone actual occurrence, of corrupt practices among its ranks and file. An effective system of disciplinary procedure, as argued above, is one of the ways a measure of this ideal could be achieved. A good public education programme can also play a part, especially in allaying fears that may be the result of a lack of appreciation of the fundamental character of the role and function of the legal profession in society.

11.5. The Public Have a Right to Know

Most advocates support a more widespread public awareness of their rights as clients of legal practitioners. As one of them put it: "Advocates are members of the elite in our society and the public should be told that they (advocates) are not above the law, as many believe them to be." He thus opines that such publicity, perhaps more than any rules, "would help curb the ever-growing indiscipline prevailing amongst the legal brethren." This should be one of the tasks the Tanganyika Law Society should undertake to do, using especially the public media and its own magazine, *The Lawyer, Tanzania*.[1315]

As part of the argument for public legal education, it is important, whenever the opportunity presents itself, that the public is made aware of the workings of the justice system. Education on the disciplinary process of advocates, especially as regards potential complainants (i.e. the clients who use advocates' services), is not only one such opportunity; it is a necessity. It is therefore suggested that rejections of complaints against advocates by any of the authorities involved must be accompanied by clear and well-presented reasons so that the lay complainant is made fully aware of the legal situation, and the

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1312 *Ibid.*

1313 Duffus, W. (1971): "The Judiciary and the Public", *D.U.L.J*, vol. 3, Dec. 1971.

1314 Deuteronomy, XVI, adopted as one of the Canons of Judicial Ethics of the American Bar Association on 9th July, 1924, and quoted in Trumbull, W.M. (1957), *op. cit.*, at p. 388.

1315 However, the distribution of this magazine at present is very limited, mainly due to its price (TShs. 2000/- per copy) and a rather ineffective distribution mechanism. The Editor of the Magazine told me that selling it has been one of the main problems faced. It is therefore read mostly by lawyers and a few other professionals, and not the ordinary person. It would be advisable for the Law Society to reduce its price and look for ways of expanding its distribution. This will increase its circulation without causing loss in its production.

reasons why his particular complaint could not be taken up as a disciplinary proceeding.

It should be the aim of the Law Society to provide the complainants with what they may actually require–a sympathetic ear into which to pour their troubles, rather than an off-hand rejection of complaints, sometimes without giving any satisfactory explanation at all. The Committee should try as far as possible to give them a chance to express their grievances, and not merely to pacify complaints. And, once a decision against holding an inquiry has been reached, a thorough explanation as to the reasons behind the decision should be made to the complainant.

12. Ethics and Acculturation

12.1. Professional Acculturation

Professional legal education involves much more than the mere imparting of legal rules and principles. It is also a process of socialisation and, most importantly, of equipping the student with the requisite professional ethics, consisting of rules, etiquette, and aptitudes.[1316]. There is, perhaps, some justification for the blame directed against the ancient Inns of Court in England for giving the student too heavy a dose of this kind of training while offering too little academic education. However, it cannot be denied that it did offer indispensable initiation to its young members, which in some schemes of legal training is sadly lacking. Many countries have a system of post-graduate practical training before law graduates can enter law practice. It may be a Law School, or a programme of articles or apprenticeship, etc. Up until now, Tanzania does not have a system of acculturizing new entrants into the profession.

Tanzania, therefore, took a different path with regard to acculturation. Mainly due to its emphasis on public lawyering, and partly because of a small private sector, Tanzania decided to introduce the internship programme, instead of a comprehensive professional training scheme as in other countries. Since almost all of its graduates were to enter public service and remain there for at least five years, where else was more appropriate than the public sector itself to give them a professional training? But, as we have seen in Chapter Five, the internship programme has over time fallen far too short of expectations, and in today's realities, it is even more inadequate.

12.2. Towards Positive Acculturation

Given the above and the social background against which the profession is operating, it is pertinent to look critically at the type of morals offered to young lawyers. Hence, while serving in the public sector may have helped public lawyers cultivate some sense of pursuing justice, the fact that many future lawyers may now have to enter the private sector without serving in the public

[1316] Shauri, V.D. (1993), *loc. cit.*

sector makes it important that a suitable programme be devised to offer them a forthright kind of professional acculturation.[1317] For, acculturation is not, in itself, the key to better standards of ethics. In fact, some forms of acculturation may have negative effects on the minds of young lawyers–especially if unnecessarily conservative ideas of lawyering are given more prominence. The imposition of a foreign legal culture as represented by certain rules of etiquette may not be necessary in our circumstances. The suits, wigs and gowns, for example, have no particular role to play other than as symbols which increase the status lawyers have in the eyes of their own more humble countrymen.[1318] I am personally not opposed to special dressing as such. I simply do not think that it is a matter that deserves the kind of attention the profession appears to place upon it. Lawyers' obsession with maintaining the current official court attire and increasing its uniqueness[1319] represents a desire not only to safeguard their material interests, but also the superior status that comes with performing the highly visible and symbolically powerful function of court advocacy.[1320]

Enhancing status and power is also a major aim of professional acculturation. But even capitalist societies display considerable ambivalence about the explicit pursuit of material gain. What is needed, therefore, is not acculturation for acculturation's sake. We need a moral and positive form of acculturation, one which ensures that the lawyer understands fully his duty to serve society, to ensure equal justice to all, to the progressive development of the law, etc. In sum, an acculturation along the lines of recommendations proposed above on the ethical regulation of lawyering.

12.3. The Relevance of Ethics

It may be easy to simply write off rules of ethics and etiquette as examples of meaningless foreign cultural imposition,[1321] far out of touch with realities of our developing societies. To emphasise the impropriety of dress code etiquette requiring the wearing the judicial robes and lawyers' suits and gowns in Dar es Salaam's hot and humid climate, one first year law student interviewee's reply to the question as to whether the professional attire should be maintained was:

1317 See Chapters One and Two, *Supra.*

1318 Luckham (1981b), *op. cit.*, at p. 118. In Tanzania, neither advocates nor judges wear wigs as part of the official attire. Chief Justice Georges did away with them in the late 1960s. However, the western suit, tie and gown were retained. See Chapter Three, item 5.2. *supra.*

1319 In the 1995 Annual General Meeting of the Law Society, a delegate complained that the present western suit and tie was not enough to distinguish advocates from other members of the public–he was particularly mad at having been mistaken for a banker–and therefore suggested that the Society should consider introducing scarves as part of the official court attire for advocates.

1320 Abel R. (1988), *op. cit.*, at p. 288. Aldous Huxley once noted that racism is simply a masking of egoistical economic and material aims that in their uncloaked nakedness would look too ugly: See Huxley, Aldous (1935) *We Europeans*, London: Robson. Hence, the ambivalence towards explicit material gain is also, perhaps, a cloak.

1321 Luckham, R. (1981b), *op. cit.*, at p. 116.