

DISCIPLINE IN A PROFESSION; CHALLENGES AND LESSONS FROM THE LEGAL PROFESSION

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Introduction

What is a profession?

It is any type of work that needs *special training* or a *particular skill*, often one that is respected because it involves a high level of education.

Legal Profession

- It is a vocation that is based on expertise in the law and its application.
- Those who pursue these ‘vocations’ collectively form a body of individuals who are qualified to practice law in particular jurisdictions.
- They thus form a ‘legal profession’.

Self-Regulation


The Advocates Act , the Law Society of Kenya Act, and the LSK Code of Standards of Professional Practice and Ethical Conduct, 2016 regulate the Legal Profession.

- Regulation in the legal profession involves:-
 - Qualification to practice as an advocate,
 - Requirements for issuance of Practice Certificates,
 - Remuneration of advocates,
 - Disciplinary processes.



Ray Simon/Murray Schwartz in his book warned law students that they are about to enter a profession which is under constant attack. They said,

“lawyers are not popular, they are not trusted; lawyers are not respected. You are embarking on a career that will lead you to ridicule, criticism and suspicion, your work will seldom be understood or appreciated by your friends, by the public or even by your own client”.



Against this background and under the Advocates Act, two bodies were established to enforce discipline within the legal profession. These are:


1. The Advocates Complaints Commission
2. The Disciplinary Tribunal.

1. Advocates Complaints Commission (ACC)

It was established in 1989 under Section 53 (3) of the Advocates Act, as a department in the Office of the Attorney General and Department of Justice

Structure of the ACC

- Commissioners are appointed by the President.
- Currently, ACC has two Commissioners who are Advocates of the High Court of Kenya.
- One Commissioner is the Chairman of the Commission.
- Commissioners are qualified to be appointed as high court judges.

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- **Section 54** of the Advocates Act establishes the secretariat .
 - The Chief Executive is the Commission Secretary and is appointed by the Attorney General.
 - The Commission Secretary oversees the day to day running of the Commission.
 - The Commission Secretary is also an advocate of the High Court of Kenya.
 - The rest of the staff is deployed from the Office of the AG and this include State Counsel and the para-legal.

Mandate of ACC

- Receive Complaints
- Investigate Complaints
- Refer Complaint to the Disciplinary Tribunal
- Prosecute before the Disciplinary Tribunal
- Promote Reconciliation
- Award Compensation or Reimbursement

TYPES OF COMPLAINTS RECEIVED BY THE COMMISSION

1. Failure to **account** for/Withholding funds
2. Failure to keep clients **informed**
3. Issuing cheques which are subsequently **dishonored**
4. Failure to **honour professional** undertakings
5. **Delay** where no active steps are taken to prosecute or finalize a client's matter
6. **Failure to reply** to correspondence from the Commission of other professional colleagues

TYPES OF COMPLAINTS RECEIVED BY THE COMMISSION

- 7. Failure to **comply with instructions** from clients or acting contrary/without instructions
- 8. Failure to **release files/documents** to clients especially where instructions have been withdrawn by the client
- 9. **Overcharging** and/or failure to advise clients on costs
- 10. Failure to **attend Court**
- 11. **Conflict of interest**
- 12. **Demanding fees** from someone who is not a client

Lodging Complaints

- Complaints are lodged at the ACC either through writing a **letter** or filling a **help form**.
- A complainant must attach co[y of identification card and supporting documents like police abstract, copies of judgments, correspondences, motor vehicle registration numbers, insurance details, etc.
- The Commission evaluates, screens and reviews the complaint in order to establish if the complaint is within the mandate of the Commission

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- If a complaint is outside the Commission's mandate, the complainant is advised to file the complaint with a relevant body but if the complaint has no substance, it is rejected.
- Where the complaint is within the mandate of the Commission, then the Commission will deal appropriately as provided for in the Advocates act.

STATISTICS OF COMPLAINTS LODGED BEFORE THE COMMISSION BETWEEN JULY 2017 AND MAY 2018

No.	Complaint	Total
1.	Complaints received between July 2017 and May 2018	698
2.	Complaints referred to the Disciplinary Tribunal	143
3.	Complaints subjected to ADR	290
4.	Amount of money collected on behalf of complainants	Kshs. 14,756,877.50

2. The Disciplinary Tribunal

- It is established under Section 57 of the Advocates Act .

Mandate: to discipline any person who is entitled to Act as an advocate.

- Its membership comprises of the following persons;-
 - The Attorney General
 - Solicitor General or a person deputed by the Attorney General, that is someone from the Attorney General's office;
 - Six Advocates other than the Chairman, Vice-Chairman and Secretary of the Law Society and they should be of not less than ten years standing. One of whom shall be an advocate who does not ordinarily practice in Nairobi, all of whom shall be elected and shall hold office for three years and be eligible for re-election.

Lodging Complaints at the Disciplinary Tribunal

- The Disciplinary Tribunal gives the advocate against whom the complaint is made notice of the filing of the complaint and an opportunity to appear before the Tribunal and to inspect any relevant documents the complainant is relying upon.
- Where the complaint does not disclose a *prima facie* case of professional misconduct, the Tribunal may, at any stage of the proceedings, dismiss such a complaint without requiring the advocate to whom the complaint has been lodged to answer to any allegations made against him and without hearing the complaint.
- If a complaint has merit, it proceeds to full hearing.
- Hearing is by way of affidavit evidence.

Lodging Complaints at the Disciplinary Tribunal

The Tribunal may dismiss the complaint after considering the evidence or under section 60(4) of the Advocates Act may order the following: -

- That such advocate be **admonished**; or
- That such advocate be **suspended** from the practice for a specified period not exceeding five years; or
- That the name of such advocate be **struck off the Roll**; or
- That such advocate do **pay a fine** not exceeding one million shillings, or
- That such advocate pays to the aggrieved person **compensation or reimbursement** not exceeding five million shillings.
- An advocate aggrieved by the order of the Tribunal can appeal against the **said order** at the High Court as per Section 62 of the Advocates Act

THE LAW SOCIETY OF KENYA

- The Law Society of Kenya has an Ethics and Compliance section that receives the affidavit of complaint for private prosecutions and complaints for the Advocates Complaints Commission.

CHALLENGES

- Devolution
- Execution of judgments obtained at the Disciplinary tribunal –bankruptcy proceedings against advocates
- Shortage of staff
- Lack of prompt responses from the Advocates and stakeholders like insurance companies
- Changes in the profession
- Fraudsters and imposters
- Funding
- Lack of legal knowledge
- ICT
- Collusion with other professions
- Lay Persons in the Disciplinary Tribunal

THE ISSUES ACCOUNTANTS HAVE AND WHAT THEY CAN LEARN FROM THE LEGAL PROFESSION

- Accountants like all other professions face similar challenges to those of the legal profession.
- The only difference is that accountants are self-regulating whereas the legal profession is not entirely self-regulating.
- The accountants disciplinary provisions are found in Part IV of the Accountants Act which lists **professional misconduct, establishment of the disciplinary committee, inquiry by the disciplinary committee, recommendation after enquiry, appeals, rules and parts to apply to previous holder of an authority to practice.**
- See the Accountants Act No. 15 of 2008 (Section 30, Section 31, Section 32, Section 33, Section 34, Section 35 and Section 36)

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- The accountants or the institution can learn from the legal profession disciplinary process to collaborate with other state agencies like the police who can assist in **investigations** of the professional misconduct offences.
- They can also collaborate with other professional bodies like the legal profession to **curb vices** that can lead to a professional misconduct.
- The institution can also **sensitize the public and other stakeholder** on their role, mandate and what can be reported as a professional misconduct against its members.
- Organize **continuous awareness trainings** to its members on the emerging areas in accountancy and how to avoid complaints being lodged against them for professional misconduct.

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- The institution should also digitize their records to enable members of the public or anyone one with a complaint to lodge it online and report on their finding and what measures they have taken against such accountants who have complaints against them especially if their licenses have been revoked and they are not fit to practice.
- The institution should also look at decentralization of their services where those who wish to lodge a complaint do not have to travel from other counties to Nairobi to lodge a complaint.

CONCLUSION

- It is important to have rules and regulations guiding a profession as that will contribute to the success of that profession and public confidence in the members of the profession.
- Professions should therefore come up with disciplinary codes and standards that are concise because a profession cannot discipline its members for professional misconduct if they are unaware and oblivious to the fact that the particular misconduct was punishable.
- Those institutions charged with handling disciplinary matters regarding their members should also maintain consistency and firmness.

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