



PRESENTATION ON

“THE CHALLENGES OF IMPROVING AND MAINTAINING

ETHICS AND STANDARDS IN THE LEGAL SERVICE”

DURING

THE LAW SOCIETY OF KENYA ANNUAL CONFERENCE AT

LEISURE LODGE BEACH AND GOLF RESORT, MOMBASA

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BY

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**THE CHALLENGES OF IMPROVING AND MAINTAINING ETHICS
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Introduction

Let me start by restating the simple truth that lawyers all over the world and in all societies hold an unenviable position. It is also true that lawyers have profoundly and in a positive way been responsible for great reforms that have benefited human kind. The flip side of it and which is equally true is that the world over and in all societies lawyers are depicted as liars, sly, wicked and full of greed. Nothing demonstrates this more aptly than the jokes said of lawyers.

A story is told of an old man who woke up in a hospital bed and called for his doctor. He asked, "Give it to me straight. How long have I got?" The physician replied that he doubted that the man would survive the night. The man then said, "Call for my lawyer." When the lawyer arrived, the man asked for his physician to stand on one side of the bed, while the lawyer stood on the other. The man then laid back and closed his eyes. When he remained silent for several minutes, the physician asked what he had in mind. The man replied "Jesus died with a thief on either side. I just thought I'd check out the same way."

OR

Q1. When can you tell when a lawyer is lying?

A When his lips are moving

OR

Q1. Why don't sharks attack lawyers?

A Professional courtesy



Role of a Lawyer

Be that as it may and by virtue of the unique position a lawyer occupies in the society as a defender of rights and the rule of law, he unlike any other professional, is constantly under public scrutiny. His contribution to the society as a service provider of legal services on diverse societal issues earns him not only a conspicuous place in the society but regrettably, it also exposes him to vulnerability.

A lawyer's competence and efficiency in rendering legal service to the public, his courage in defending the rule of law and the cause of justice, and his ability to maintain a high degree of integrity and ethical standards constitute the hallmarks of a dynamic, effective and progressive professionalism. These are the qualities that define not only our image as lawyers but they are also the qualities that capture the public confidence in this noble profession. These qualities must be maintained if we have to enhance our ability to discharge our duty as guardians and watchdogs for the protection of the rule of law and catalysts for social, economic and political change. It is for this reason that we must seek to improve and maintain our professional ethics and standards in our service to the society.

Definition of Ethics



The topic for discussion is ***“The Challenges of improving and maintaining ethics and standards in the Legal Service”***. For a start, it might help to define the term *“Ethics”*. The term *“ethics”* means the same as morals, but is often applied distinctly in reference to professional fields, business practices and employment. Therefore, we normally use the terms professional ethics, business ethics, code of ethics, etc.

Ethics or morality poses questions about how we ought to act and how we should live. It is an inquiry into the justification of particular actions, posing the question whether these actions are right or wrong. It is also a search for good or virtuous traits or moral character. It sets the standards of acceptable behaviour. Behaviour that departs from the accepted norms is described as unethical or immoral.

Talking about ethics and the lawyer in Kenya, the late Chief Justice C.B. Madan had this to say:-

“The lawyer’s duty to his community in National Development is higher than that of the ordinary citizen because of his training and specialized knowledge. A higher requirement of integrity and personal discipline is demanded of a lawyer. He has to rise above some of the severest tests and temptations which come his way because of the trust placed in him not only in money matters but also in his skill as a professional man to safeguard his client’s liberty.”

[Why Professional Ethics for Lawyers](#)



Professional ethics and standards in our profession seek to protect the integrity of the profession itself, the professional, and the public; always remembering that the public is entitled to the highest standard of honesty, confidentiality and competence.

Under Section 81 of the Advocates Act, Chapter 16, Laws of Kenya, the Council of the Law Society of Kenya is empowered to make rules for professional conduct and discipline of the members of the Law Society. By way of subsidiary legislation we have the Advocates (Practice) Rules, the Advocates (Deposit Interest) Rules and the Advocates (Accountant's Certificate) Rules all of which are included in the Act.

The rationale behind these rules which form part of the Act is that the practice of law for the majority of lawyers anywhere involves property rights and money in one form or the other, and everywhere the lawyer is standing in a position of trust to a client. This position would therefore necessarily demand maintaining of high ethical standards to ensure public trust and confidence. In the recent past, the growth of professionalism at global and at national level, has been tremendous.

[Complaints against Lawyers](#)

Sadly, though, as statistics from the Complaints Commission would reflect, there has been little or no corresponding growth in professional responsibility and accountability and lawyers have come short of performing their duties in accordance with their professional calling and ethics. The continued growth of professionalism and its importance in the national development has put in focus the need for addressing ethics, integrity, and professional standards as a way of enhancing good



governance and reducing corruption in the delivery of professional services.

According to the Complaints Commission's statistics, the Commission received a total of **425** complaints against advocates between **January 2008 and June, 2009** alone. These do not include complaints which may have been made directly to the Disciplinary Committee. Most of these complaints relate to failure to render professional services and withholding of funds. According to these quarterly reports, there has been a marked increase in the number of complaints against advocates for the past ten years. Certainly this does not speak well of our conduct and ethics as professionals.

Besides Complaints received at the Commission, prosecution of advocates on offences relating to withholding of funds and issuing of dishonoured cheques is today a common occurrence in our criminal courts.

It is not just about clients and funds that make the bulk of complaints against advocates; the Kenya Anti-Corruption has received complaints about advocates as accomplices in attempts to bribe judges; a complaint of an advocate demanding a bribe from a judgment debtor to delay execution of a decree and it has received complaints about advocates stealing or being used to steal public funds. Behind the most notorious scandals there are names of lawyers who have helped in one way or the other. It is also not uncommon to find some advocates who go shopping for a particular "favourite" judge to hear their cases. We also know that lawyers misconduct themselves by filing counter-claims for



the sake of fees. There are those who file constitutional references for the sake of delaying cases. With all these abuses it is true to state that our professional ethics seem to be fast running down the drain.

Initiatives by Judges, Magistrates and Prosecutors

Apart from advocates who are practitioners, other legal service providers who cannot be ignored in addressing this issue of improving and maintaining ethics and standards in the legal service are the Judges, Magistrates and the Prosecutors.

However, following the enactment of the Public Officers Ethics Act, 2003, a Code of Conduct for Judges, Magistrates and Paralegal staff has been developed. The Code emphasizes professionalism, integrity and honesty. It focuses on acceptable behaviour of public officers. The Code provides guidance to judges and magistrates and provides a structure for regulating their conduct. One of the reasons it was found necessary to legislate on the ethics of public officers was that it was necessary to specify the standards of integrity and conduct to be observed by public officers and to inform the public of the conduct it is entitled to expect of a public officer.

It is encouraging to note that the Chief Justice has gone further to establish a Standing Committee on Ethics and Governance of the Judiciary. The Committee is mandated to gather information from the public on issues touching on the judiciary, the conduct of judicial officers and to identify areas of corruption and the perpetrators. It is through



this committee that members of the public are able to report on corrupt judicial officers.

On its part, the Kenya Magistrates and Judges Association has introduced the peer review which is an informal mechanism of self-regulation of its members. Such regulation is intended to uphold the Judicial Code of Conduct and Ethics.

As far as the prosecutors are concerned, a Code of Conduct and Manual for prosecutors has been developed. The Code outlines the minimum standards of professional and ethical conduct that every public prosecutor must adhere to. It is also intended to reinforce the dignity and independence of all prosecutors in their performance of their duties as well as their adherence to appropriate behaviour outside the office. Adherence to a code of ethics by judges, magistrates and prosecutors without a corresponding obligation on the part of lawyers may not give the desired effect.

It is noted with regret that despite the mandate which the Council enjoys under S.81 of the Advocates Act and Section 4 of the Law Society of Kenya Act, the society has never published a code of conduct. This may partly explain why ethical standards in our profession has deteriorated over the years.

[Why a Code of Conduct?](#)

It is important to note that a code of conduct is an important management tool that can positively shape the culture of an association/institution. Indeed codes are an integral part of any



institutions governance process. Many associations have found that adopting a clearly defined approach to ethical issues improves its reputation and promotes public confidence and trust.

A code of conduct can be used to clarify grey areas and provide guidance on everything from the simplest of questions to the most complex ethical dilemma. It can build trust within the organization and between the organization and outsiders. It increases awareness of key ethical issues and expectations. It stimulates and legitimizes ethical dialogue. It builds consensus around vital issues and guides decision-making.

It fosters the reporting of misconduct and encourages staff to seek advice. It clarifies expected conduct among staff and to outsiders. It tells the world the values that the organization stands for, and challenges the staff to live up to those values. The code also sets clear penalties for any breaches.

While it is not the only reason, there is no doubt that lack of a Code of Conduct for Lawyers, is a major factor that has contributed to poor delivery of legal services and a hindrance to sustenance of ethics and standards in the Legal Services Sector.

Bar associations the world over have come up with effective Codes of Conduct to regulate the affairs of those in the profession and to protect the integrity of not only the profession itself but also those in the profession. For example, in South Africa the General Council of the Bar of South Africa has a Code of Conduct, which, among other things, provides for the general professional conduct for lawyers and their



duties to the their clients and the court. The Code is so comprehensive that it even prescribes the conduct of pupils undergoing pupillage and their relationship with their masters and the court. Comprehensive and wide as it is, the South Africa Code of Conduct still acknowledges that it is not exhaustive and in the event a new issue arises then it will be referred to the Bar Council for determination.

England and Wales have also developed Codes of Conduct for both Solicitors and Barristers and their employees as well. Confidentiality is a prime example of a rule which will apply to all employees the breach of which would make an employee individually culpable.

As early as 1956, the International Bar Association promulgated the International Code of Ethics for its members. The Association, which is a Federation of National Bar Associations and Law Societies and individual members, has prescribed guidelines for all practitioners through their respective Bar Associations or Law Societies. Except where the context provides the Code applies to any lawyer of one jurisdiction in relation to his contacts with a lawyer of another jurisdiction or to his activities with another jurisdiction. The International Bar Association may bring incidents of alleged violations to the attention of relevant organizations. For the record the Law Society of Kenya is a member of the IBA.

If other Law Societies and Bar Associations in other jurisdictions all over the world have Codes of Conduct for their members why should the Law Society of Kenya lag behind in this area? Is it not a weakness on our part that clerks and pupils in South Africa and England and Wales have Codes of Conduct yet we do not have any for lawyers in Kenya? Is it not



time we developed our own Code of Conduct? How should a pupil for instance doing pupillage conduct himself in your chambers? What rules and/or regulations exist that touch on confidentiality? How should such a pupil conduct himself in court? These are but some of the issues that a code would address.

KACC AND APSEA

At this juncture I wish to inform this forum that the Kenya Anti-Corruption Commission, in exercise of its statutory mandate of Prevention of Corruption, has been working with the Association of Professional Societies in East Africa (APSEA) towards development of Codes of Conduct for the Association's respective members.

As you may know the KACC uses a three pronged approach to combat corruption. These are:-

- i) Law Enforcement;
- ii) Education and
- iii) Prevention

This joint initiative between Kenya Anti-Corruption Commission and APSEA is geared towards enhancing ethics and good corporate governance among professionals and private sector as a corruption prevention strategy.

As a result of this joint venture, two Codes of Conduct for the professional bodies, the Kenya Society of Physiotherapists and the



National Nurses Association of Kenya were launched on 16th July 2009 and are now in force. Under the same initiative, we are working with 12 other professional bodies which are also members of APSEA to come up with Codes of Conduct appropriate for their members. I would invite the Law Society of Kenya, being a member of APSEA, to join us in this initiative and develop an ideal and appropriate Code of Conduct for its members.

Way Forward

I must hasten to add here that much as Codes of Conduct are important in improving and maintaining ethics and standards in the legal profession just like in any other profession, that in itself, is not enough. For the Codes of Conduct to have any impact in enhancing good governance and deterring unethical conduct, the codes of conduct must have sanctions and the implementation and monitoring mechanisms must be equally enhanced.

To quote John F. Ohles,

“A code of ethics means nothing to those who are not aware about it; it means little if it is not subscribed to; and it may have no significance if it is not enforced.”

Enforcement of the Codes is therefore critical.

Secondly, apart from the need for a code of conduct it is important for judicial officers and the legal practitioners alike to avail themselves of the continuing legal education so as to enable them not only to keep abreast with the new developments in the law but also to remind



themselves of the professional ethics and standards that we must all strive to uphold. When people have been taught what is expected from them in regard to ethics, then it becomes morally justified to apportion blame and punish non-compliance. If we do not tell people what is expected of them, then we lose the high moral ground for punishing them for things they may have been ignorant about.

The Law Society's efforts in enforcing the Continuing Legal Education programs is commendable. However, it is important for the Society to include more activities on professional ethics in its calendar of events. It is noted that there is only one lecture on professional ethics in the calendar of events for this year, 2009, CLE programme. It was held in April in Bungoma and it carried only one CLE unit!

Thirdly, it must be emphasized that the disciplinary machinery in the legal profession must be efficient, independent and fair to both the complainant and the advocate if confidence in it is to be sustained.

Fourthly, the Law Society of Kenya must review rules of ethics from time to time so as to address emerging issues.

Conclusion

In conclusion, it is imperative to constantly ask ourselves whether we have acted ethically and responsibly towards our clients? Secondly, whether in so doing we have struck the right balance between protecting our clients and upholding truth and justice. It is my humble view that the two issues are fundamental to the improvement and maintenance of ethics and standards in the legal profession.



We owe it to ourselves and to the profession to improve and maintain Ethics and Standards in our profession.

And with those very many remarks, I thank you for listening to me.