

**ENTRENCHING CONSUMER RIGHTS IN THE
ADVOCATES' DISCIPLINARY SYSTEM IN KENYA**

**By:
Christine Siranga
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**Supervisors:
Dr. Francis Owakah
Dr. Jacinta Mwende**

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DECLARATION

I Christine Siranga hereby declare that the work in this research project paper is entirely my own work, except where stated. The research was gathered using online databases and printed texts and all work referenced is included in a reference list. No help was sought from an external professional agency and there was no use of other students past work and has not been submitted as an exercise for assessment at this or any other University.

Signed: _____ **Date:** _____

This research project paper has been submitted for examination with our approval as the University Supervisor

Dr. Francis Owakah

Signed: _____ **Date:** _____

Dr. Jacinta Mwende

Signed: _____ **Date:** _____

DEDICATION

This research project paper is dedicated to my beloved parents Peter and Mirriam Siranga and my brothers Michael, Stephen and Fidel for their encouragement and inspiration. I also give my boundless gratitude to my supervisors, lecturers and friends for their support and inspiration.

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I take this opportunity to thank the Almighty God who gave me the strength and guidance throughout this study.

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ABSTRACT

This study focused on the need to entrench consumer rights in the Advocates Disciplinary System in Kenya. It was limited to two main institutions involved in the discipline of advocates in Kenya, which are the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal. Attention was drawn to the correlation between increase in the number of complaints against advocates and weak institutions, the effectiveness of the institutions in promoting consumer rights and ways in which the institutions can be improved to entrench consumer rights.

The study was designed on a descriptive and analytic approach. Data was summarized using statistics and percentages used to quantify the level of efficiency. The study target was the complaint files available in the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal.

The findings from the study show that despite the existence of the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal the legal profession has seen a startling increase in malpractice among advocates in Kenya, that the two institutions have not being effective in the promotion of consumer rights and that there is need for reform of the institutions to make them compliant with the provisions of the Constitution of Kenya 2010 and the Consumer Protection Act 2012.

The recommendations from the research suggested that there is a need to significantly amend the Advocates Act to change the structure of advocates discipline in Kenya and broaden its focus in order to make it more consumer-oriented, decentralization of the Advocates' Complaints Commission and the Advocates Disciplinary Tribunal services through the creation of regional offices to bring services closer to the people, employment of more staff at the Commission to deal with the workload and the introduction of a computerized case management system.

Consequently, the recommendations drawn from this research paper are not confined to the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal but also as a guide towards influencing policy in other related institutions throughout the country.

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CHAPTER ONE

GENERAL INTRODUCTION

1.0 Background to the Study

In Kenya, the law governing the disciplinary regime of advocates is set out in the Advocates Act, which provides for two main disciplinary processes. The first is the Advocates' Complaints Commission which was established in 1989 as a department within the Office of the Attorney General. The Commission's mandate is to inquire into complaints against advocates, firm of advocates or any member or employee thereof. The second is the Advocates' Disciplinary Tribunal which has been in existence since 1949 when the Advocates Act came into force. It was previously referred to as the Advocates' Disciplinary Committee before an amendment to the Advocates Act in 2012 to change its name to Advocates' Disciplinary Tribunal. Its mandate is to hear and determine complaints against advocates including those made by the Law Society of Kenya. In addition to these institutions, we have the courts which have jurisdiction over the discipline of advocates in Kenya and the council of the Law Society of Kenya which has powers under its parent Act, that is, the Law Society of Kenya Act, to undertake disciplining of advocates (Mbote & Migai 2011, 117).

History attests to the fact that these institutions have not been able to protect consumers of legal services from professional misconduct from advocates in Kenya. There has been a significant increase in the number of complaints against advocates and in most cases the way these institutions handle these complaints seem to favour advocates against whom accusations are levelled. For example in the years 2009 (Kenya Gazette Notices Nos. 6034 of 2009, 11117 of 2009, 13852 of 2009) and 2010 (Kenya Gazette Notices Nos. 210 of 2010, 8030 of 2010, 12205 of 2010) the Commission received a total of 947 complaints compared to 1201 complaints in 2011 (Kenya Gazette Notices Nos. 437 of 2011, 8362 of 2011, 10005 of 2011) and 2012 (Kenya Gazette Notices

Nos. 5038 of 2012, 9368 of 2012, 14666 of 2012). With regard to the handling of complaints, out of the 3271 cases lodged at the Advocates' Complaints Commission in the years 2009, 2010, 2011 and 2012, 434 of those cases were dismissed as no professional misconduct was found on the part of the advocates, 870 cases were closed for the reason of abandonment, 1062 cases were closed for lack of evidence and 499 cases were forwarded to the tribunal for further action. The remaining 406 cases are still pending at the Commission and remain unresolved. According to the secretary of the Law Society of Kenya out of the 499 cases filed at the Advocates' Disciplinary Tribunal during that period, 385 of those cases have been finalized. The remaining 114 cases remain unresolved. Also, upon perusal of about 50 cases that have been finalized at the tribunal, it was established that 38 of those cases tended to support the advocates. For example, the sentences handed down to the advocates are lenient despite records at the Law Society of Kenya showing that most of these advocates are repeat offenders thus exposing other innocent members of the public to the practitioners whose professional conduct would be considered unsatisfactory.

A report (Stobbs 2002, 12) on the workings of the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal revealed that they are under-funded, under-resourced with management systems that are no longer able to cope with the volume of complaints. These institutions are also not free of political influence with the election of the Law Society of Kenya members at the tribunal increasingly been decided along political party lines. There is poor dissemination of information, majority of the consumers of legal services do not know their rights and there is a failure by these institutions to adequately exercise their powers in the regulation of advocates.

The enactments of the Constitution of Kenya 2010 and the Consumer Protection Act of 2012 have brought with it changes and it is no longer business as usual. They have broadened the democratic space and the expectations of the consumers have changed. The Constitution of Kenya 2010 and the Consumer

Protection Act 2012 provide consumers with unprecedented protection and empower them to seek redress where they have been wronged. Under Article 46 of the Constitution, consumer rights are recognized and given expression through the written law. In the spirit of the provisions of the Constitution, Parliament enacted the Consumer Protection Act in December 2012. The significance of this new legal environment relating to consumer protection is that advocates as legal service providers are now legally obliged to uphold the rights of their consumers and failure to do so will attract a legal sanction both from the courts and the regulator.

Thus the environment has changed and the legal profession ought to adapt with it in order to remain in business. It is for this reason that there is need for reform of these institutions towards the promotion and protection of consumer rights.

1.1 Statement of the Problem

The parameters used by the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal in handling complaints against advocates in Kenya have not adequately protected the consumer of legal services. The enactment of the Constitution of Kenya 2010 has brought with it increased emphasis on rights including consumer rights. These rights were further expanded through the enactment of the Consumer Protection Act 2012 which deals specifically with consumer protection in Kenya. However, in spite of this new legal environment, the consumers of legal services continue to experience obstacles in the enjoyment of their rights. The institutions charged with the discipline of advocates in Kenya have made little or no progress to improve in order to promote and protect the rights of the consumer. The real effect of this to the changing national spirit in protecting human rights has not attracted intellectual enquiry in the recent past and as such no solution has been suggested.

This research therefore aimed at looking at the structure and processes used by the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal in the handling of complaints against advocates in Kenya, their impact on the rights of the consumer as envisaged in the Constitution of Kenya 2010 and Consumer Protection Act 2012 and provide possible solutions at improving in order to adequately protect the consumer of legal services.

1.2 Research Questions

The research sought to answer the following questions:

1. What are the possible causes of increased complaints against advocates?
2. Is the existing institutional framework within the advocates' disciplinary system effective in the promotion of consumer rights as envisaged in the Constitution of Kenya 2010 and the Consumer Protection Act 2012?
3. In which way should the institutions be improved to entrench consumer rights?

1.3 Objectives of the Study

The general objective of this study was to examine the structure and processes of the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal vis-à-vis the rights of consumers of legal services with a view of entrenching consumer rights within the advocates' disciplinary system in Kenya. From this general objective, specific objectives were derived as follows:

1. To demonstrate that an increase in the number of complaints against advocates is a function of weak structures and institutions.
2. To examine the effectiveness of the existing institutional framework within the advocates' disciplinary system in the promotion of consumer rights as envisaged in the Constitution of Kenya 2010 and the Consumer Protection Act 2012.

3. To examine ways and means of improving the institutions in a bid to entrench consumer rights.

1.4 Justification of the Study

This study is invaluable to the various stakeholders in the legal industry and general consumers of legal services in Kenya. The research could not have come at a better time than this following the ongoing efforts at reforming the regulation of advocates in Kenya. This research will therefore go a long way in informing the stakeholders of the areas that need to be improved so as to ensure that the consumers of legal services are adequately protected as provided for under the Constitution of Kenya and the Consumer Protection Act.

Taking into account that the Consumer Protection Act 2012 came into force in 2013, there is little publication on the same hence this research will be significant to the Academia as the findings will provide an understanding of the legal structure intended to protect the consumer of legal services. The research will also be significant to the members of the public as the findings will enhance and promote consumer protection in the provision of legal services in Kenya.

1.5 Scope and Limitations of the Study

The scope of this study was limited to the conduct of the two main institutions namely; the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal in the handling of complaints against advocates in Kenya. The researcher had no interest in legal arguments. At the end of the study detailed recommendations were made on how consumer rights can be entrenched in the existing advocates' disciplinary system in Kenya.

The study analyzed the entrenchment of consumer rights in the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal and the review was done in Nairobi as this is where the two institutions are located. The

focus was on the structures and processes of the two institutions so as to understand how they operate in relation to the promotion and protection of consumer rights.

1.6 Definitions of Concepts

Advocates: Persons who through a program of study, are learned in legal matters and have been admitted by law to practice their profession in Kenya, who advise clients on their legal rights and argues their cases in court.

Client: A person who as a principal or on behalf of another or as a trustee or personal representative, or in any other capacity has power, express or implied, to retain or employ an advocate for whose service he or she is liable to pay.

Consumer: A person who purchases goods and services for direct use or ownership

Consumer Protection: A policy framework to ensure that a person understands his or her rights and that he or she is not exploited.

Consumer Rights: A claim made by a consumer to access goods and services of reasonable quality, information in order to enable consumers gain full benefits of the goods and services so accessed.

Disciplinary System: It is a mechanism to promote honesty, fairness, respect, and accountability within a community and to provide a fair and effective machine for resolving cases that came out of breach of a given profession.

Legal Profession: It is a paid occupation based on expertise in law that involves prolonged training and a formal qualification.

Professional Misconduct:It is acting in a manner contrary to the established code of conduct and is punishable by disciplinary measures.

1.7 Literature Review

According to Maute (2008,55) although consumer redress falls outside the usual scope of lawyer discipline, recommendations for expanding lawyer regulation to increase mechanisms designed to resolve consumer complaints that fall outside the purview of the disciplinary agency have reached new levels. She noted that the 1992 American Bar Association McKay Report recognized the significant gap between client expectations and existing regulations, and recommended that state courts should develop systems of regulation that bridge the gap with component agencies to address efficiently and effectively the widerange of complaints about lawyers' conduct. There was a proposal for major regulatory reforms to the United Kingdom legal professions, including creation of a legal services ombudsman to investigate handling of disciplinary complaints by the relevant professional bodies. Since then, and culminating in the 2007 Legal Services Act(which currently applies only to England and Wales), the reforms in the United Kingdom (U.K.) give unprecedented focus on consumer protection and redress to clients outside of or overlapping with revamped disciplinary schemes. Meanwhile,Parliaments in Australia, Scotland and New Zealand enacted ombudsmansystems authorizing varying levels of intervention for consumer redress. Expanding the scope of professional regulation to provide greater consumer protection has taken hold in other westernized legal markets. She stated that other jurisdictions including the United States of America State Courts that have not yet done so should take heed of these international developments and create mechanisms to address client complaints for redress outside the disciplinary process. In as much as the arguments expressed above relate to the United States lawyers regulatory system it gives an overview on the importance of expanding lawyers regulation to protect the consumer.

Kimanthi (2010, 1) notes that relationship between advocates and the public is characterized by mistrust if the jokes told about lawyers are anything to go by. He notes that statistics on complaints against lawyers are shocking. According to the Advocates' Complaints Commission, 425 complaints were received between January 2008 and January 2009. These figures do not include complaints made to the Disciplinary Committee of the Law Society of Kenya. It is currently not unusual to see advocates being hauled to courts for withholding funds, issuing of dishonoured cheques, domestic violence and sending abusive texts among others and there is always some excitement when a lawyer is charged. This is because professional ethics and standards in the legal profession seek to protect the integrity of the profession, lawyers and the public. The public is entitled to the highest standards of honesty, confidentiality and competence. A higher requirement of integrity and personal discipline is demanded of a lawyer. Prior to the establishment of the Advocates' Complaints Commission, the role of maintaining discipline of lawyers was in the Law Society of Kenya. However, doubts had increasingly risen over the ability of the Law Society of Kenya to discipline its members. It was feared that the Law Society of Kenya could not protect and assist the public in all matters touching to the law. The boards of inquiries which had been established to deal with complaints could not cope. This necessitated the formation of the Advocates Complain Commission. Professional integrity within the legal profession has thus proven to be very important. Owusu (2013) made reference to this statement where he noted that news of a high court judge being jailed for corruption or lawyers being jailed for stealing clients' money were unheard of in the past but the same is currently happening. Also there are murmurings of dishonesty at the bar, and at the bench yet the integrity of the legal profession is expected to be so high. He noted that when he used to be a young lawyer and there was an argument in a crowd, the people would normally turn to him and ask what he thinks, the assumption being that a lawyer has an all-round knowledge and his integrity and respect is without a doubt. But, today a

lawyer's opinion is treated with outmost suspicion and sometime even disregarded.

Mark, Gorgon, Brun & Tamsitt(2012,24) observes that professional integrity is the fundamental quality of any person who seeks to practice as a lawyer. They noted that if a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be compromised regardless of how competent the lawyer may be. It was concluded that public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect credit on the legal profession, inspire the confidence, respect and trust of clients and the community, and avoid even the appearance of impropriety. This also involve appropriate management system that support and encourage ethical and client focused behaviour. Where professional integrity is low, public confidence is lost and trust in the institutions is thereby compromised. Indeed professional integrity and ethical behaviour is crucial for personal credibility and professional success within the business world both for the service provider and the consumer of the services.

Arguably, professional integrity has an influence on consumer protection. Shirvington (2001,5) argues that this results in an ethical dilemma amongst the legal practitioners thus damaging the integrity of the profession as one is sometimes expected to act in a manner that is likely to damage another. She notes that the lawyer's role is both to uphold the rule of law and serve the community in the administration of justice by serving their clients' interests competently, communicating clearly with their clients, treating people with respect, acting fairly, honestly and diligently in all dealings, pursuing an ideal of service that transcends self-interest, developing and maintaining excellent professional skills, acting frankly and fairly in all dealings with the Courts, being trustworthy, keeping the affairs of clients confidential, unless otherwise

required by the law, maintaining and defending the rights and liberty of the individual, avoiding any conflict of interest and working with their colleagues to uphold the integrity of the profession and honourable standards and principles. Therefore, professional integrity and consumer protection are interrelated and mutually reinforcing. A profession's reliability has a major impact on the protection of the consumer thus systems and processes to improve professional integrity have the potential to help increase the consumer protection.

This concept of consumer protection is required to exist for most service organizations especially in the current legal environment. Mutunga (2013,3) noted that the integrity of the justice system depends on the effective, fair and efficient functioning of all actors in the legal sector. He observes that if the legal profession is to be taken seriously, it must begin to convey to the public its own discomfort with the low standards, both in training and practice. It must also project and defend the principle of equality before the law and serve the ends of justice for both the rich and poor alike. He observes that the consumers and practitioners will be best protected if attention is turned on the systemic and preventive actions. He goes further to emphasize the need for the creation of strong and democratic institutions in the discipline of advocates.

A critical look at the provisions of Article 46 and 50 of the Constitution of Kenya 2010, the Kenyan experience generally reflects a national reluctance on the part of the legal profession to initiate necessary reforms that are in the interest of the public and consumer protection. Reforms in the disciplinary system for advocates in Kenya need to be geared towards improving consumer protection and promotion in this new constitutional era (Marienga 2011, 1). The article encompasses advocates' discipline in Kenya and the need for institutional reform in light of the new constitutional dispensation which is the focus of this study. Emphasis is made on the weaknesses that exist within the current framework and consumers need to be satisfied with service delivery.

The Federation of Women Lawyers (FIDA-Kenya) reported that many African countries are facing an erosion of citizen's trust towards the legal profession. Too many legal practitioners are not concerned about public trust as an important factor. They noted that the status of service delivery in the courts constitutes some of the worst cases of human rights violations and puts a grim picture of the judiciary's ability to safeguard the rights of clients. They explained that frustration, bribery, lack of information, withholding of information, confusion and negligence characterize court services. As a result citizens' engagement with the judiciary and the lawyers is at best wary. In agreement Anthony & Anthony (2006, 32) noted that customer perception of quality of service is often influenced by the actual quality of the customer service delivered and received in relation to the product.

Effective institutions assist in the administration of justice and guarantee the rule of law for a just and fair society motivated by the protection of consumers and protection of the legal profession (Stobbs 2002, 21). This is important based on the fact that majority of customers who complain against advocates are the poor members of society and the workings of the Advocates' Complaints Commission and the Disciplinary Committee now referred to as the "Advocates' Disciplinary Tribunal" determines whether they get justice or not and whether the profession can regain its glory. To put this into perspective, Stobbs (2002,15) looks at the workings of the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal. He notes that the Commission receives between 300 and 400 complaints per quarter yet in its service charter it aims to reach a decision on complaints in 90 days. In effect, with a backlog of over 3,200 live cases suggests that this aim is rarely, if ever, achieved. Also, the many advocates do not take the Commission seriously as most of them do not answer to the Commission's letter and its resources are entirely inadequate to cope with the task in hand making it difficult for the complainants to get justice. On the other hand, he noted that the Disciplinary Tribunal's procedures are cumbersome and in need of urgent reform to provide

a coherent case management system and reduce the substantial delays that exist. With regard to courts the writer states that although there exists powers in the Chief Justice and the other judges to deal with advocates' misconduct it is not clear if this jurisdiction has ever been exercised. The Law Society of Kenya which acts as the secretary to the Tribunal is also under-staffed and lack strong levels of management and systems for accountability. The writer supports the idea of reform for improvements to the system and dealing with the particular problems that exist. Although the writers gives a detailed report on the workings on the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal with regards to their structures and processes, the analysis was made before the enactment of the Constitution of Kenya 2010 and the Consumer Protection Act 2012, which creates great emphasis on consumer rights.

Ojienda (2005,7) discusses the legal profession in Kenya, its history and the current structure, the legal training in Kenya, the institutions involved in the training of lawyers in Kenya and goes further to look at the institutions involved in streamlining the profession in Kenya such as the Council for Legal Education, Advocates' Complaints Commission, the Advocates' Disciplinary Tribunal and the Law Society of Kenya among others. He discusses the process of instituting a complaint, the procedure through which a complaint goes through, the expected outcome in the event of a successful prosecution. The writer further list challenges facing the disciplinary process and gives recommendations. The discussion by this writer is almost similar to what that researcher is discussing in this research. However the difference with this study is that it does not look at the institutions involved in advocates discipline in respect to consumer rights as provided for in the Constitution of Kenya 2010 and the Consumer Protection Act 2012.

Developing a consumer-oriented organization is becoming the new cornerstone of success. For many, understanding consumer rights and knowledge of how to maximize its potential requires transformation. Good implementation of

consumer rights; improves relations between the consumer and the services providers; reduces complaints, improves perceptions of customers and potential customers towards the services rendered by an institution; and helps in improving the socio-economic status of the consumers. Commission on Evaluation of Disciplinary Enforcement of the American Bar Association (1992,6) noted that times have changed and the expectations of the public and the consumers have changed. The existing system of regulating the profession is narrowly focused on violations of professional ethics and provides no mechanisms to handle other types of consumer' complaints. The system does not address complaints that the lawyer's service was overpriced or unreasonably slow and does not usually address complaints of incompetence or negligence except where the conduct was egregious or repeated or address complaints that the lawyer promised services that were not performed or billed for services that were not authorized. The disciplinary process does nothing to improve the inadequate legal or office management skills that cause many of the complaints. In Kenya consumer rights are now recognized as part of Kenya laws and regulations must be put in place or expanded to protect the consumer.

1.8 Theoretical Framework

This study was based on two theories: public interest theory and the consumer protection theory. Posner (1974, 2) public interest theory of regulation has been found quite useful. This theory holds that regulation is supplied in response to the demand of the public for the correction of inefficient or inequitable market practices. One assumption is that markets are by nature fragile and this is likely to create inefficiency in operation. With these assumptions, it is very easy to argue that the principal government interventions in the economy were simply responses of government to public demands for the rectification of palpable, and remediable, inefficiencies and inequities in the operation of the free market. This theory is the reason behind government involvement in the advocates' disciplinary process. In its attempt to protect public interest in the discipline of advocates in Kenya the government amended the Advocates Act and created the

Advocates' Complaints Commission. This Commission works together with the Advocates' Disciplinary Tribunal, the Law Society of Kenya and the Courts in the discipline of advocates in Kenya. On the other hand, the disappointing performance of the regulatory process is the result not of any unsoundness in the basic goals or nature of the process but of particular weaknesses in personnel or procedures that can be remedied as the society gains experience in the mechanics of public administration. The public interest theory of regulation holds that regulatory agencies are created for bona fide public purposes, but are then mismanaged, with the result that those purposes are not always achieved. Kenya has recently enacted laws that aim at reforming the way institutions are operate and with the coming into force of the Constitution of Kenya 2010 and the Consumer Protection Act 2012 calls for improved public administration have reached peak levels.

Brown & Wolf (2012,9) propounded the consumer protection theory by claiming that many of the woes and weaknesses of the attorney disciplinary system could be mitigated through increased public participation. By making the disciplinary process more inclusive of victim perspectives and more open to participation from multiple stake holders, attorney discipline can combat cynicism among lawyers and the public they serve, build trust between attorneys and their clients, and foster the professional qualities that are captured in both the mandatory rules of professional conduct for lawyers and the aspirational comments that accompany those rules. It is not unusual to see a consumer receiving less justice when they suffer injustice at the hands of the justice system than when they suffer injustice at the hands of the providers of non-justice goods and services. Almost all justice systems have chronic system capacity crises at all levels. Victims wait too long for compensation and healing. Innocent defendants wait too long to clear their names. The legal profession bears the burden of climbing mountains of backlogs to ameliorate system incapacity. Their contribution to this debate is to envision a specific structure and form for public participation in disciplinary processes. Therefore, the

involvement of the consumers in the system will go a long way in ensuring the effectiveness of the institutions involved in the discipline of lawyers.

The various theoretical approaches generally hypothesize that things are changing and there is an urgent need of relooking at the existing institutional framework in the discipline of lawyers in Kenya in order to entrench consumer rights.

1.9.0 Research Methodology

1.9.1 Research Design

This study used explanatory and analytic research design with a view to explain the current advocates' disciplinary system. This allowed the researcher to expose the nature of the disciplinary system and discover possible shortcomings that may interfere with delivery of service. It helped in explaining the current situation and verified the rate at which violations of the rights of consumers of legal services are occurring and categorize the information. Thus the researcher's justification for this design for the study is that it facilitated the precise action the researcher aimed to achieve, which is, whether the current system promotes and protects the rights of consumers of legal services.

1.9.2 Sampling Method

The study target was the two principal institutions within the advocates' disciplinary system namely; the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal. The research sought access to cases that had been lodged at the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal and which have been adjudicated upon and final judgment passed. The main concern was with complaints that arose from civil cases for which data was categorized in terms of the type of cases, success of cases filed and the lack of success of the cases filed.

The researcher purposively selected from among the complaints lodged, cases that arose from civil claims. The reason was to select complaints that were the most common as they were easily accessible. The purposive sample involved perusing various complaint files within the two institutions to separate those that arose from civil claims from those that arose from criminal cases. The sample size was five (5) complaint files available for the period 2006 to 2012. The files comprised two complaints that had been concluded and three that were still ongoing. It was observed that the reasons given for the concluded matters were not satisfactory as they both had letters of protest against the decisions of the institutions written by the complainants in the matter.

The researcher intended to conduct interviews to engage the consumer of legal services in order to get their perceptions and find out their experiences with the services being offered by the two institutions. However, the same was not done, owing to language barrier as most clients at the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal have limited knowledge and understanding of expressions.

1.9.3 Data Collection

The study used both primary and secondary data. Primary data was obtained from participant observation of the operations of the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal. Secondary data was obtained from complaints files at the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal, statutes and through review of various documents such as articles, newsletters, law magazines, published reports and journals. A personal visit on several occasions was made to the two institutions to search for documentations, archival records, literature and publications.

Using secondary and primary data was necessary because no one source could provide the comprehensive data required for this study. In addition, primary

data enabled the researcher to validate and explain the findings of secondary data.

1.9.4 Data Analysis and Presentation

Data was categorized into themes and summarized using statistics which were formed to quantify the level of efficiency. Quantitative data was summarized to give explanations to the analysis of the cases studied.

1.10 Ethical Issues

Due to the sensitivity of the information collected privacy and confidentiality was maintained at all times. All findings were portrayed in a confidential manner and no personal or identifiable information was recorded or printed in the study. Prior to gaining consent from the institutions, letters requesting permission to carry out the study were sent to the necessary institutions (see Appendix: letter of permission to the institutions).

CHAPTER TWO

THE JUSTICE WITHIN THE ADVOCATES' DISCIPLINARY SYSTEM IN KENYA

2.0 Introduction

The disciplinary system for advocates in Kenya is found in Part X and Part XI of the Advocates Act (Chapter 16, Laws of Kenya, revised edition 2012). This legislation establishes two institutions, that is, the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal. This chapter summarizes the historical development of the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal, their structure and processes.

2.1 Historical Development

The disciplinary regime in Kenya has undergone a metamorphosis at a given historical epoch. The period between 1901 to 1949, the legal profession was under an independent regime. The first regulatory regime was placed under the Chief Justice as a measure of control by the public through this office. Complaints against advocates were referred to a High Court Judge. This was done by way of an application by the aggrieved person to the Judge for the advocate to show cause why he or she should not be suspended. During this period several amendments were made aimed at limiting the profession to trained advocates. These amendments included the 1906 Legal Practitioners Act, which forbade applicants who had not been enrolled before an Indian High Court, and notaries public, to practice in East Africa Protectorate. Further amendments in 1911 omitted the licensing of non-lawyers from practicing, while in 1926 the requirements that one must have been a resident of Kenya for the last six months before one is allowed to practice was introduced. In 1929 penalties were introduced for wrongfully acting as an advocate (Ghai & Mc Auslan 1970, 12).

The second regulatory regime ran from the period 1945-1989. Towards the end of the first regulatory regime, specifically around 1935, both the Nairobi Law Society and Mombasa Law Society started agitating for a society replica to that of England. The result of this agitation was the enactment of the Advocates Act and the Law Society of Kenya Act of 1949. These Acts brought the regulation of the profession under self-regulation. The Law Society of Kenya (LSK) was tasked with the role of maintenance and improvement of the standards of conduct of the legal profession, protection of their members and the members of the public as regards their condition of practice among other responsibilities. Despite these provisions, amendments to the Advocates Act which introduced the Advocates' Committee and the Remuneration Committee seemed to introduce a limitation on the powers of the society. In the Advocates' Committee the composition included the Attorney General, the Solicitor General, and three members from the society. Its mandate included hearing of a complaint concerning the conduct of an advocate and filtering the complaints filed before forwarding to the High Court. Similarly, the composition of the Remuneration Committee included five members of the Law Society of Kenya who worked together with the Chief Justice. Its mandate was to enforce or set aside a remuneration agreement, recommend to the Chief Justice the rates of remuneration for both contentious and non-contentious business and set the minimum rates to be charged by advocates. The Committee later formulated policy guidelines on issues of conveyance by prohibiting non-lawyers from preparing documents on such transactions (Advocates (Amendment) Act No. 20 of 1952). Following further agitations, the Disciplinary Committee was formed with full executive powers over the disciplinary process (Ghai & Mc Auslan 1970, 14).

A board of inquiry was established to act as the investigating arm of the Disciplinary Committee. The board consisted of three advocates of not less than five years standing appointed by the Council of the Law Society of Kenya. All complaints to the Disciplinary Committee were forwarded to the boards whose

mandate was to inquire into the complaints with a view to either dismiss the complaint if the complaint in their view does not warrant forwarding to the Disciplinary Committee. The board could refer the complaints to the Disciplinary committee. The Disciplinary Committee would first look at the complaint as forwarded to it and on its own motion determine whether or not there is prima facie case established before it. It may therefore decide to dismiss the case or call the advocate complained against to answer to the complaint. After the hearing, the advocate maybe acquitted, admonished, fined, or suspended or order struck off the Roll. Appeal lay before a two Judge bench in the High Court (Ghai & Mc Auslan 1970, 25). An amendment to the Advocates Act in 2012 replaced the Disciplinary Committee with the current Advocates' Disciplinary Tribunal.

In 1989 amendments were made to the Advocates Act wherein the Advocates' Complaints Commission was established under section 53 as a department within the office of the Attorney General to inquire into complaints against any advocate, firm of advocates or any member or employee thereof (Advocates' Complaints Commission report, 2011). The Commission replaced the board of inquiry therefore bringing back the government at the center of the disciplinary process of the advocates. This model is that of co-regulation.

The Advocates' Complaints Commission works together with the Advocates' Disciplinary Tribunal to regulate the conduct of advocates and to instill the much needed discipline in the legal profession in Kenya. The discussion below looks at the two institutions in detail and shows how they inter-link.

2.2.0 Advocates' Complaints Commission

2.2.1 The Structure

The Advocates' Complaints Commission was established in 1989 and it became operational in 1990. The purpose of its establishment was *inter alia*; to receive,

investigate and prosecute complaints of professional misconduct against advocates, firm of advocates or any member or employees thereof as provided for under section 53 of the Advocates Act (Chapter 16, Laws of Kenya, revised edition 2012). It is a technical department within the Office of the Attorney General situated at Sheria house in Nairobi. Currently the Commission does not have offices outside Nairobi.

The Commission has two Commissioners who are appointed by the President and who also prescribe remuneration for them. One of the Commissioners is the chair of the Commission. Both Commissioners are advocates of the High Court of Kenya and are qualified to be appointed as a judge of the High Court under Chapter IV of the Constitution. The Secretary is an advocate and the accounting as well as the administrative officer. The Commission is currently made up of twenty three legal officers and seventeen non-legal officers who are appointed by the Attorney General through the Public Service Commission (Advocates' Complaints Commission Consultative Workshop report, 2009).

2.2.2 Powers and Functions

In accordance with the Advocates' Act, the Commission's powers include:

- a. to receive and consider complaints against advocates in Kenya
- b. to reject the complaint
- c. to institute investigations
- d. to require any person to assist it in carrying out its duties
- e. to summon witnesses in the process of investigations
- f. to examine witnesses on oath, to order an advocate to produce all relevant books and documents relating to a matter being investigated
- g. to engage an accountant to assist in the investigations of an advocate's accounts
- h. to make such order of award as it shall consider just and proper within its mandate

- i. to promote reconciliation and facilitate amicable settlement between advocates and their clients
- j. to award to the complainant compensation or reimbursement of expenses
- k. to order the surrender to the client of all funds or property which the advocate does not dispute
- l. to issue a warrant for the levy by distress or sale of the amount of any sum ordered to be paid by it on the immovable property of the person or firm so ordered to pay the compensation
- m. to refer complaints to the disciplinary tribunal or refer the complaints to the courts if it considers that they are the most appropriate forum to resolve the dispute; and
- n. to take all such steps as it may consider proper and necessary for the purpose of its enquiry.

Notably, an order made by the Commission is enforceable in the same manner as an order of the court once it is registered with the court. Advocates aggrieved by a decision can appeal to the High Court from any decision of the Commission (Advocates Act, revised edition 2012). The Commission has a duty to publish quarterly reports with regards to its mandate. In addition, the Commission conducts public sensitization programmes in various counties every year to continuously reach out to various stakeholders such as members of the public, advocates, other government departments, political leaders, religious leaders, school teachers, social groups, professional bodies, non-governmental organizations and the business community in the region. The programme entails public dissemination of information and knowledge of rights and obligations in an advocate-client relationship and the mandate and functions of the Commission. This is in line with the country's Vision 2030 and a pro-poor approach in development programme of enhancing the rule of law and administration of justice (Marienga, 2014).

2.2.3 Types of Complaints

At the Commission, professional misconduct covers a broad range of acts. These acts are classified as follows:

a. Serious acts of professional misconduct

These are acts which involve a substantial or consistent failure to reach or maintain a reasonable standard or competence and diligence or conduct happening in connection with the practice of law or otherwise that would, if established, justify a finding that the advocate is not a fit and proper person to engage in legal practice. They include:

- Failure to account for or withholding client's fund which is regarded as a breach of trust in the handling of client's money.
- Issuing cheques which are subsequently dishonoured which is not only regarded as professional misconduct but also a criminal offence under section 316A of the Penal Code (Chapter 63, Laws of Kenya, revised edition 2012).
- Failure to honour a professional undertaking deliberately or without any reasonable explanation, in the course of his or her practice.
- Failure to comply with client's instructions in which he or she is to carry out the duties.
- Overcharging a client on fees contrary to the laid out rules.
- Acting in conflict of interest as loyalty to a client is impaired not only by the representation of opposing parties in situations but also in any situation when an advocate may not be able to consider, recommend or carry out an appropriate course of action for one client because of the advocate's own interests or responsibilities to others.
- Any other behaviour which may amount to professional misconduct that is dishonest or otherwise discreditable to him or

her as an advocate or prejudicial to the administration of justice or likely to diminish public confidence in the legal profession and bring it into disrepute.

- Demanding legal fees from a person who is not a client.

b. Acts of professional misconduct that do not appear to be of an aggravated nature

These are acts which are capable of being resolved amicably between the parties through an alternative dispute resolution process.

They include:

- Failure to keep clients informed of their matters to the extent that is reasonably necessary to permit the client to make informed decisions regarding the representation.
- Delay by an advocate to prosecute or finalize a client's matter which inhibits the achievement of an expeditious and timely resolution of a dispute.
- Failure to reply to correspondence from the Commission or other professional colleagues.
- Failure to release files or documents belonging to a client unless the same were previously provided to the client or otherwise agreed with the client.
- Failure to attend court on the day that the time appointed without any proper explanation. (Advocates' Complaints Commission Legal Watch Document, 2002).

2.2.4. The Procedure for Handling Complaints

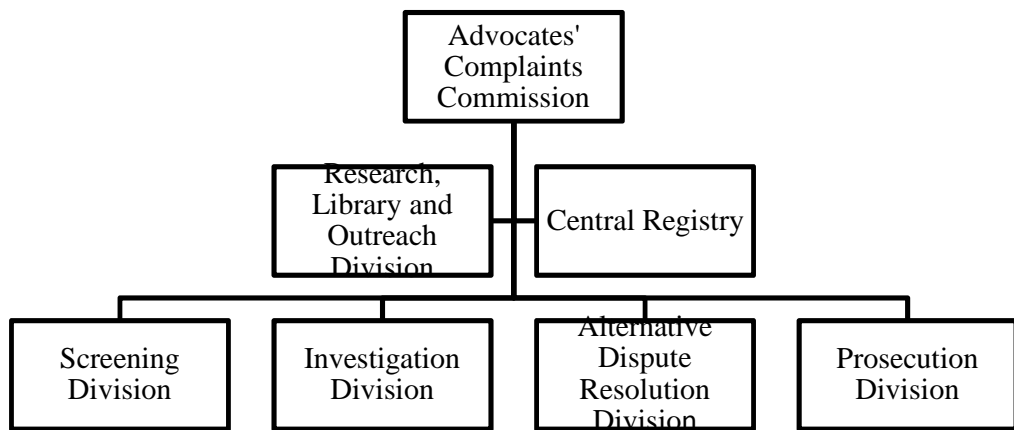
Complaints at the Commission are made in writing through a specifically designed help form or through a letter. The complaints are then processed through the various divisions within the Commission, namely;

1. Intake, Screening and Review Division
2. Investigation Division
3. Prosecution Division

4. Alternative Dispute Resolution Division
5. Research, Library and Outreach Division
6. Central Registry

The reason for the divisions was to ensure effectiveness and efficiency in the handling of complaints at the Commission. It entailed breaking down the organization into different functions and processes in order to improve coordination and developed specialized teams (Advocates Complaints Commission research report, 2014).

Figure 1: See below an illustration of the Advocates' Complaints Commission organization.



1. Intake, Screening and Review Division

In this division complaints are analyzed to determine whether they fall within the mandate of the Commission and whether there is sufficient evidence to support the complaint. The division is made up of five state counsels who receive an average of one hundred and fifty (150) complaints in a month which translates to thirty (30) complaints per month per counsel(Advocates'

Complaints Commission research report, 2014). This clearly shows that there are insufficient state counsels in the division to support the workload.

It was notable that there is no method of tracking where a file is or the progress made on that file. This is mainly because each of the state counsels in the division have a cabinet where they keep the files they are handling such that the files are not easily traceable by other members of staff especially when a counsel in possession of a particular file that is needed is away. This means that when a complainant visits the office to make an inquiry about his or her file they sometimes cannot be given the required information and it is also difficult for incoming letters or documents to be filed in their respective files.

2. Investigation Division

Investigation in this division entails seeking information from other people or institutions as to the nature of the complaint. The investigation team is made up of three state counsels and two policemen. They receive an average of one hundred files per month from the intake, review and screening division (Advocates' Complaints Commission research report, 2014). Notably the number of staff in the division is insufficient to deal with the workload. This contributes to the delay in obtaining the necessary information so as to deal with a complaint. It was also observed that many advocates and some institutions make no response to the Commission's letters. Some advocates sometimes indicate that they will seek to resolve the matter and then fail to do so. This suggests that many advocates and some institutions either do not take the Commission seriously or have no answer to the complaint. This also contributes to the backlog of cases at the Commission as some cases are not dealt with owing to lack of information.

3. Prosecution Division

The prosecution division is made up of a team of six state counsels, who upon receipt of a complaint analyze the evidence provided and prepare an affidavit

charge which formally accuses the advocate of committing a specific offence (Advocates' Complaints Commission research report, 2014). On average the team receives sixteen (16) complaints in a week which translates to about sixty four (64) complaints in a month. In addition to preparing the charges the state counsels attend the disciplinary tribunal weekly to prosecute the cases filed. It was reported that each state counsel in the division prosecutes an average of ten (10) files every week. This draws serious concern because the preparation of a charge as well as the prosecution of cases requires sufficient time and analysis and the number of staff therein are clearly insufficient to be able to provide quality service. This means that the standard of performance of many prosecutions before the tribunal is low and, in particular, many of the prosecutors are usually not well prepared to handle the cases leading to unnecessary adjournments, causing further delay.

4. Alternative Dispute Resolution Division

Complaints that are considered not to be of an aggravated nature are forwarded to this division, to try and resolve them amicably between the parties through the In-House Dispute Resolution (IHDR) mechanism as mandated by Section 53 (5) of the Advocates Act (Chapter 16, Laws of Kenya, revised edition 2012). The IHDR mechanism is a homegrown version of the Alternative Dispute Resolution (ADR) mechanism which is now mandated by the Constitution of Kenya, 2010 under Article 159 (c) (Advocates' Complaints Commission research report, 2014).

This division is made up of three state counsels and one of the Commissioners as the chair. They receive an average of twenty (20) complaints per week for resolution through the IHDR mechanism. In addition to this, the Commission conducts the IHDR sessions at the county level every year. This activity is aimed at reducing the number of pending complaints at county level and is in line with the government's policy objective of decentralization of service delivery and it also forms part of the Commission's contracted performance targets. Usually,

the Commission handles an average of forty (40) files in the counties per quarter which translates to about one hundred and sixty files in a year. This large number of complaints cannot possibly be handled by a team of four.

This process is voluntary and is supposed to be confidential. However, many advocates are reluctant to have their matters sorted out through the process and even where they agree to do so they do not take the process seriously and in some cases they fail to comply with the agreement reached between them and the parties. The commission also lacks a proper room to conduct the sessions hence the issue of confidentiality is compromised.

5. Research, Library and Outreach Division

This division is tasked with managing the research division, undertaking research in diverse areas regarding the Commission's work, reviewing existing and proposed legislation and preparing advisory proposals on the same to the policy makers and other stakeholders, providing background/supportive research to other divisions within the Commission, establishing a centralized library service within the Commission and gathering of library materials, organizing the Commission's public awareness meetings in various counties and identifying and creating partnerships (Advocates' Complaints Commission research report, 2014). The division is newly created and by the time of conducting this study it was not possible to examine its efficiency and effectiveness.

6. Central Registry

The central registry is made up of clerical officers, secretaries and the support staff totaling seventeen employees. Their role include receiving clients, registering complaints, maintain the Commission's files, filing documents, dispatching correspondences, dealing with the stationery, typing work and other requirements of the office (Advocates' Complaints Commission research report, 2014).

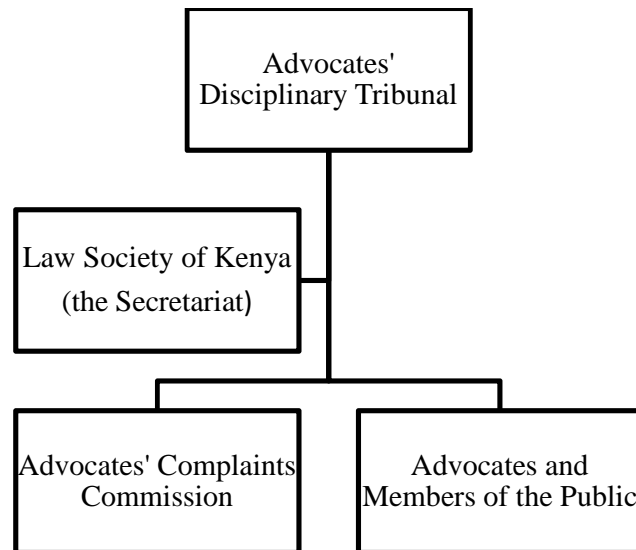
It was observed that the registry facilities are inadequate. The space is not sufficient to accommodate the staff as well as the documents. There are few storage facilities, computers, printers and scanners. They lack a computerized case-management system to register and monitor the files at the Commission. This has caused a situation whereby complainants get to lodge multiple complaints against an advocate in respect to the same matter. This has also contributed to discrepancies in the number of files being handled in each of the division and those that have being forwarded to the disciplinary tribunal. It was noted that the closed files are stored in a small room within the Commission taking up unnecessary space as they ought to be destroyed or archived somewhere else.

2.3.0 Advocates' Disciplinary Tribunal

2.3.1 The Structure

The Advocates' Disciplinary Tribunal is established under section 57 of the Advocates Act (Chapter 16, Laws of Kenya, revised edition 2012). It is a judicial body which hears complaints against advocates on matters relating to professional misconduct. It consists of the Attorney-General who is the chair of the Tribunal, the Director of Public Prosecutions, the Solicitor-General or a person deputed by the Attorney-General and six advocates (other than the chairman, vice-chairman or secretary of the Society), of not less than ten years standing, one of whom shall be an advocate who does not ordinarily practice in Nairobi, all of whom shall be elected and shall hold office for three years and be eligible for re-election. At any one time the Tribunal may have a quorum of either three or five members. It sits largely as a court but with a bit of relaxation regarding the strict rules of evidence. The secretary of the Law Society of Kenya is also the secretary of the Tribunal. The Tribunal only sits three times in a month, only on Mondays, at the professional centre building which is located along Parliament road in Nairobi (Wanjama, 2013).

Figure 2: See below an illustration of the Advocates' Disciplinary Tribunal organization.



2.3.2 Powers and Functions

The Tribunal hears and determines any charge against an advocate, a firm of advocates or any employee thereof that is made to it by the Advocates' Complaints Commission or the Law Society of Kenya or any person who has a complaint against an advocate; hears and determines any application made by a person for the restoration of his or her name to the roll of advocates and hears and determines any application made by a person for the revocation of an order. The Tribunal also has powers to tax an advocate/client bill of costs, reprimand an advocate, order an advocate to pay a fine, suspend an advocate from practice for a period of time and strike off an advocate from the roll of advocates (Wanjama, 2013).

2.3.3 Proceedings before the Tribunal

The tribunal hears all aspects of a prosecution and a typical meeting begins with the consideration of pleas in respect of the latest cases. A date is then set for the hearing following which the matter is heard then a date for judgment given. Once a judgment has been made the matter is listed for mitigation and sentencing (Wanjama, 2013). Usually, in a case where the advocate is found guilty, the matter comes before the tribunal four times. Where an advocate was absent at the plea stage the tribunal, if satisfied that the advocate was properly served, enters a plea of not guilty. If the advocate is absent at the hearings, the tribunal generally adjourns the matter. It was noted that the same panel hears each stage of the complaint. Where one of the members is absent, the matter is ordinarily adjourned. The members of the tribunal are made up of practising advocates running their own private law firms and are sometimes quite busy. This leads to a situation whereby some members are unable to some of the sittings due to pressure from their other duties. It was observed that many matters are adjourned by the accused advocates for reasons that would be considered unsatisfactory such as sickness without the production of a doctor's report or a promise to conciliate with the complainant on the matter. This adds to the considerable delay to finalize matters at the tribunal.

It is evidently clear that the tribunal is not able to cope with the work load. A look at the cause list shows that the tribunal handles an average of fifty (50) files per week. This is quite a large number considering that it only sits one day in a week with a panel of three members per sitting. This contributes to the back logs being experienced at the tribunal which is unfair to both the complainant and the accused advocate.

Although an appeal procedure is prescribed by the Advocates Act (Chapter 16, Laws of Kenya, revised edition 2012), many accused advocate seek judicial review of the findings of the tribunal rather than an appeal. The advantage of the same is that they can get to ask the court to stay the sentence which is more often than not granted then fail to prosecute the judicial review and the same

remains pending for years. This same right of appeal is not extended to the complainant who if dissatisfied with the decision of the tribunal he or she is forced to accept it.

The sentencing handed down to the advocates is sometimes lenient for cases of withholding or failing to account for clients' money. Some of the sentences given include Kshs 20,000/= fine and costs of Kshs 5,000/= to the Law Society of Kenya. This is quite low considering the seriousness of the charge. In the other jurisdiction, such cases would invariably result in the advocate being struck off or suspended for some considerable time. The reason given for the relatively low sentence was that the concern is mainly to see that the client has been paid his dues (Marienga, 2010). It was also observed that there was inconsistency in the sentences. For example, one accused advocate who was guilty of a similar offence as another accused advocate received a lower penalty than the other advocate. The tribunal lacks a computerized data system to ascertain judgments and sentences handed down in similar cases.

It was noted that enforcement of the tribunal's orders is a big problem and there is no clear procedure on how it should be done. The Law Society of Kenya and the Commission lack sufficient staff and resources to carry out the process and currently no execution proceedings is being carried out on the files and complainants with matters where they are owed money by the accused advocate are uncertain whether they will ever receive their dues.

CHAPTER THREE

THE CURRENT LEGAL REGIME AND CONSUMER PROTECTION IN KENYA

3.0 Introduction

This Chapter interrogates the provisions of the Constitution of Kenya 2010 and the Consumer Protection Act 2012 and how the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal can work within this improved legal environment. In addition, this chapter demonstrates how other jurisdictions particularly in New Zealand, Australia, United Kingdom and South Africa have transformed in an effort to promote and protect the rights of consumers of legal services in the discipline of lawyers in an attempt to improve the Kenyan situation.

3.1 The Current Legal Regime

The extensive legal protection for human rights that currently exists in the Constitution of Kenya 2010 is the product of decades of struggle by individuals concerned with human justice and well-being. Also, the progressive convergence of human rights norms in the international plane had a significant impact in the development of human rights protection in Kenya. The global culture of human rights advancement is attributable to positive efforts by various nation states to promote respect for human rights. Virtually, the rights contained in the Constitutions of modern democratic nations reflect the human rights norms set forth in the Universal Declaration of Human Rights (UDHR) and other global human rights declarations and conventions, in particular the Charter of the United Nations, the United Nations Covenants on Civil and Political Rights (CCPR) and Economic, Social and Cultural Rights (CESCR), thus providing a measure of uniformity in the fundamental guarantees and a reinforcement of the universal character of the human rights (Roschmann, Wendoh & Ogolla, 2012).

It is in this regard that Article 46 of the Constitution of Kenya 2010 is lauded as a landmark achievement in the area of consumer protection. The article spells out that “consumers have the right to goods and services of a reasonable quality”. It further provides that consumers have the right “to information necessary for them to gain full benefit from goods and services; to the protection of their health, safety, and economic interests; and to compensation for loss or injury arising from defects in goods or services”. Although this may not seem like a great deal at a first, it is a huge milestone. For a country that has hitherto not had any meaningful consumer protection laws, Kenyans have just been handed the whip and shield required to enforce their rights. It is also noteworthy that the Article applies to goods and services offered by public entities or private persons (Kiunuhe 2011, 1).

In the spirit of Article 46 of the Constitution of Kenya 2010, Parliament enacted the Consumer Protection Act in December 2012 which came into effect in March 2013. This law spells out consumers’ rights and obligations *vis-a-vis* product and service liability; it makes provision for the promotion and enforcement of consumer rights as well as empowers consumers to seek redress for infringement of their rights as consumers; and also make provisions for compensation.

The Act gives consumers a wide range of rights including the right to commence legal action on behalf of a class of persons in relation to any contract for the supply of goods or services to the consumer. This right cannot be ousted by any agreement between the parties. Other consumer rights provided for in the Act include the right to full pre-contractual information for the consumer to make an informed choice, the right to complain with regard to quality, delays in provision of rectification, quantity and price of such goods or services as are offered, the right to a reasonable notification of termination of service particularly in relation to the provision of basic telecommunications services and/or internet access, among other rights. It prohibits ‘unfair practices’ and

proceeds to provide for radical sanctions against a supplier who engages in ‘unfair practices’. Such practices include, representing that goods or services have a sponsorship, approval, performance or characteristics that they do not have; or representing that goods or services are of a particular standard, quality, grade, style or model, if they are not, and so on. Therefore, where a consumer enters into an agreement, whether oral or written, after or while a person has engaged in an unfair practice, the Act provides that the consumer has the right to terminate the agreement and seek any remedy available to them in law, including a suit for damages.

Undoubtedly, the Consumer Protection Act is a far-reaching piece of legislation that will affect different sectors of our economy including legal practice, real estate, e-commerce, manufacturing, agriculture, banking and finance, aviation, among many others. In this connection, the Act establishes the Kenya Consumers Protection Advisory (CPA) Committee that shall aid in the formulation of policy related to consumer protection, accredits consumer organizations, advice consumers on their rights and responsibilities, investigate complaints and establish conflict resolution mechanisms amongst other duties. A breach of any regulations made under the Consumer Protection Act 2012, will make a person liable to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding two years or both such fine and imprisonment (Oraro 2013, 1).

Although there has been some doubt about whether this consumer protection law applied to professions, the Consumer Protection Act is clear that it covers “both private and public entities”. It is therefore beyond doubt that the Act applies to the legal practice of lawyers, whether they are: partnerships or sole practices. It applies at all stages of providing legal services, including: advertising, promotion and negotiations about providing legal services; the client agreement or contract to provide legal services; the actual provision of the services and costing of work done.

The disciplinary system for advocates in Kenya should therefore be geared towards improving consumer protection in line with this new constitutional dispensation. The number of employees at the Commission as well as the Tribunal is relatively low in comparison with the workload thus compromising the provision of quality services to the consumers. The composition of the Commission and the Tribunal whereby they are made up of lawyers only poses a great threat to the right of fair administration of justice. The Attorney General being the head of the Commission and also chairing the Tribunal is clearly unconstitutional as it defeats the purpose and spirit of democracy, equality, the principle of separation of powers and the rule of law upheld in the Constitution. The fact that these institutions are only based in Nairobi makes it impossible for the majority of Kenyans to access their services yet advocates are based in every region in the country. The objects of devolution as outlined under Article 174 of the Constitution is *inter alia* to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya and to facilitate the decentralization of State organs, their functions and services, from the capital of Kenya. The lack of proper case management systems and guidelines to follow in decide cases by these institutions compromises the issue of fairness as captured in the Constitution of Kenya 2010 and the provision of quality services to consumers as outlined in the Consumer protection Act 2012. The election of members of the Law Society of Kenya sitting at the tribunal who are also eligible for re-election creates a perceived allegiance to the advocates appearing before them and this falls short of attaining a fair trial contrary to the express provision of the Constitution of Kenya 2010 and the Consumer Protection Act 2012. The execution process at the tribunal takes an unnecessarily long time goes against the established principle of law that justice delayed is justice denied.

3.2 Jurisdictions with best Practices

In New Zealand it is a stated purpose of the Lawyers and Conveyancers Act “to protect the consumers of legal services” and in doing so the Act is intended to

provide “amore responsive regulatory regime in relation to lawyers”.The Act created comprehensive complaints and disciplinary process for lawyers, conveyancers, employees, firms, and their clients. It has three main parts namely; Part 1: The establishment of the Standards Committees of the New Zealand Law Society and the New Zealand Society of Conveyancers to consider complaints; Part 2: The establishment of the Legal Complaints Review Officerto provide independent oversight and review the decisions made by the standards committees of the New Zealand Law Society and the New Zealand Society of Conveyancers; and Part 3: The establishment of the New Zealand Lawyers and Conveyancers Disciplinary Tribunalto hear and determine disciplinary charges against members of the legal and conveyancing professions.It is, however, important to note that this is not just the regulatory regime casting its net more widely to be able to discipline lawyers for breaches of legal duties owed to their clients. It is also an expansion of the function of the complaints and discipline regime of the professional bodies.

Perhaps the most important shift under this new framework is the introduction of a new and lower disciplinary standard to which lawyers will be held. Compensatory orders may be made against lawyers who are found guilty of “unsatisfactory conduct”. That term is defined in section 12 of the Act as including “conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer”. It is of note that the Act looks to the standards expected of a member of the publicand what they are entitled to expect from a reasonably competent lawyer. This is an articulation of the well-established consumer protection standard of the “reasonable consumer test” which focuses not on the views of professional people (i.e. a peer based standard) as to proper standards, but the reasonable expectations of ordinary people. While in practice the two will frequently converge, the shift in focus is an important signal. It should also be noted that unsatisfactory conduct may also be found in cases of conduct consisting of a contravention of the Act, or of any regulations or practice rules

made under the Act. It may also be found where the lawyer has engaged in “conduct unbecoming of a lawyer” or “unprofessional conduct” or any other conduct which “would be regarded by lawyers of good standing as unacceptable” (Webb 2008, 7).

The Standards Committees have wide powers of investigation. They may either exercise those powers of investigation themselves or may appoint an investigator to do so. The investigatory powers enable the standards committee to require the production of records. Importantly, such an ability to require the production of records relating to clients’ affairs will trump any claim of confidentiality. Moreover, any claim of privilege will of course belong to the client and the lawyer will not be able to assert it on their own behalf. A lawyer may only assert privilege in his or her own right where the document in question relates to a relation in which the lawyer him or herself was the client / litigant in respect of which advice was sought or litigation contemplated. In such a case of course the privilege will be absolute. However, probably the most powerful weapon in the arsenal of the standards committee is found in s 141 (b) of the Act under which the committee may “require or permit the person complained against to appear before it to make an explanation in answer to the complaint”. Given that the committees also have the power to require evidence to be given on oath this amounts to a considerable inquisitorial power. Importantly any misconception that practitioners are entitled to remain silent in the face of an inquiry should be quickly dispelled. Not only had there never been a right to silence in disciplinary proceedings, increasingly the rules approach a positive obligation to disclose damning information to a standards committee on inquiry.

In Australia, the Legal Profession Act of 2004 significantly altered the structure of lawyer discipline in Queensland and broadened its focus. The Act shifted responsibility for lawyer discipline to an independent Legal Services Commissioner, to take a much more consumer-oriented approach to lawyer

discipline. Section 414 provides for the appointment by the Attorney-General of the Legal Services Commissioner who may be a lay person or a lawyer but may not serve for more than (10) ten years. There is an advantage to having a non-lawyer serve as the Legal Services Commissioner. Lawyers are acculturated to the norms of the legal profession, which are sometimes at odds with ordinary notions of morality and the interests of the public. It is important in a lawyer discipline agency designed to protect the public that there be someone in authority with a non-lawyer's perspective (Levine 2008, 13). That perspective helps ensure that complaints about certain lawyer misconduct will not be "overlooked" or dismissed, especially where the conduct conforms to professional norms but violates ordinary notions of morality.

An example of the advantages to having a non-lawyer Legal Services Commissioner was illustrated in *Legal Services Commissioner v. Mullins (2006) LPT 012*. In that case, a discipline complaint was filed against a Queensland barrister who did not reveal when settling a personal injury automobile accident case that he had recently learned that his client was seriously ill with cancer. The barrister continued to rely in mediation on the claim that his client had a twenty seven (27) year life expectancy when he knew that this life expectancy was very unlikely due to the client's illness. While many lawyers might take the conventional advocate's view that the barrister was simply preserving privileged information and being a zealous advocate for his client, a non-lawyer would readily see that by allowing the insurance company to settle the case believing that his client had a twenty seven (27) year life expectancy, the barrister was committing fraud. This was, in fact, the view taken by the lay Legal Services Commissioner, who pursued the complaint and obtained a reprimand and a \$ 20,000 fine against a highly-regarded member of the Bar. It is less likely that a legally-qualified commissioner or at least one who had previously practiced in Queensland would have had the courage to prosecute the complaint (Pakula 2011, 8).

The Queensland's Legal Services Commissioner is afforded sufficient independence, regardless of whether the Legal Services Commissioner is a layperson or a lawyer. There is no requirement that the Attorney-General consult with any constituency about the appointment. The Legal Services Commissioner reports annually to the Attorney-General, who tables the report with Parliament. The annual report is available to the public. The Act gives the Legal Services Commissioner the exclusive power to receive complaints and, where appropriate, to dismiss them without investigation (Section 259, Legal Profession Act, 2004). The Legal Services Commissioner may refer those complaints to the Law Society or the Bar Association for investigation and recommendations, but he reviews the recommendations and has the ultimate authority to determine whether a matter should be prosecuted. If the Legal Services Commissioner decides to proceed with a matter, he has the exclusive authority to prosecute the case.

Under the Act, complaints that are not immediately dismissed are divided into three categories. Complaints of "professional misconduct" allege conduct that would "justify a finding that the practitioner is not a fit and proper person to engage in legal practice" and includes "a substantial or consistent failure to reach or maintain a reasonable standard of competence or diligence" (Section 245 (1), Legal Profession Act, 2004). Complaints of "unsatisfactory professional conduct" allege conduct "that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian practitioner (Section 244, Legal Profession Act, 2004). "Professional misconduct" and "unsatisfactory professional conduct" complaints (hereinafter "conduct matters") are heard in separate tribunals. Complaints involving "consumer disputes" are disputes between a person and a legal practitioner that do "not involve an issue of unsatisfactory professional conduct or professional misconduct" (Section 262, Legal Profession Act, 2004) The Legal Services Commissioner may suggest to the parties that

they enter into mediation, but mediation is voluntary and consumer disputes will not result in a hearing (Section 263, Legal Profession Act, 2004).

Professional misconduct complaints are heard by the Legal Practice Tribunal, which is composed of members of the Queensland Supreme Court, and is constituted by any one of its members. The single justice, who alone constitutes the Legal Practice Tribunal, sits with one member of a lay panel and one member of a practitioner panel who are to “help” him in hearing and deciding a discipline application. The Legal Practice Tribunal’s decisions may be appealed to the Queensland Court of Appeal. Unsatisfactory professional misconduct complaints are heard by the Legal Practice Committee, which is composed of two lawyers and a lay person. Decisions by the Legal Practice Committee may be appealed to the Legal Practice Tribunal, and with leave, to the Court of Appeal.

The Act represents a significant departure from the prior system, not only because it establishes an independent agency to handle complaints about lawyers, but because of its decidedly consumer oriented tilt. Problems with lawyer competence and diligence which had previously been largely ignored by those in charge of lawyer discipline are now expressly a basis for discipline. The standard applied in determining unsatisfactory professional misconduct is no longer what the community of lawyers thinks about the conduct, but rather what a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

At its inception in July 2004, the Legal Services Commission inherited 938 complaints. Two years later, it reportedly has eliminated most of the complaint backlog reducing the pending number of pre-Act complaints to 29 (Legal Services Commission, Annual Report, 2005-2006). Also, although the Legal Profession Act 2004 does not expressly provide for private discipline, some complaints are resolved privately. Complaints that allege unsatisfactory

professional conduct may be resolved informally with the Legal Services Commission if the lawyer will take restorative steps such as apologizing to the complainant, waiving some or all of a fee, or implementing better office systems. In such cases, the Commission “will use the leverage the Act gives it to seek to persuade lawyers to do whatever they reasonably can to put things right, and to prevent similar mistakes in the future”. If the Legal Services Commission is satisfied with the steps taken by the lawyer, the complaints are dismissed in the “public interest,” on the theory that there is no public interest in prosecuting them. Currently, almost 15% of all conduct matters are dismissed on “public interest” grounds(A Statistical Analysis (2001) 13 Bond Law Review).Due to the Legal Services Commission’s ability to resolve the complaint back log, it has been able to devote some of its resources to its own investigations and initiatives.

The Australian Consumer Law is ‘generic’ consumer protection legislation that applies to the provision of goods and services generally. The Legal Profession Act is ‘specialist’ legislation that applies specifically to the provision of legal services. The two pieces of legislation sit side by side and overlap. The Australian Consumer Law uses different language, and brings a lawyer’s ‘customer service’ obligations into sharper focus, but imposes few if any new or additional professional or service obligations on lawyers. It has never been acceptable, for example, for lawyers to engage in misleading, deceptive or unconscionable conduct, or to enter into unfair contracts with their clients or to use undue harassment or coercion in recovery of their fees. It follows that the Legal Services Commissioner has jurisdiction to deal with complaints about lawyers which involve alleged contraventions of the Australian Consumer Law, not because the Legal Services Commissioner has jurisdiction to deal with complaints under the Australian Consumer Law, it doesn’t, but because the conduct of a lawyer which contravenes the Australian Consumer Law will more often than not also contravene his or her professional or service obligations under the Legal Profession Act.

It seems that the Queensland Legal Services Commission is committed to a model of individual consumer protection, and does not view that function as subsidiary to the discipline function. Significant resources are devoted to informally resolving consumer concerns of existing clients. In some cases, these efforts may include obtaining agreements from lawyers to pay clients' money in order to resolve consumer dissatisfaction. Thus, while the Legal Services Commissioner has no power to make compensation orders, the Commission and the Law Society will sometimes informally arrange for compensation in appropriate cases. Likewise, the Legal Services Commission is now treating fewer complaints as "consumer disputes," and more complaints as "unsatisfactory professional conduct," which gives it more leverage to work out dispositions that are likely to satisfy individual consumers (Levine 2008, 13).

In the United Kingdom, historically, most legislation focused on the lower tiers of legal professionals rather than the elite barristers, who had close ties to the upper house of Parliament. Until 2007 there was no generally applicable law of unauthorized practice; unless Parliament specifically reserved certain tasks to a category of licensed professionals, any person could offer to sell law-related services providing no false or deceptive statements were made about the services. Competition law actively encouraged access to consumer information and competition from different types of consumer providers, challenging the legitimacy of anticompetitive ethical restrictions (Maute 2008, 11).

An ombudsman office was proposed to replace the Lay Observer, an independent person who could investigate solicitors' procedures but who could not reexamine the substantive complaints (Mackay Report, 1989). This led to the creation of a Legal Services Ombudsman (LSO) by the 1990 Courts and Legal Services Act (CLSA). The Act empowered the Lord Chancellor to appoint a non-lawyer to oversee the handling of legal complaints by the respective professional bodies. Unlike most ombudsman schemes which deal directly with consumer complaints, the Legal Services Ombudsman could only investigate

after clients have exhausted a lawyer's internal complaints handling system and that of the appropriate professional body. In carrying out investigations, the Legal Services Ombudsman had the same power as the High Court in terms of requiring attendance, examining witnesses, ordering the production of documents and charging contempt. The Courts and Legal Services Act empowered the ombudsman to make recommendations about the professional bodies' complaints handling procedures and to suggest reconsideration of a complaint or payment of damages (Maute 2008, 14).

The Legal Services Ombudsman received 815 complaints about solicitors in 1991, most relating to poor communication, delay or a disregard for client instructions (ABA Commission on Multijurisdictional Practice report, 2008). Complaints about costs were also common. Ombudsman Michael Barnes felt that many of these were related to poor communication, since clients uninformed about costs received unexpectedly large bills (Rhode 2002, 6). Complaints about barristers related primarily to their behavior "at the door of the court," including "excessive zeal in procuring a last-minute settlement, apparent insensitivity and inattentiveness to the lay client's concerns and lack of confidentiality in negotiating with an opponent." In 1992, Barnes again criticized solicitors for failing to communicate with their clients about costs. Although the Law Society's written standards recommended that solicitors inform new clients about likely costs, updating them at least every six months, many ombudsman complaints indicated that the recommendation was not consistently followed. This constituted inadequate client service. In all, the ombudsman received 923 new complaints about solicitors and 71 new complaints about barristers (Maute 2008, 15).

A detailed five year evaluation of the Legal Services Ombudsman operations (James & Seneviratne, 1995) found that although the Legal Services Ombudsman was effective in investigating complaints, it was not well publicized nor widely used as very few complainants contacted the office. It

appeared that consumers had misconceptions and false expectations about the services the Legal Services Ombudsman offered. The ombudsman primary function was to serve as the “guardian of the guardians” and a “second port of call” for legal complaints. The legal professions retained primary responsibility for complaints handling. This led to sweeping reforms in the 1999 Access to Justice Act which significantly expanded the Legal Services Ombudsman’s regulatory powers, authorizing the ombudsman to issue binding orders, not just recommendations. The Act also gave the Lord Chancellor the power to appoint a Legal Services Complaint Commissioner to take over complaints handling if the professional bodies were not doing so in a satisfactory manner.

Despite the legislative and institutional reform, there was still dissatisfaction with the complaints handling, poor administration, poor decision making and poor service on the Law Society’s part. This called for radical reforms which led to the enactment by the British Parliament of the Legal Services Act, which received Royal assent on October 30, 2007. The Act established the Office of Legal Complaints (OLC) which is a single, independent body, to investigate and determine all consumer complaints against legal service providers. The Act requires practitioners to maintain in-house procedures that serve as the first port of call for clients’ complaints.

Unlike the original scheme, those who are unhappy with the practitioner’s handling of their complaints proceed directly to the ombudsman, bypassing the Law Society or Bar Council. The ombudsman may direct the respondent to apologize, reimburse fees, pay compensation, rectify the error at the practitioner’s own expense, or take other actions in the interest of the complainant. The ombudsman can provide redress but not discipline, which remains under the professional bodies’ jurisdiction. The ombudsman also may dismiss a complaint without consideration of the merits if the complaint is “frivolous or vexatious,” or if there was undue delay in making the complaint or providing evidence. Once the ombudsman has decided a complaint, he or she

must prepare a written statement, including the reasons for the decision. The ombudsman must give a copy of the statement to the complainant, respondent, and any relevant professional body. If the complainant accepts the determination, it becomes final and binding on both parties. The Act creates a “polluter pays” system, requiring respondents to pay charges to the Office of Legal Complaints unless the complaint is resolved in their favor and the ombudsman is satisfied that the respondent took all reasonable steps to resolve the issue through in-house procedures.

The sweeping reforms establish the Legal Services Board (LSB) as the governmental entity charged with oversight of approved regulators organizations of the professional bodies which must perform their duties to the board’s satisfaction, consistent with the Act’s regulatory objectives (Maute 2008, 17).

In South Africa, the constitutional dispensation generated new concepts and terminologies which were not only unique but also provoked much heated debate. They include words like: transformation, configuration, reconstruction, reparation and phrases like: African renaissance, affirmative action and black empowerment (Iya 2003, 2). Thus the impetus for the transformation of the legal profession is entrenched in the Preamble of the Constitution as it, calls for a healing of the divisions of the past to establish a society based on democratic values, social justice and fundamental human rights.

The legal profession is divided into two branches: attorneys and advocates. The attorney is the person with whom you first make contact when you seek legal advice or if you have a legal problem. Therefore, an attorney needs to be readily available to everyone, and the service he or she supplies need to be broad enough to cover a wide field of legal problems. Advocates, on the other hand, have specialized expertise in various areas of the law, especially in the presentation of cases in court. To obtain the services of an advocate, the client

approaches the attorney who then engages the advocate on his behalf to represent the client in court or to give the client the necessary advice. Attorneys handle a large variety of affairs for individuals, businesses, associations and corporations. These include work in the field of business and corporate law; civil and criminal litigation; property transactions; taxation; estate planning; and business as well as personal advice. Many attorneys consider themselves to be general practitioners. Advocates are primarily experts in the art of presenting and arguing cases in court. Whereas in the past, only advocates were permitted to present cases (appear) in the higher courts, attorneys were granted right of appearance in the High Courts and the Constitutional Court as from 1 November 1995. This requires a mastery of law and fact, good judgment and the ability to present a case clearly and coherently. Advocates also give legal opinions and help with the drafting of legal documents that are required in every walk of life, for example, commercial, industrial or domestic (Iya, 2003, 3).

Law Society of South Africa is the umbrella body for the attorney's profession in South Africa. The society recommends that a person talk to their attorney first about any problem they have with his or her service. If the person is still not satisfied, then he or she should complain to his or her provincial law society. The person can complain to their provincial law society about the ethical behaviour of their attorney, such as failing to answer his or her letters, or to account for money held on his or her behalf, and overcharging. The Law Society of South Africa disciplinary committee conduct closed disciplinary hearings and its findings are sealed. Only when a lawyer has been struck from the roll, which is rare, is the offender's name revealed. However, the societies will not handle complaints, such as alleging incompetence or negligence, which might give rise to claims for compensation, as the societies do not have the power to award compensation. Such compensation can only be pursued through further legal proceedings where one will have to contact another attorney. On the other hand the General Council of the Bar of South Africa is the federal body representing the organized advocates' profession in South Africa. There is

a Bar at the seat of every provincial and local division of the High Court of South Africa. The Bar enforces a strict code of ethical conduct and professional integrity to which advocates are required to adhere and sometimes to enforce discipline amongst its members. An advocate who transgresses the law or the code of conduct may be expelled from the profession by way of an application to the High Court.

The recently enacted Legal Practice Act will see all lawyers both advocates and attorneys fall under a single regulatory body for the first time, that is, the South African Legal Practice Council (SALPC) which will be assisted by provincial councils in its daily operations. The single national body will be made up of representatives of the two categories of the legal profession. The primary function and powers of the national body is to determine norms and standards for the profession, set the requirements for admission to the profession, oversee the implementation of the Legal Services Charter, promote and protect the public interest and access to justice. It would usher in a transparent, transformed, public-centered and responsive profession.

With regards to discipline of legal practitioners, the Act states that disciplinary bodies that adjudicate on cases of alleged misconduct will be open and transparent and will consist not only of lawyers, but also of lay persons. The disciplinary proceedings will no longer take place behind closed doors and the requirements of information regarding disciplinary proceedings and complaints are to be freely available. The Act also states that a Legal Services Ombudsman is to be appointed, who will be a judge discharged from active service and whose mandate is to protect and promote the public interest in relation to the rendering of legal services and to ensure the fair, efficient and effective investigation of complaints against allegations of misconduct by legal practitioners (Business Day 2014, 2). Ultimately, the Act is about the safety and protection of the public.

3.3 Conclusion

There is much to be admired by the world generally particularly, in the New Zealand, Australia, United Kingdom and South African's lawyer discipline reforms. For the first time, legal practitioners are subject to disciplinary processes that can result in an array of sanctions. Complaints against legal practitioners are being investigated much more quickly and prosecution decisions are being made by an independent agencies mainly headed by a non-lawyer. The public are able to learn about the discipline imposed on lawyers, which allows individuals to better protect themselves when they choose to retain counsel. The new legal disciplinary systems are much more transparency and credibility than the previous systems. They are among the most consumer-oriented discipline systems in the world.

CHAPTER FOUR

ANALYSIS OF SELECTED CASES

4.0 Introduction

This chapter presents the findings from the analysis of some of the cases that have been handled at the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal. The case analysis was carried out on five complaint files available in the period 2006 to 2012. The files reviewed comprised two complaints that had been concluded and three that were still ongoing. The files were chosen because they had evidence of dissatisfaction from the complainants.

4.1 Case Analysis and Discussion

(a) *In the matter of a business man vs. an advocate (2006) ACC*

In this matter, the complainant was alleging that the advocate received money on his behalf in respect to a debt recovery matter but had not remitted the same to him. A letter was written to the advocate to respond to the complaint in September 2006 but he did not respond to the letter. A letter of reminder was written to him in June 2007, which is nine months down the line but he did not respond. Two years down the line in July 2009 another letter was written to the advocate informing him of the complaint. This time round he responded stating that he is in the process of filing his bill of costs in court for determination. The complainant was informed of the same and he wrote to the Commission objecting to the advocate's bill of costs claiming that the amount being charged was exorbitant. The Commission then wrote to the advocate asking that he files his bill of costs at the Commission to enable quick and inexpensive resolution of the matter. However, by the time of reviewing this file the advocate had not filed his bill of costs and the matter remains unresolved.

According to the Commission's service charter investigation should be completed within 90 days of receipt of the original complaint. Obviously exceptions to this will apply if there are ongoing legal proceedings, if attempts to conciliate are made or if for good reason, one of the parties cannot answer within the given times. A review of this case shows that this matter was lodged at the Commission in 2006 and eight years down the line the matter is yet to be resolved. At one point from 2007 to 2009 the matter remained dormant with no action from the Commission. Yet the complainant continues to wait for his matter to be resolved to date. The delay in resolving the matter defeats the ends of justice. This principle is the basis for the right to a speedy trial and similar rights which are meant to expedite the legal system, because it is unfair for the wronged party to have to sustain the wrong with little hope for resolution. A sense of confidence by the members of the public in the disciplinary process is essential for a just society but inordinate delay in the disposal of cases shaken the confidence of the people and fails to protect the consumer of legal services from unscrupulous practitioners.

(b) *In the matter of X advocate (2008) ADT*

In this matter, the complainants numbering a total of eighteen persons had alleged that the advocate had received some money on their behalf in a compensation claim but had remitted to them only part of it leaving the balance unaccounted for. Upon investigations by the Advocates' Complaints Commission a *prima facie* case of professional misconduct was established against the advocate and the matter was forwarded to the Advocates' Disciplinary Tribunal for adjudication. The charges leveled against the advocate were that of; failing to account for part of the compensation to the complainants, withholding an undisputed amount being part of the compensation money, making payments out of the compensation fund without the consent or express instructions of the complainants, overcharging the complainants on legal fees and charging legal fees in a matter where the advocate was the sole defendant and where the complainants were not parties. At the tribunal the advocate

pleaded not guilty to the charges and the matter was set up for hearing. At the hearing the tribunal members proceeded to determine the cause through affidavit evidence under Rule 18 of the Advocates' (Disciplinary Tribunal) Rules. The tribunal then proceeded to enter judgment in the matter whereby the advocate was found guilty of failing to account, making payments without the clients consent and charging legal fees in a matter where the advocate was the sole defendant and complainants were not parties. With regard to the charge of withholding an undisputed amount the tribunal found that the charge was not proven and proceeded to acquit the advocate. Furthermore, with regards to the charge of overcharging the complainants on legal fees, the advocate was ordered to file his bill of costs at the tribunal for determination.

The advocate filed an application at the tribunal in 2010 seeking to set aside the judgment that was made in 2009. Notably, the application was made one year after judgment was made and it is not clear why it took that long and why no action was taken by the tribunal in that period. The advocate's application proceeded for hearing and it was dismissed sometime in 2011. The advocate was then ordered to comply with the tribunal's earlier orders to file his bill of costs for determination. In another turn of event, the advocate filed in the tribunal three bills of costs and two of those bills were in relation to other matter not before the tribunal. This prompted the Advocates' Complainants Commission who are the prosecutors in the matter to raise a preliminary objection to have the two bills of costs excluded for the tribunal's proceedings. The preliminary objection was thus upheld by the tribunal and the tribunal proceeded to tax the advocate's bill of costs relating to the matter before it. The ruling of the taxation was done in July 2014. The matter is still pending at the tribunal and the complainants are yet to be paid the balance of monies belonging to them.

A review of this case shows a delay in processing the matter at the Advocates' Disciplinary Tribunal. A look at the file revealed that the complainants lodged

the matter with the Advocates' Complaints Commission in 2007 and the same was forwarded to the Advocates' Disciplinary Tribunal in 2008. However, six years down the line the matter is yet to be resolved and justice continues to elude the complainants. From the proceedings, it is clear that the advocate played a role in the delay of the matter but no action was taken against him. In fact in one of the tribunal's judgment, it was observed that the advocate's act to file other bills of costs relating to other matters not before the tribunal was an abuse of the court process and that it was done in bad faith and was only meant to delay the process. The same was observed by the Advocates' Complainants Commission in their submission on the matter and it was argued that strict measures should be put in place to ensure avoidance of delay by parties.

(c) In the matter of a Shareholder of a Limited Company vs. an advocate (2010) ACC

In the matter, the complainant had alleged that the advocate had failed to account for money he received on behalf of a company he represented in a sale transaction. The Complainant also alleged that the advocate fraudulently paid other people money belonging to the company without the shareholders' knowledge and the manner in which payments were made by the advocate to the over six hundred (600) beneficiaries was suspect as different beneficiaries received different amounts of money for the same acreage of land. The issue that arose was whether the Commission had the mandate to deal with the allegations been raised by the complainant taking into consideration that the matter involved a limited company which is in itself a legal entity with capacity to sue and be sued. Upon assessment of the claim, the advocate wrote to the complainant stating that no case of professional misconduct had been established against the advocate as the issues raised fell outside its mandate and also the subject matter of the complaint are the same as those raised in a matter that was pending before a court. The complainant was however dissatisfied with the findings claiming that the manner in which the Commission handled the matter was unsatisfactory as it lacked professionalism, fairness and impartiality.

According to him the advocate's conduct fell short of the public expectations as he assisted in mismanaging the company finances and enabling the directors of the company to steal from the company and therefore the advocate should have been subjected to disciplinary proceedings.

The Commission's opinion that the advocate's conduct does not amount to professional misconduct appears to suggest a conspiracy on their part to protect the advocate who happens to be a colleague in the profession. This is a violation of the right to fair administrative action. Though the advocate acted within the instructions of the directors in the company with regards to the manner in which the payments were made, it is prudent to note that advocates have a duty not only to their clients but also to the public at large and to their professional communities and colleagues. Thus, apart from any specific contractual obligations that advocates assume in their commercial dealings with others, there are several tortious and equitable duties that advocates might owe people and organizations at large, as well as a number of moral responsibilities which advocates assume as qualified legal professionals. Hence an advocate can owe a duty to a third party. For example, in the case of *Tracy et al. v. Atkins* (1979), 195 D.L.R. (3d) 632 (B.C.C.A.), it was held that a purchaser's lawyer could owe a fiduciary duty to the vendors because they were unrepresented and the lawyer knew or ought to have known that the elderly and unrepresented vendors were or might be relying on him to protect their interests.

The manner in which the payments were made particularly to the individual directors was questionable and the advocate should have dissuaded his client from making that decision as it resulted in the commission of a fraudulent act resulting in substantial injury to the financial interests of the shareholders. Therefore, this review shows weakness in the decision of the Advocates' Complaints Commission. It was obvious that the Commission favoured the advocate over the complainant in its decision.

(d) *In the matter of a woman vs. an advocate (2011) ACC*

In this matter, the complainant had alleged that the advocate had failed to render to her adequate professional services by failing to process her title documents in respect to a piece of land she had purchased despite payment of the required legal fees. The Commission wrote to the advocate to answer to the complainant in August 2011 and he responded the following month stating that the transfer documents were passed to a surveyor who could not be found. In its decision, the Commission found no professional misconduct on the part of the advocate stating that the matter should be handled by the police. The complainant was not happy with the Commission's decision and sought a review of the same but upon further discussion the Commission upheld its earlier decision. According to the complainant the advocate's explanation that the surveyor is to blame for the delay to process the transfer was unsatisfactory because according to her she had instructed the advocate and not the surveyor and it is him who should be held responsible for the delay to process her title.

In the case of *Rogers vs. Whitaker (1992) HCA 58*, it was held that while the retainer is contractual in nature, the relationship is also fiduciary and, accordingly, lawyers owe a duty of care to exercise reasonable competency and skill in the conduct of the client's matter. Thus practitioners should serve their clients competently and diligently. They should be acutely aware of the fiduciary nature of their relationship with their clients, and always deal with their clients fairly, free of the influence of any interest which may conflict with a client's best interests. They should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law. This cannot be said of the advocate in the above matter who acted negligently by handing to the surveyor original documents belonging to the complainant without any reasonable explanation. The fact that the advocate was given instructions by the complainant and paid legal fees he was required to carry out the instructions diligently to the end and if there was

reasonable cause to give the documents to the surveyor he should have consulted the client first. Thus, the loss of the documents that had been entrusted with the advocate amounts to inadequate professional service or negligence and the advocate should take full responsibility. Negligence in a professional capacity so as to bring the profession into disrepute is a disciplinary offence and the Commission should have taken action against the advocate for failing to act with reasonable diligence and engaging in conduct prejudicial to the administration of justice.

The review shows an omission on the part of the Advocates' Complaints Commission to deal with complaints that allege minor neglect or incompetence on the part of the advocates which may not necessarily be considered for disciplinary action but in the eyes of the consumers they are considered unsatisfactory and a violation of their rights

(e) In the matter of X advocate (2011) ADT

In this matter, the advocate was accused of withholding funds belonging to the complainant. The Advocates' Complaints Commission investigated the matter and found that the advocate's action amounted to professional misconduct. The matter was then forwarded to the Disciplinary Tribunal for adjudication. At the tribunal a plea of not guilty was entered on behalf of the advocate and the matter proceeded to hearing. At the hearing the tribunal members proceeded to determine the cause through affidavit evidence under Rule 18 of the Advocates' (Disciplinary Tribunal) Rules. The matter was then listed for judgment. However, the advocate made an application seeking to have the matter heard afresh as he had not been represented effectively. The advocate also claimed that he had paid the complainant all her dues and was not withholding her money. The tribunal proceeded to dismiss the advocate's application stating that no evidence of payment to the complainant had been provided and that the lack of proper representation does not exonerate him from taking responsibility.

However, in the judgment, the advocate was cleared of the charge levelled against him.

The notion that justice must be served means that an accused person got what he or she deserved and that the complainant was satisfied with what was administered to them as punishment. However, in this case, justice was not served at least as far as the complainant is concerned especially with regards to conforming to what is right and true. The review showed weakness in the decision of the Advocates' Disciplinary Tribunal as it acquitted the advocate of the charge levelled against him despite the fact that no evidence of payment to the complainant had being provided.

CHAPTER FIVE

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

The Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal can improve where their efficiency and effectiveness is linked to the promotion and protection of consumer rights. However, the current structures and processes of these institutions poses a problem to this realization which this study sought to describe. The objective was to demonstrate that an increase in the number of complaints is the function of weak structures and institutions, to find out whether the existing institutional frameworks within the advocates' disciplinary system are effective in the promotion of consumer rights as envisaged in the Constitution of Kenya 2010 and the Consumer Protection Act 2012 and to recommend ways in which the institutions can be improved to entrench consumer rights and what can be done to make this happen. The findings from the data are shown herein under;

5.1.0 Summary of the Findings

5.1.1 Main Findings: Objective One

The first objective was to demonstrate that an increase in the number of complaints against advocates is the function of weak structures and institutions. The findings suggest that despite the existence of the Advocates' Complaints Commission which was established twenty five years ago and the Advocates' Disciplinary Tribunal which was first created in 1949, the legal profession has seen a startling increase in malpractice among advocates in Kenya. The overwhelming majority of complaints being made against advocates are particularly disturbing because the Commission and the Tribunal are clearly unable to cope with the workload. Such workload brings the entire system into disrepute. This shows a serious mismatch between client needs and the regulatory response by the advocates discipline agencies. The Advocates'

Complaints Commission and the Advocates' Disciplinary Tribunal as currently structured have serious flaws. It is also, clear that the Advocate's Complaints Commission lacks sufficient staff to handle the workload. With an average number of one hundred and fifty (150) complaints being lodged per month in addition to other pending complaints, a staff capacity of forty three people is quite low.

Of great concern is the fact that the investigative and prosecutorial powers of complaints of professional misconduct against advocates in Kenya are vested in the Advocates' Complaints Commission. As a department within the Office of the Attorney General and Department of Justice, the Commission is headed and controlled by the Attorney General who also happens to be the chair of the Advocates' Disciplinary Tribunal. This implies that the Attorney General investigates complaints against advocates at the Commission, and then forwards the same before the Disciplinary Tribunal where he prosecutes while at the same time he is the chair meaning he is the Judge in his own case. The Tribunal can refer cases of fraud to the Attorney General for prosecution under section 80 of the Advocates Act. The Tribunal consists of six advocates who are elected by advocates during the Law Society of Kenya elections. This makes the elected members "Judge" over their electorates or constituents. This begs the question whether the advocates sitting in the Tribunal can be bold enough to lose votes by ruling against their electorates. This creates a perceived "allegiance" by the Tribunal members to the advocates appearing before them.

The case analysis revealed that the complaints handling process takes an unnecessary long time. In general complaints take between three and five years at the Commissions offices under investigation. Thereafter the matter takes another two to four years before the Disciplinary Tribunal. Once judgment is given the exercise of execution goes back to the Law Society where now both the Attorney General and the Disciplinary Tribunal have no control. The law is silent in the case where an advocate leaves the jurisdiction of the Tribunal in

order to defeat the execution process. This means that if the Law Society of Kenya fails to trace the errant advocate then the matter remains unresolved indefinitely. The provisions of the Advocate's Act give the accused Advocate a right to appeal against the order(s) of the Tribunal and an opportunity to apply for judicial review of the order(s) passed by the Tribunal. That same right has not been extended to the complainant. The law is silent on the same. It is a precarious position since the Attorney General prosecutes on behalf of the complainant before himself as the Chair of the Tribunal. Therefore if the complainant is not satisfied with the decision of the Tribunal, the Attorney General cannot appeal or apply for judicial review against his own decision.

The Commission and the Tribunal are based in Nairobi only yet they are ideally established to serve the whole country and it is expected that complaints against the advocates are everywhere where the advocates provide the legal services. The decisions of the Commission and the Tribunal are also very inconsistent as they lack firm and consistent jurisprudence on their decisions. This is against the set principles in law of precedent-setting.

5.1.2 Main Findings: Objective Two

The second objective sought to answer the question whether the existing institutional frameworks within the advocates' disciplinary system are effective in the promotion of consumer rights as envisaged in the Constitution of Kenya 2010 and the Consumer Protection Act 2012. The result from the study shows that the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal have not been effective in the promotion of consumer rights.

Firstly, statistics from the Advocates' Complaints Commission show an increase in the number of complaints over the years. The Commission received a total of 947 complaints in the years 2009 and 2010. This number increased to 1201 complaints in the years 2011 and 2012. The situation is alarming considering that the increase in the number of complaints is occurring despite the existence

of the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal. Although, multiple factors could explain the increase such as increase in the number of advocates in the population as well as increased competition among advocates, the rate of increase is quite high and if the same is not controlled through the disciplinary process, the practice of law will no longer be relevant.

Secondly, the way the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal handle complaints appear to favor the advocates against whom accusations are levelled. In the years 2009, 2010, 2011 and 2012 the Commission received a total of 3271 which were processed as follows;

Table 1: Descriptive statistics on complaints processing at the Advocates' Complaints Commission

No.	No. of Complaints	Decision made
1.	434 Complaints	Closed as no professional misconduct was found on the part of the advocate
2.	870 Complaints	Closed for reason of abandonment
3.	1062 Complaints	Closed for lack of evidence
4.	499 Complaints	Forwarded to the Disciplinary Tribunal for prosecution
5.	406 Complaints	Remains unresolved to date

At the Advocates' Disciplinary Tribunal, the 499 complaints filed during that period were processed as follows;

Table 2: Descriptive Statistics of complaint processing at the Advocates' Disciplinary Tribunal

No.	No. of Complaints	Reason
1.	385 Complaints	Finalized
2.	114 Complaints	Remains unresolved to date

The statistics above show that most complaints lodged are dismissed. Out of a total number of 3271 complaints received at the Commission in the years 2009, 2010, 2011 and 2012, 2366 were dismissed. Some of the reasons given include no professional misconduct found on the part of the advocate, abandonment by the complainant and lack of evidence. However, dismissing valid complaints does nothing to correct the advocate's behavior or compensate the client. Dismissing so many complaints also casts suspicion on the disciplinary process. Usually, there are some complaints that allege instances of minor misconduct, minor neglect or minor incompetence which the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal may not consider to be grounds for disciplinary action and are almost always dismissed, although technically they do violate the rights of the consumer. The summary dismissal of these complaints is one of the chief sources of public dissatisfaction with the system. The statistics above also show a large percentage of pending complaints that remains unresolved to date. This delay in resolving complaints creates unnecessary stress for the respondents and the complainants which is against the rules of natural justice.

Thirdly, analysis of cases from the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal demonstrate that their decisions tend to support the advocates. For example, in the matter of *a Shareholder of a Limited*

Company vs. an advocate (2010) ACC the Commission's decision that no professional misconduct had been found on the part of the advocate was unsatisfactory. This was the case despite the questionable manner in which the advocate made payments to the individual directors which conduct would be regarded as dishonourable in the eyes of the consumer. In the case of *In the matter of X advocate (2011) ADT* the disciplinary tribunal cleared the advocate of the charges levelled against him notwithstanding that the advocate failed to produce evidence of the alleged payment of money owed to the complainant. Most complainants expect serious consideration of their complaints and when these basic expectations are not met, the proceedings are likely to be perceived as unfair, regardless of the reality.

5.1.3 Main Findings: Objective Three

The third objective was to examine ways and means of improving the institutions in a bid to entrench consumer rights. The outcomes from the study show that the coming into force of the Constitution of Kenya 2010 and the Consumer Protection Act 2012 has changed the way things are done and the existing institutional framework within the advocates' disciplinary system, in its current state, is not in support of the Constitution of Kenya 2010 therefore there is need for reform.

Firstly, the fact that the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal are administered by lawyers only may lead to a situation where some complaints are overlooked or dismissed, especially where the conduct conforms to professional norms but violates ordinary notions of morality yet according to the public the act falls short of the standard of a competent legal practitioner. Lawyers can be acculturated to the norms of the legal profession, which are sometimes at odds with ordinary notions of morality and the interests of the public. On the other hand, even where an unhappy client files a complaint with the institutions, they are slow in responding to the complaints, overly lenient, and notoriously unresponsive to consumer

concerns. Their efforts focus primarily on serious misconduct and rarely address the more common client complaints like failure to communicate or neglect of client matters. This goes against the constitutional provision under Article 46 (1) (a) that consumers have a right to goods and services of reasonable quality and this is further emphasized under section 5 of the Consumer Protection Act that provides that goods and services under a consumer agreement must be of a reasonably merchantable quality. In Australia, an example of the advantages to having a non-lawyer Legal Services Commissioner was illustrated in *Legal Services Commissioner v. Mullins (2006) LPT 012*. In that case, a discipline complaint was filed against a Queensland barrister who did not reveal when settling a personal injury automobile accident case that he had recently learned that his client was seriously ill with cancer. The barrister continued to rely in mediation on the claim that his client had a twenty seven (27) year life expectancy when he knew that this life expectancy was very unlikely due to the client's illness. While many lawyers might take the conventional advocate's view that the barrister was simply preserving privileged information and being a zealous advocate for his client, a non-lawyer would readily see that by allowing the insurance company to settle the case believing that his client had a twenty seven (27) year life expectancy, the barrister was committing fraud. Similarly, in South Africa, the Legal Practice Act states that disciplinary bodies that adjudicate on cases of alleged misconduct will be open and transparent and will consist not only of lawyers, but also of lay persons.

Secondly, the institutions are not afforded sufficient independence. The members of the Tribunal are paid their remuneration by the Attorney General in consultation with the Treasury out of the monies provided by Parliament. This implies that the Commissioners, Disciplinary Tribunal members and the State Counsel who investigate and prosecute the complaints against the advocates are all paid by the Attorney General. These persons are equally answerable to the Attorney General who happens to be the head of the Advocates' Complaints Commission and the Advocates' Disciplinary Tribunal. The Constitution of

Kenya 2010 provides a clear distinction of separation of powers. It appears in the Constitution that each body has been seized with its own responsibilities and functions while maintaining a healthy system of checks and balances. For instance, the three arms of government have their independence strengthened by express provisions of the Constitution. In the exercise of their powers, the same should be carried out within the modicums put forth by the same constitution. It is the division of government with each arm having its own duties that lays the plat form for the separation of powers in Kenya. Separation of powers promotes justice and fairness in solving disputes.

The Constitution provides that every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The provisions of Constitution recognizethe aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. In addition national values and principles of governance bind all State organs, State officers and all persons. Therefore, as a State Officer, the Attorney General is bound by the Constitution. However, by him conducting a multiplicity of roles in the disciplinary process of advocates, defeats the purpose and spirit of democracy, equality and the rule of law upheld in the Constitution. This multiple functions falls foul of current human rights jurisprudence. In such a scenario where the Attorney General investigates, prosecutes and adjudicates over complaints against Advocates, it can be argued that he cannot accord the advocates equal protection in law. Article 27 (3) of the Constitution provides that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Thus the Attorney General's multiple roles in advocates' discipline is derogation from the fundamental rights accorded to all the citizenry of Kenya. In the United Kingdom, an ombudsman office was established whose role is to investigate solicitors' procedures only. The legal services ombudsman could only investigate after clients have

exhausted a lawyer's internal complaints handling system and that of the appropriate professional body.

Thirdly, delay in processing and resolving complaints against advocates by the Commission and the Tribunal, goes against the established principle of law that justice delayed is justice denied. It is unfair to both the complainant and the advocate that a complaint should be delayed for three more years before it is resolved. It is hard to see how any institution can satisfactorily deal with cases of this age: memories will have faded, evidence will be unreliable, some complainants and advocates may even have died. At its inception in July 2004, the Legal Services Commission in Australia inherited 938 complaints. Two years later, it reportedly has eliminated most of the complaint backlog reducing the pending number of pre-Act complaints to 29. In Kenya, even with the establishment of the Advocates' Complaints Commission the number of complaints continues to rise.

The execution process which contributes greatly to the delay in finalizing matters at the Tribunal has not protected the consumer of legal services. The Law Society of Kenya as the secretariat of the Disciplinary Tribunal is mandated to execute the orders of the Tribunal. Execution is done against the advocates who were unsuccessful in defending themselves against the Tribunal and having exhausted their right of appeal or judicial review. One way of carrying out the execution is through attaching and selling the movable property of the errant advocate where money is involved and the order seeks restitution. A successful complainant seeks through the Law Society the services of an auctioneer to carry out the execution process through attaching and selling the movable property of the charged advocate. These instructions are issued by the Law Society of Kenya through their advocate and then passed to auctioneers from the area the errant advocate is practicing. It can be noted that these auctioneers work with the advocates; they are clients to the advocates on a daily basis and are then been instructed by the complainant to attach the advocates

movable property. This raises serious conflict of interest. Will the auctioneers serve the interests of the complainant or will they jealously seek to protect their long business relationships between themselves and the errant advocate? It is arguable that the auctioneers may grow cold feet in seeking to execute against their former or current bosses. The upshot of this is that the auctioneers will be very reluctant to pursue their clients for a disciplinary cause. The complainant will end up not enjoying the fruits of their judgment; since there is no one willing to carry out the execution process. This goes against the constitutional provision on fair administration of justice under Article 47 and section 15 of the Consumer Protection Act which prohibits unfair practices.

Fourthly, the complainant's inability to appeal or apply for judicial review is a hurdle to access to justice and against the tenets of fair trial. The Constitution of Kenya entitles every person a fair hearing. Article 50 (1) of the Constitution provides that, *"every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body"*. Also, due to inconsistency in the decisions of the Commission and the Tribunal, the two institutions lack proper guidelines to follow in case it encounters a complaint having the same facts as a complaint that had being earlier dealt with. The issue of fairness is thereby compromised. There exists a situation where two claims with similar facts are decided differently thereby creating a situation where one claimant feels victimized.

Lastly, inaccessibility of the Commission and Tribunal offices by complainants living outside Nairobi brings into question the constitutionalism of the institutions. This implies that many of the complainants living outside Nairobi who have grievances against advocates are not able to be assisted as they cannot afford to travel long distances, as most of the Commission's and Tribunal's clients are the poor and underprivileged in society. This goes against the principle of access to justice in which the Constitution of Kenya 2010 has been

premised. Chapter 11 of the Constitution discusses the objects and principles of devolved government. The objects of devolution as outlined under Article 174 of the Constitution is inter alia to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya and to facilitate the decentralization of State organs, their functions and services, from the capital of Kenya. Also, the Constitution provides for consumer protection, competent services and proper communication to the client. This is not realized due to the fact that the Tribunal is not accessible to the largest number of the citizenry residing in the countryside. Furthermore, the Constitution and the Consumer Protection Act protects citizens in the provision of goods and services offered by public entities or private persons. The legislations make it clear that consumers have a right to information necessary for them to gain full benefit from goods and services. Therefore, the Law Society of Kenya digest on professional conduct and etiquette should be accessible to the members of the public.

5.2 Conclusion

In conclusion, we want to state that the current system of lawyer discipline in Kenya is poorly constructed to protect the consumer of legal services. Evident as a result include; increase in malpractice among advocates in Kenya, advocates domination in the disciplinary process, lack of clear distinct powers and functions of the institutions involved, delay in complaints handling process, multiplicity of functions by the Attorney General, inconsistent decisions, inaccessibility of the Commission and Tribunal offices to persons living outside Nairobi, the absence of a formulated code of conduct, complainant's inability to appeal or apply for judicial review and the lack of obvious accountability in the system. Meaningful reforms in the disciplinary system are therefore necessary to expand responsiveness to the consumer of legal services about the quality of services. Other jurisdictions, particularly in the developed world have made vast improvements in the disciplinary system of lawyers to bring the consumer at the center of the system and in order for the Kenya's legal profession to promote

consumer rights and further expand its global competitiveness, it must create workable systems to improve the quality of discipline and complaints handling especially with the current legal environment where emphasis on consumer rights is now prevalent.

From a consumer's point of view, there is no question that the discipline model as it currently established ought to be reviewed in the face of great public awareness occasioned by the current legal system, namely, the Kenya Constitution 2010, The Consumer Protection Act 2012 and, the activities of consumer organizations. This will greatly enhance the protection legal service consumers will receive. Under a consumer protection model for regulating lawyers, the regulatory structure and process would be radically different. It is important that the disciplinary agencies services are accessible to all consumers in terms of cost, user friendliness and geographical allocation. In handling complaints, the agencies ought to be pro-consumer in orientation and impartial in judgment. The processes need to be speeded up to ensure that justice is achieved. It must enable the parties to actively participate in dispute resolution, ensure harm is redressed and the results or remedies are made final and carried out (Chalfie, 1991).

5.3.0 Recommendations

In respect to the above findings, the research recommends the following in order to embed consumers' rights in the disciplinary system of advocates in Kenya;

5.3.1 Amendment to the Advocates Act: There is need to significantly amend the Advocates Act to broaden it and have it focus on the consumer of legal services rather than a tool of rectifying advocates whenever they err. Some of the ways of achieving this include;

- The creation of a Legal Services Ombudsman to replace the Advocates' Complaints Commission. This change of name is intended to develop a

new identity in the minds of consumers in order to distance itself from negative perceptions associated with the institution's past.

- The introduction of an in-house procedure of resolving disputes where the Act shall require that all advocates maintain in-house procedures that serve as the first point of call for clients' complaints. The Advocates' Complaints Commission will therefore receive complaints once it is satisfied that the advocates have taken all reasonable steps to resolve the issue through in-house procedures. This will reduce the lodging of minor or frivolous complaints that may easily be dealt with between the parties. This will in turn reduce the workload at the Commission making it more effective and efficient.
- The Act should give the Advocates' Complaints Commission the exclusive power to receive, investigate and prosecute complaints against advocates' in Kenya. This will create a clear distinction between the various bodies involved in the discipline of advocates in Kenya thus improving public perception.
- The Act to introduce a limited period within which complaints are concluded to avoid protracted investigations and prosecutions which cause delay.
- The Act to introduce non-legal members' persons to sit both at the Commission and the Tribunal to complement the lawyers. For example, the chair of the Commission to be appointed by the Attorney General and he/she to be either an advocate or a lay person and at the Tribunal a lay person to form part of the panel in hearing and deciding a disciplinary application.
- The Act to provide that complaints be divided into complaints of "professional misconduct" and "consumer disputes". The consumer complaints are those complaints that would generally be considered minor such as failure to communicate with client or failure to attend to client who visits an advocate's office. Such complaints can be handled through mediation, however, mediation shall be voluntary and the same

shall be suggested to the parties before consent is attained. On the other hand, professional misconduct complaints are to be heard by the Advocates' Disciplinary Tribunal.

- While the Advocates' Act has empowered the Advocates' Complaints Commission to make compensatory orders the amount of compensation are modest. The Act should consider increasing the amount of compensation considering the current cost of living. This will no doubt incentivize lawyers who are subjected to the complaints and discipline procedure to carefully manage that process.
- Although the Attorney General is obviously the appropriate person to perform an oversight role in the disciplinary system of advocates in Kenya he/she should not chair the Disciplinary Tribunal. The Act should provide that the Advocates' Disciplinary Tribunal be under the Judiciary arm of government. It is to be composed of members of the Supreme Court of Kenya and constituted by any one of its members. The single justice, who alone shall constitute the Advocates' Disciplinary Tribunal, to sit with one non-legal member and one member of a practitioner panel who are to "help" him in adjudicating the disciplinary matters.
- The Tribunal to establish its own secretariat composed of a secretary and clerks who shall perform the administrative functions and such other functions as the Chairperson of the Tribunal may direct.
- The Advocates' Disciplinary Tribunal's decisions to be appealed to the Court of Appeal and the Act to be specific that such right of appeal is available to both the advocate and the complainant.
- The Advocates' Act has also empowered the Disciplinary Tribunal to make compensatory orders those powers could only be triggered by a finding of misconduct and even then the amount of compensation could be considered modest. The Act should consider increasing the threshold at which such orders can be made and increase the amount of compensation.

- The Act to provide that enforcement of the Tribunal's orders to lie with the Commission who shall work in conjunction with the Law Society of Kenya and the Disciplinary Tribunal Secretariat.

5.3.2 Decentralization of the Advocates' Complaints Commission and the Advocates Disciplinary Tribunal services: Ideally the Commission and the Tribunal are established to serve the whole country. The right of establishment of advocates is felt everywhere in Kenya. Therefore, it is expected that the complaints against the advocates are everywhere where the advocates provide the legal services. This is an upfront to access to justice which is one of the principles in which the Constitution of Kenya 2010, has been premised. Thus, the structure of the Commission and the Tribunal must be in such a way that they would enhance access to justice by all people in society regardless of their status. It is in this regard that the decentralization of the Commission's and Tribunal services needs to be given urgent attention through the creation of regional offices.

5.3.3 Employment of more staff at the Commission: In order to improve on efficiency, additional staff is required to deal with the work load. This will help in reducing the amount of time spent handling one complaint as there will be more people to deal with more of the complaints.

5.3.4 The introduction of computerized case management system at the Advocates' Complaints Commission and the Advocates Disciplinary Tribunal: This will help in storing information about a complaint and monitoring the progress to ensure efficiency. This will also help in guiding the decision of the tribunal for consistency and development of precedent.

5.4 Suggestion for Further Studies

The researcher suggests further studies on how government involvement in the regulation of professional bodies undermines their independence or whether it is

necessary with regards to the protection of rights of consumers. This is critical because government's involvement has always being regarded as interference and a tool to promote its self-seeking political agendas yet at the same time government involvement is important owing to its duty to protect the consumers.

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APPENDIX

LETTER OF PERMISSION TO THE INSTITUTIONS

Researcher's
Address

Date

Institution's Address

Dear Sir/Madam,

Re: Research Study: Entrenching Consumer Rights in the Advocates' Disciplinary System in Kenya

I am currently undertaking a Masters of Arts degree in Human Rights at the University of Nairobi. I am in my final semester and as part of my final assessment I am required to submit a research project on an area of interest. I have selected the above research study and I am hoping to conduct the study within your institution. I am writing to seek approval to use the institution's documents and records in my study.

Consumer rights is a new phenomenon in our legal system and to date little research has been carried out in this specific area and could possibly benefit from it in the future. This study will involve analysis of cases that have been lodged at the institution.

The aim of this study is to identify and highlight areas within the advocates' disciplinary system which currently may be in need of improvement and/or completed development and in turn promote the rights of consumer of legal services. This study also intends to explore the clients' perceptions and experiences of this area in order to gain a full understanding of the services which are currently been provided and examine the areas the institutions within the advocates' disciplinary system feel they can improve which will benefit the consumers. It is envisaged that this study will benefit the legal practice and quality of service as a result of knowledge accessed.

Thank you for taking the time to read this letter. Should you have any queries please feel free to contact me at XX or email XXX at any stage. I look forward to hearing from you.

Yours sincerely

XXX

Signed: _____