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African Law 2

Editors

D. Brian Dennison /

Pamela Tibihikirra-Kalyegira

Legal Ethics and Professionalism

A Handbook for Uganda

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D. Brian Dennison / Pamela Tibihikirra-Kalyegira (Editors)

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PREFACE

Benjamin J Odoki, Chief Justice

It gives me great pleasure to write the preface to Uganda's first textbook dedicated to introducing University level law students to legal ethics and professionalism. This textbook should prove to be an important resource to law schools and law students for years to come.

I am particularly pleased to write this preface because the issue of legal ethics and professionalism is important to me. During my long career at the Bar and the Bench I have taken on countless initiatives that are intended to improve the ethical climate among bench and bar.

In 1973 when I was the Head of Bar Course at the Law Development Centre, I drew up a syllabus for a course on professional ethics which included judicial ethics. The subject was examinable.

In 1976 and 1977 while I was Director of the Law Development Centre and Member of the Law Council, we formulated for the first time in Uganda, a Code of Professional Conduct which is still in force under the Advocates (Professional Conduct Regulations 1977 (SI 267 - 2).

The objective of formulating a Code of Conduct was to promote ethical standards in the legal profession and restore public confidence in the profession. It was felt that the lack of well-defined and acceptable ethical standards had contributed to the decline in ethical standards in the legal profession over the years as identified by the Gower Report on Legal Profession (1969). This would also improve the teaching of legal ethics in law schools.

In 1989 while I was a Judge of the Supreme Court, I was among those who advocated for the formulation of a Code of Judicial Conduct for Judges and other Judicial Officers, to codify ethical principles for Judicial Officers to promote compliance and transparency.

In 1995 I led a team of consultants who reviewed legal education training and accreditation in Uganda and produced a report which made far reaching recommendations which included the need to enhance the teaching of legal ethics in law schools. This recommendation is being implemented.

In 1999 while I was the Chairperson of the Judicial Service Commission and Justice of the Supreme Court. I was among a group of about ten Senior Judges from Commonwealth Countries which formulated the Bangalore Principles of Judicial Conduct adopted in Bangalore, India in 2002. The objectives of the Judicial Integrity Group were to promote the Principle of Judicial Accountability through the implementation of the measures intended to fight corruption and strengthen judicial integrity.

The Bangalore Principles were intended to provide universally acceptable principles for the guidance to judiciaries in preparing their codes of judicial conduct. The Principles have been adopted by several United Nations Agencies. The Bangalore Principles are based on the core values of independence, impartiality, integrity, propriety, equality, diligence and competence.

In 2003, As Chief Justice I championed the review of the Uganda Code of Judicial Conduct to incorporate the Bangalore Principles. I established the Judicial Integrity Committee to monitor compliance with the Judicial Code of Conduct.

Beginnings and Contributors

The textbook is the result of a collaborative effort. The project to create this textbook began in May, 2010. At that time a team of concerned parties, stakeholders and speakers from around the globe gathered in Kampala to attend a workshop dedicated to the development of a model curriculum for a legal ethics course for Ugandan university

level law students. At the conclusion of this workshop the attendees decided that a textbook would be an essential component to a legal ethics course.

Tiri International sponsored the Legal Integrity Education-Uganda workshop. Tiri is an international Non-Governmental Organization dedicated to "Making Integrity Work." We are thankful to Tiri for taking the initiative to promote the development and flourishing of legal integrity in Uganda.

Ten different authors contributed chapters to this book. These authors include judges, private practitioners and law lecturers. In addition to the chapter authors, this book features short vignettes from legal practitioners and other individuals with a keen interest in the justice process in Uganda. These vignettes help to bring aspects of ethics and professionalism to life and demonstrate the practicality and importance of the subject matter. The varied perspectives and experiences of this book's many contributors will certainly add value to future readers and learners.

Why Write a Text About Legal Ethics?

Some critics might wonder why we need to write a book on legal ethics. Is not the law enough? Is there a need to expand on what the law already says? Is teaching ethics itself a futile pursuit?

The American judge and scholar Richard Posner has questioned the utility of teaching legal ethics. According to Judge Posner "as for the task of instilling ethics in law students […] I can think of few things more futile than teaching people to be good."[1]

I do have some appreciation for Judge Posner's sentiments. Surely neither this textbook nor a course that teaches legal ethics will make law

[1] Richard Posner, "The Deprofessionalization of Legal Teaching and Scholarship," *91 Mich. L. Rev.* 1921, 1924 (1993).

students good people or ethical lawyers. True character and integrity are grounded in more than what we read or what we are taught at University level.

While we may not be able to teach students to be good, a course of study in legal ethics and professionalism can generate real benefits. These benefits include the development of the student's awareness of ethical issues and capacity to navigate ethical and professional challenges. An advocate's capacity to meet these challenges is grounded in cognizance of the relevant ethical rules, awareness of broader moral and ethical concerns, and familiarity with functional techniques and strategies that enable advocates to avoid ethical pitfalls and work through inevitable ethical challenges.

However, mere knowledge and techniques are not enough. An advocate must also have the character and integrity that will drive the advocate to right decisions and actions. An advocate with integrity must be able to "***walk the talk.***" Ethical understanding is vapid without ethical action.

A course on legal ethics and professionalism must go beyond development of a toolkit for proper conduct. The subject matter entails self-awareness. A student enrolled in a legal ethics course should engage with bigger questions such as …"Who am I?" "What do I believe in***?" "What is important to me?"*** "What will I do to make this world and my nation a better place?" "How will I be remembered?"

This textbook presents the law student with an opportunity to take stock of who they are and look to the future with their core values in mind. It is easy for advocates to forget who they are and why they chose to pursue a career in law. Many advocates find themselves working for money alone. Hopefully this book will help law students to begin the lifelong challenge of being true to oneself and one's beliefs in legal practice with an informed head start.

The Scope of this Textbook

The scope of this book is quite comprehensive. This is necessary as legal ethics and professionalism is a broad subject.

The text begins with an introductory chapter written by the former Principal Judge of the High Court, Justice James Ogoola. The purpose of this first chapter is to set the stage of the rest of the book and underscore the importance of ethics, integrity and professionalism in legal practice.

The introductory chapter is followed by a series of chapters addressing the duties of the advocate. Chapter two covers the duties of the advocate generally. Chapter Three explores certain ethical and professional aspects of the attorney client relationship while Chapter 4 addresses issues confidentiality and privilege. Chapter five addresses advocates and their duties concerning money and financial matters. Chapter six concludes this series of related chapters by addressing the duty of competence as well as matters concerning admission to practice. Chapter Seven covers the wide-ranging topic of attorney communications. This topic includes the emergent issue of legal marketing. Chapter Eight concerns legal ethics in the context of alternative dispute resolution. Alternative dispute resolution is growing in prominence both globally and within Uganda. Understanding ethics and professionalism within this context is increasingly important. Chapter Nine discusses the ethical aspects of ***pro bono*** legal services. This has become a very important and relevant issue in Uganda in recent years with the introduction of the ***pro bono*** service requirement for members of the Roll of Advocates. Chapters Ten concerns judicial ethics. Judicial ethics is a matter of great interest to me for obvious reasons. I have published a book entitled***, "An Introduction to Judicial Conduct and Practice."*** Chapter 11 covers the issues of discipline and whistle blowing. This chapter explores many of the practical and

theoretical aspects of these issues. The book closes with Chapter 12's look toward the future of legal ethics in Uganda.

The Ethical Challenges We Face

As you embark on reading this material, I request that you place three central ethical challenges at the forefront of your mind. In my opinion these are the key ethical challenges that the legal profession must address during the time of your future careers as advocates. In addition, I believe that how you confront and address these ethical challenges will largely define the success or failure of the legal fraternity in Uganda. These challenges are 1) the challenge of a culture of self-interest and favouritism; 2) the challenge of trust-building; and 3) the challenge of access.

The Challenge of a Culture of Self-Interest and Favouritism

Most people operate out of self-interest to a certain degree. However, in Uganda we see many instances where people choose self-interest over ethical and legal obligations. This overriding tendency is exemplified by the ubiquity of the phrase ***"kitu kidogo."*** The prevalence of self-interest is understandable. It is difficult to survive in Uganda and even more difficult to obtain a high standard of living. Many Ugandans abuse systems and adopt corrupt practices in order to get what they can. The low salaries of public officials in developing nations are often pointed to as a cause of corruption.

Most people also tend to favour their own. Practices such as nepotism and tribalism are widespread. However, in Uganda the impact of favouritism on our culture is particularly acute. In Uganda there is a great deal of concern about the distribution of the ***"national cake."*** These concerns often break down along regional and tribal lines. Tribe

members and clan members often expect to receive special treatment from fellow tribe and clan members. Many family members expect to be taken care of by relatives who are in a position to access resources and curry favour. This culture results in widely held perception that who you know has more to do with the result you will get in court than what is right and just. This is a dangerous and destructive belief. If people believe that a justice system produces results based on relationships instead of justice, the people without connections will distrust the system and those with connections will attempt to exploit those relationships to their gain.

The justice sector is particularly susceptible to the dangers of self-interest and favouritism. The adversarial nature of our legal system causes some to believe that the duty of the advocate is to do whatever is in the best interest of the client. Advocates that take on such an approach are likely to engage a self-interested climate in a corrupt manner. Such advocates are also unlikely to consider the harm that unethical practices can cause to opposing parties, the justice system or society in general. An advocate focused merely on the interests of clients and the advocate's own financial gain is unlikely to make an impact for the greater good in Uganda.

Advocates must rise above the tactics of bribery and the exploitation of relationships. Results within the justice system should be the product of the facts and the law. If advocates pursue other means for the advancement of their client's case the profession will continue to suffer and the public's trust in the legal system will continue to erode.

A Challenge of Trust-Building

This brings us to the related challenge of trust-building. As noted above, if people believe that corruption and favoritism are rampant in Uganda, people will not have trust in the justice system. As future

advocates your future livelihood is dependent on the public's utilization of the justice sector. If the people of Uganda do not have trust in their legal system they will not use it.

It is no secret that lawyers have fallen into some disrepute in Uganda. The phrase "lawyers are liars" has become a tired and hackneyed phrase. However, as is the case with many overused phrases and stereotypes, the public's perception is grounded in a degree of truth.

Advocates must work to change public perception. This will require doing more than maintaining the status quo. Advocates must demonstrate that honesty is a core value of the legal profession. Advocates must conduct the practice of law in a way that will grow trust in the system. The public must know that advocates are not mere tools of the client. Advocates must demonstrate that they are moral actors who are beholden to the courts, the opposing counsel, themselves, and the nation as well as the client. Most importantly people must see the justice system working.

The people of Uganda must also have trust in their judges. Ugandans must believe that their judges are free from bias and that they will make rulings and decisions based on the facts and the law. Ugandans must not believe that judges can be bribed or that paying off a judge is the best way to get a good result in court.

Without the public's trust the justice system will not grow. People will choose to resolve issues outside of the courts. Crowds will continue to practice "mob justice," and many advocates will continue to find legal work hard to come by.

A Challenge of Access

A final key ethical challenge is the challenge of access. The vast majority of Ugandans cannot afford to access the justice system. This is a massive problem that is not going away any time soon.

Some efforts are being made to address this challenge. Most notable is the recent *pro bono* service requirement. In addition to this requirement the Ugandan Government has funded "Justice Centres" in various locations that are intended to serve some of the justice needs of the poor. While these efforts are noble and helpful the justice-based needs of the poor remain overwhelming.

All of Uganda's advocates must take this challenge to heart. It is easy to complain about fees and service requirements. It is easy to argue that the legal professionals are unfairly given the brunt of the burden of providing legal services to the poor. However, instead of complaining we must keep serving and keep doing. We must go beyond the baseline requirements of the law and make a radical commitment to enable the poor to access the justice system.

We might not think of helping the poor as part of legal ethics. However, in Uganda the challenges we face are different from the challenges that lawyers face in more widely developed nations. Part of our duty to our country is to empower the poor and to inform the uninformed. If advocates help in building up our people, we will have a more prosperous Uganda and we will have a greater need for legal services. An improved Uganda will be a better Uganda for Ugandan advocates.

Conclusion

Let me encourage you to take this book and this course seriously. The challenges you will face in the areas of ethics and professionalism will shape and define your career and who you are as a person. Make the effort to face these challenges equipped and informed.

Most of all, decide who you are and what is important to you. Decide wisely and live out your life in a manner consistent with your

core values. Hopefully you will also choose to join me in facing the major challenges of Uganda in a positive way.

EDITORS' INTRODUCTION

It gives the editors great pleasure offer this book to the reading public. We hope that it will increase the interest in and study of legal ethics and professionalism for legal practitioners, law students and academics.

This book is the first of its kind in Uganda. While other texts have touched on matters of legal ethics and professionalism in Uganda, this is the first text that addresses these important issues so extensively.

This book is the result of a sustained collaborative effort. We are so very thankful to the many authors and content contributors from Uganda and elsewhere that have made the book possible.

In particular, we are happy to have contributions from Former Ugandan Chief Justice Benjamin Odoki, Former Ugandan Principal Judge James Ogoola and the current Ugandan Director of Public Prosecutions Mike Chibita. The involvement of these prominent and esteemed figures speaks well of this project.

Fortunately we need not say much more by way of introduction as we have Justices Odoki and Ogoola to do that for us. As editors, we happily adopt their inspiring words as our own!

It is our prayer that this book will improve legal practice in Uganda. We hope it will inspire and enable advocates to practice law with integrity.

Soli Deo Gloria!

D. Brian Dennison & Pamela Tibihikirra-Kalyegira

1

ETHICS: THE HEART AND SOUL OF THE LEGAL PROFESSION

James Munange Ogoola †

> *"The angels will gather out all ... those who practise lawlessness ... and will cast them into the furnace of fire."*
> Matthew 13:41-42

1.1 Introduction

A comprehensive textbook on professional ethics for lawyers practising in our jurisdiction (of Uganda and East Africa) is long overdue. The arrival of this book on the legal landscape, therefore, is a most welcome tool in the armoury of teaching the budding lawyers of this region[2]; and instructing afresh the veteran practitioners of the law.

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† LLB University of East Africa, Dar es Salaam, Tanzania; LLM Columbia University, New York, USA; International Diploma in Restorative Justice, Queens University, Ontario, Canada; Principal Judge (Emeritus) of Uganda; Lord Justice, COMESA Court of Justice, Lusaka, Zambia; Justice of Appeal, East African Court of Justice, Arusha, Tanzania; Adjunct Professor of International Monetary & Banking Law, American University, Washington D.C., USA; Special Lecturer, International Law Institute-Centre, for Legal Excellence, Kampala, Uganda; Chairman Judicial Service Commission of Uganda Author: Songs of Paradise, an anthology of poetry [World Alive Publishers, Nairobi (2009)].

[2]Given the advanced integration effort in the East African Community (Uganda, Kenya, Tanzania, Rwanda and Burundi), cross-border legal practice ─ not to mention legal practice before the East African Court of Justice (temporarily hosted in Arusha, Tanzania) ─ has already arrived on the East African scene.

The lawyer, like the centipede, is a multifaceted creature endowed with many constituent body parts — all working at once in complex synchronization and intricate harmony. These are, among others: (i) the part constituting Knowledge of the law; (ii) the part constituting the Skills of the profession (i.e. advocacy: how to apply accumulated legal knowledge effectively and efficiently); and (iii) the part constituting the Conduct and Liturgy of the practice of law (i.e. the ethics and etiquette of legal practice). In a manner of speaking, this trinity of constituent parts addresses the lawyer's Know-What (k*nowledge*); Know-How (*process*); and Know-Why (*philosophy and morality of legal practice*).

The first of these three parts (*substantive law*) is normally taught at the University as a series of academic subjects. The second part (*advocacy*) is taught largely as hands-on practical skills at one of the professional schools: the Law Development Centre in Uganda; the Kenya School of Law; the Law School of Tanzania; and for barristers in the United Kingdom (England and Wales), at one of the four Inns of Court: Inner Temple, Middle Temple, Lincolns Inn and Gray's Inn ─ all under the umbrella body: The Council of Legal Education.[3]

The third part (*ethics*) has not, in the past, been taught at all as a formal subject – neither at the University, nor at the Practical Law Schools. It should and must be taught. For while the learning of the substantive and procedural law at the University and the learning of advocacy skills at the Law schools, lasts a combined total of only four to

---

Under the East African Common Market Protocol, peoples (including professionals) have the freedom of movement across the E.A. borders, and the right of establishment within any of those borders. In effect, therefore, the age of *Avocats sans frontieres* (Advocates-Without-Borders) has arrived. The training and disciplining of the East African lawyer, therefore, should be undertaken in the context of the Integration Effort. Cf. the European Union counterpart.

[3]Traditionally, solicitors not having attended these inns of court (where emphasis was on professional discipline and etiquette), were barred from practising at the bar (i.e. not allowed to appear before the court); and from being appointed to the higher bench (i.e. High Court and above).

five years, the practice and observance of the ethico-moral standards of the profession, and the etiquette and rectitude of the legal practitioner is an ongoing debt. That debt continues to be paid by the lawyer for a whole life-time— that is to say, for as long as the lawyer remains in professional practice.

The ethical Code of Conduct is the oil that lubricates the rigid and mean machine joints of the lawyer's practice, to ensure smooth, cordial, coherent and harmonious transaction of the tumultuous business of lawyering where tensions are stretched taut; and where civility is in short supply. This harsh intensity of the professional drama of wits in the courts requires the calming elixir of gentle ethics, gracious etiquette, and graceful decorum.

This mellow oiling of the professional machine provides critical therapy, especially during the daily melodrama of the tough adversarial court contests ─ whose sparks flare between the Bench and the Bar (and within the Bar *inter se);* where egos fly high; where the stakes loom large.

It is important to teach ethics to the trainee lawyers at an early stage, before they embark on their full-fledged practice of the law. Without a grip on professional ethics, lawyers would be left largely to their own whims and wishes, or to their fertile ingenuity and wily devices of litigation antics and gimmicks ─ with the risk of rapidly descending into a state of un-edifying practices, if not outright abuse of process ─ or, even, worse: degenerating into chaos or near professional anarchy, where no rules apply. That would be a recipe for disaster. It would merely help to heap coals of ill repute on a profession, which, at the best of times, is afflicted by a love-hate affair with members of the general public. In this regard, every lawyer (and non-lawyer) has heard the myriad taunts hurled at lawyers – one such being the tired, time-worn alliterative but dismissive insolence of: "**Lawyers are Liars**!" While this may be an otherwise empty cliché, nonetheless, credence to the

taunt is readily provided every time an errant lawyer misbehaves (and there are many who do); or every time a rogue lawyer breaches the bounds of ethics and decency (and opportunities abound for such breaches).

Whenever and wherever such lapses occur, that otherwise hollow cliché is gratuitously filled with a semblance of the moral force of truth ─ leading to erosion of public trust in the profession.[4] Lawyers, like all other professionals, owe it to themselves, to their fraternity, to their clients, to the opposite party, to the courts of law (as "officers of court"), and to the public at large to keep chaste the nobility of the *learned* profession.[5] They do so, if they remain standing tall on the lofty canons of their Professional Code of Conduct. They fail, if they stoop below the bar of that Code. The Disciplinary Rules state the *minimum* level of conduct below which no lawyer can fall without being subject to disciplinary action.[6]

This book is comprehensive: in the encompassing scope of its coverage of diverse topics on ethics. Similarly, it is quantitatively and qualitatively expansive in the number and profundity of the contributors to those topics. The admixture of these two ingredients truly yields a sumptuous buffet for the exploring intellect of the reader.

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[4]Surveys show that in terms of ethics and honesty, only building contractors, politicians, and car sales-people have lower ratings than lawyers. In the USA, funeral directors are rated more highly ─*see* Peter MacFarlane's working paper: "*The Importance of Ethics and the Application of Ethical Principles to the Legal Profession*": *Journal of South Pacific Law*, Vol. 6 (2002), www.paclii.org/journals/fJSPL/vol. 06/8.shtml.

[5]*Cf.* US Chief Justice Harlan Fiske Stone's address on the "chained linkage" of the lawyer as guardian of the public interest: "The Public Influence of the Bar" (1934) ─ quoted in the Preface to the 1969 issue of the American Bar Association's (ABA) Model Code of Professional Responsibility (amended to 1980).

[6]*See* 'Preliminary Statement' to the ABA's Model Code of Professional Responsibility.

The contents of the book are tailored for both the new arrivals (*the infants)* in the profession, as well as for the longtime professional settlers (*adults)* in the law, including the seasoned scholars and jurists of academia (*the elders and the literati*). The former, coming to these topics for the first time, will find a rich, verdant patch of a pasture on which to graze with gusto. The latter two (*the adults and the elders*), revisiting particular aspects of these topics of the book, will rediscover refreshing nuggets of delightful delicacies on which to nibble in quiet serenity.

The professional lawyer lives, works and operates in the setting of the "real" world. Daily, weekly and monthly ─ all year round, the lawyer transacts the clients' business largely in the market place of the secular world. The opportunity offered by the world is great for the lawyer to take improper advantage (colloquially called "cutting corners" or "taking shortcuts") through these transactions ─ either against the opposite party, or (in blatant breach of his fiduciary duty) even against his own client. There is always pressing temptation for the practitioner to lower the guard of professional standards; indeed, to bend over backwards or even to fall prostrate before the force of the whirlwind of the World's corruptive[7] tendencies in these professional dealings.[8]

It is here that the true professional must not allow himself or herself to be "of the world" ─ i.e. to be overcome by the World's temptations. Instead, the practitioner will, with superhuman effort, bear true fidelity to the professional Code of Honour. He will, with dignity, accept the delicate boundary that distinguishes a profession from a business. Ours

[7]"Corruption" here is used in the widest corrosive sense of the term: from financial impropriety (e.g. bribery, causing financial loss, etc.), to all other forms of professional violations (e.g. abuse of office or of trust, conflict of interest, misleading the court, collusion to pervert the course of justice, etc.).

[8]*See* US President Theodore Roosevelt's admonition in this regard, quoted in Vanderbilt, "The Five Functions of the Lawyer: Service to Client and the Public", 40 ABA J31, 31-32.

is a learned profession dedicated to public service, not a mere money-getting trade.[9]

A lawyer who offers himself to practise the vocation of representing the people in their legal battles; a professional who, for a deserved fee for his skilled labour, offers himself as an advocate to intercede for his clients in the legal crossfire of litigation or prosecution ─ must do so with the full understanding and complete commitment to observe and uphold the profession's creed and doctrine of ethics. The lawyer's self-esteem, as well as the reputation and stature of the entire profession, flow from each individual's strict adherence to that creed and doctrine. The dignity and esteem of the collective legal fraternity is drawn from the foundation of that doctrine.

The integrity and credibility of the individual advocate percolates from his close dedication and loyalty to that doctrine. This is the doctrine and creed of professional ethics. Breach of that doctrine and violation of that creed, like transgression of one's theological tenets, leads in the ultimate to excommunication of the offender from the corporate body of the faithful.

In the temporal realm, the offending lawyer is struck off the Roll of practising Advocates, as a kind of professional excommunication.[10]Such, is the doctrine handed down from eminent

[9] For instance, suits to collect fees should be avoided: ABA Opinion 205 (1943). But cf. ABA Opinion 320 (1968).

[10]Section 20(4) (c) of the Advocates Act, Cap. 267. This is the ultimate disciplinary sanction, analogous in its severity and finality to the criminal law death penalty. The "convict" once struck off, is "dead" to the Roll of Advocates; is stripped of his practising certificate, plus closure of his office; is deprived of a professional livelihood; and is exiled from the family of the fraternity (i.e. expelled from membership of the Uganda Law Society: per Sections 20 & 22 of the Advocates Act, and Section 8 of the Uganda Law Society Act, Cap. 276). Worse still, the "death" is notified to all High Court Registries and Law Societies in the East African countries; and to the Inns of Court and other professional bodies abroad ─ per Section 28 of the Advocates Act of Uganda, and identical Sections of its Tanzanian, Kenyan and Zambian counterparts.

fathers of the law and prominent mothers of the profession over history's long and meandering lanes of time. The doctrine, like good old wine, has aged (and continues to grow) in veneration.

In this Introductory Chapter of the book, emphasis is laid on five core enquiries concerning professional ethics, namely: (1) What is Professional ethics? (2) What are its sources? (3) Does legal ethics matter? (4) What are the sanctions for violations of the ethical code of conduct? and (5) What are the available mechanisms for the Enforcement of the Code?

The rest of the Chapters of this book address, in detail, the substance and process of the myriad precepts and perspectives of Professional Conduct that lawyers are obliged to observe for the individual good of each practitioner, as well as for the collective benefit of the legal fraternity as a whole.

Among these many precepts and perspectives are the following: the general duties of the advocate (*chapter two*); the attorney-client relationship (*chapter three*); confidentiality and professional privilege (*chapter four*); the financial/fiduciary aspects of the attorney-client relationship (*chapter five*); advocates' professional competence and admission to the Roll of Advocates (*chapter six*); attorney communications and legal marketing (*chapter seven*); legal ethics in ADR (*chapter eight*); ethics in *pro bono* legal services (*chapter nine)*; judicial ethics (*chapter ten*); and whistle blowing in the context of professional discipline (*chapter eleven*). The book closes with a look forward at the future of legal ethics in Uganda (*postscript*).

1.2 Definition of Ethics

We should start by defining the term "**Ethics.**" Fortunately or unfortunately, some concepts are infinitely impervious to definition. Such concepts are simply too complex to be capable of simplistic

definition. One case in point here will do. How do you define a "cow"? A four-legged animal? So are most animals! A large cud-chewing herbivore with split hooves and a couple of horns? But so is the buffalo! Yet, everyone knows a cow (and a buffalo) when they see one; and can easily distinguish between the two, when they see both.

The same is true of "Ethics". Even that Goliath of moral philosophy Aristotle tried a definition of Ethics. He ended at making a distinction between *virtue* and *vice:* the one, a positive; and the other, a negative aspect of human behavior. Suffice to say that everyone knows Ethics, when they see it; when they smell it; when they hear it; when they taste it; and when they touch it. Equally, all know the opposite of Ethics (the Un-ethical), when they confront it, even at first glance. The one (the ethical) is a wholesome, positive force in societies, and, especially so, in the governance mechanisms of our societies. The others (the unethical) are stubborn, troublesome and totally negative forces, which must have absolutely no pride of place in the lawyer's professional kitty.

Even though we may not be able to define the word "Ethics" with any measure of exactitude, the concept of Ethics is self-evident. The concept has telltale sign posts which, when we pass them on our life's journey, ring a shrill bell to jolt our brain, to jerk our mind, and to twitch our conscience as to what animal we are passing. These signposts are many, and they are real. They include such signs as nobility, accountability, honesty, honour, trust, truth, openness, hard work, resilience, competence, diligence, proficiency, perseverance, charity, sacrifice, selflessness, self-denial and self-esteem. These, and others of their kind, in manifold array, are the constitutive elements that are integral to the chemical formula of the natural compound called Ethics.

Of similar difficulty is the related concept "morality." Although the term "moral turpitude" has been used in the law for centuries, and has been the subject of many court decisions, it has never been clearly and comprehensively defined. The best attempt at its general definition is

that "*it imports an act of baseness, vileness or depravity in the duties which one person owes to another or to society in general, which is contrary to the usual, accepted and customary rule of right and duty which a person should follow.*"[11]

Similarly, the term "moral character" means "*those qualities of truth speaking, of a high sense of honour, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character.*"[12]

For the Lawyer and the Legal Profession, a fitting and succinct summary of all the above concepts, would be the one word: "**integrity**". Of this virtue, it has been said: "[i]ntegrity is the very breath of justice".[13] Because of this, lawyers who are the guardian angels of the administration of justice, should not only avoid impropriety, but should avoid even the appearance of impropriety.[14]

1.3 Sources of Ethics

The sources of ethics are many and varied. Ethics is grounded in philosophy, in metaphysics, in virtues and values, in logic and reason, in ancient traditions, and in religion and morality ─ among others.

Religion[15] and morality are indispensable pillars of Ethics. They are the twin patriarch and matriarch of Ethics. But Ethics is restless -

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[11]*See* 58 CJS at p.1201, quoted in footnote 13 to Disciplinary Rule 1-102 of Canon 1 of the American Bar Association Model Code of Responsibility. *See also Committee on Legal Ethics v Scheer*, 149 W.Va 721, 726-27, 143 SE 2d 141, 145 (1965).

[12] Per Devlin, J, in *Schware v Board of Bar Examiners*, 353 US 232, 247, 1L.Ed.2d 796, 806, 77 S. Ct. 752,761 (1957), Frankfurter, J, concurring.

[13]*Erwin M. Jennings v Digenova*, 107 Conn. 491, 499, 141 A. 866, 868 (1921).

[14]*State ex rel Nebraska State Bar Ass'n v. Richards*, 165 Neb. 80, 93, 84 N. W. 2d 136, 145 (1957).

[15] Starting with the Judeo-Christian Ten Commandments, plus the ancillary Mosaic Law; and stretching to other doctrinal tenets and precepts of all the other

swaying perilous in the winds of religion and morality ─ except if it be firmly rooted in the silent depths of the human conscience. Your conscience quietly and silently beckons you to what is right and noble; and pulls you away from what is wrong and ignoble. The conscience is the very voice of God living in you day and night: in prosperity, and in adversity; in opportunity, and in calamity! Ethics is the firstborn of Metaphysics: the discipline dealing with what is good and bad and with moral duty and obligation; the touchstone against which our actions rise above the minimum standards of human decency. It is for this that Ethics has been called "*the science of the ideal human character"*[16]*;* and has been thought of in terms of: *"moral action, conduct, motive or character; … containing right or befitting; conforming to professional standards of conduct."*[17]

Well, at this agreeable confluence of ideas —where philosophy meets morality, we may well pause for a fresh breath of reality!

1.4 The Challenge and Importance of Legal Ethics

Now, that we have an inkling of what Ethics is, let us then ask ourselves: Where did Ethics come from; and Why does Ethics matter? To answer the second question first, there can be no doubt that the integrity and the reputation of a profession, such as that of the Lawyers, matters. It matters because the very efficacy and survival of every profession and vocation depends on its reputation in the eye of its own clientele, and in the ear of the general public. Indeed the best asset of

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faiths of the World, mankind has lived under the umbrella of faith-based laws and edicts ─ a primary pillar of which is morality.

[16]Merriam–Webster's Collegiate Thesaurus (1988) p.275

[17]*Kraushaar v La Vin* 181 Misc 508, 42 NYS 2 d 857,859: quoted in Black's Law Dictionary (16thEdn.) 1990, p.533

any profession is its collective reputation. This is an old truism of venerable antiquity. It is recorded in Holy Scriptures – no less.

1.4.1 Enemies Within

In the Biblical book of *The Acts of the Apostles, Chapter 19, verses 21-32,* it is recorded that the welders and machine fitters of the city of Ephesus in ancient Asia rose up one nasty morning in a violent demonstration to vehemently and virulently protest the anti-idolatry teachings of Apostle Paul and of Gaius and Aristarchus, Paul's fellow travelers in doctrine. The rioters understood that this Pauline doctrine, if left unchallenged, would have put their livelihood in danger. Their profession relied on making and selling idol gods and silver shrines to a society that fully subscribed to pagan beliefs.

Paul had to be exterminated at once, before he strangulated the profession. Hence, the violent riot of the silversmiths and the acerbic attack of the artisans of Ephesus some 2000 years ago. The riot was orchestrated and led by the shrewd, but devious Demetrius: benefactor and patron of that Profession.

But what, in retrospect, were Demetrius and his riotous cohorts fighting for? If we look carefully, we will discern in this story a number of fundamental principles that are pertinent to the overarching theme of this book ─ namely:

(i) Respect of profession.
(ii) Reputation of profession.
(iii) Public confidence and goodwill in the work of the profession.
(iv) Survival of the profession.
(v) Discipline among the members of the professional fraternity.
(vi) Wealth and Welfare (i.e. Prosperity) of the members of the profession.

All these principles were mortally threatened in the circumstances that gave rise to the biblical riot of Ephesus.

The "enemy", in the above Ephesus case, was clearly from without (i.e. outside) the Profession. The outsider is an easier adversary to target and to tackle. More insidious and more difficult is the enemy from within the Profession; namely, the prodigal son or prodigal daughter from inside the family. The insider enemy (unlike the outsider), knows the innards of the Profession – its whole terrain, its weak links, its fragile spots, its exploitable loopholes, its places of refuge in the event of trouble, etc. Such an enemy, occupying the vintage space of the Fifth Column, is a formidable adversary indeed. He will strike a mortal blow at the very heart of the institution, and then retreat with impunity to the secret sanctuary on the outskirts of the same institution.[18] It is against such an enemy that the toughest security barricades need to be erected. The barricades need to be tough, and efficient; and to be effective and effectual.

In terms of Ethical standards, the barricades need to be real, transparent, known by all, adhered to religiously by the whole membership of the Profession, and enforced with a vigour and a rigour supported by the entire membership. In a sense then, the question must be put: Who will judge the judges and the lawyers? The answer must be that, at one level, the lawyers must judge themselves.

They will judge themselves: **first**, by drawing from their Code of Ethical conduct, all that which they as professionals hold dear to the fruitful operation of their vocation; and precious to the survival of their profession; **second**, by willingly and freely (without compulsion), lending true allegiance; candid obeisance; and unvarnished fidelity to

[18] *Cf*. The case of an advocate who files an appeal against the Law Council's decision to suspend or strike him off the Roll of Advocates; and then prosecutes the appeal no further ─ as the filing of the appeal effectively stays the decision to suspend/strike off, thereby allowing him to practise unhindered in the meantime.

their Code of work and conduct[19]; and **third**, by promoting, protecting, preserving, upholding and defending their professional creed – including strictly imposing disciplinary penalties and sanctions on errant comrades (the enemies within).

The driving forces in this kind of self-regulatory regime are self-survival, self-preservation and self-esteem. What is at issue here is the collective necessity to uphold the Profession's reputation. As was evident in the Ephesus example above, reputation is critical for a number of reasons, including the following:

(i) to cultivate and sustain the public's confidence in the integrity of your profession;

(ii) to inculcate and retain your Clients' trust and satisfaction[20];

(iii) to generate growth and expansion of your business;

(iv) to garner good ratings from organizations and institutions that routinely or occasionally undertake professional assessments or perception ratings of your standing or work;[21]

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[19] A cardinal principle of lawyering requires complete loyalty and service in good faith to the best of the lawyer's ability. He must devote his full and faithful effort to the defence of his client: *see Johns v Symth*, 176 F. Supp. 949,952 (E.D. Va, 1959); and adhere to high standards of honesty, integrity and good faith in dealing with his client ─ without taking advantage of the client, concealing facts or law from him, or in any way deceiving him: *Smoot v. Lund*, 13 Utah 2d 168, 172, 369 P 2d 933,936 (1962).

[20] Lawyers must not allow their private interests to conflict with those of their clients. They owe their entire devotion to the interests of their client. *See e.g. United States v. Anonymous*, 215 F. Supp. 111, 113 (E.D. Tenn. 1963).

[21] *Cf.*, among others: Legal 500, Chambers Global, and International Financial Review (IFCR 1000) ─
which specicialize in ranking law firms globally using various criteria (e.g. quality of service, complexity of deals done, technical expertise of the law firm's top personnel, ability to advise on cross border transactions, etc.). These rankings boost the law firm's attractiveness to clients, both local and foreign.

(v) to serve as an indicator of your own individual and your firm's discipline, efficiency, competence, diligence, proficiency, etc.;

(vi) to act as a barometer of your being a law-abiding firm: one that demonstrates due obedience to the law of the land; and to enhance good, positive publicity for the firm to potential clients and consumers.

How then, is self-regulation evidenced? In the majority of cases, self-regulation is achieved through the free agreement by members of the profession to institute a Code of Professional Standards or Code of Professional Conduct.[22] Normally, the Code is not a legal instrument having the full force of law.[23] Typically, it is a set of guidelines, written specifically to guide the members and the management of the profession in their daily practice of their profession. Emphasis is on guidance: for practice, for conduct, for ethics, for discipline, for due process and fair hearing of disciplinary complaints, and even for appropriate sanctions. The guidelines establish the professional standards that every member is expected to adhere to. The standards are largely based on ethical

[22]The Advocates Act, Cap. 267; The Advocates (Professional Conduct) Regulations, SI 267-2.
The nomenclature for the "Code" can be expansive and variable, including: Code of Professional Responsibility, Canons of Ethics, Rule of Professional Conduct, Statements of Professional Principles, or simply: Disciplinary Rules ─ each emphasizing a particular aspect of the concept.
Cf. The International Bar Association General Principles; The European Union Code of Conduct for Lawyers, 1988 (as amended in 1998 & 2002); The South African Bar Uniform Rules of Professional Conduct, 1986 (as amended through 2004); The Australian Solicitors' Conduct Rules (of June 2011), and the Australian Model Rules of Professional Practice (applicable across all the Australian state jurisdictions); and The American Bar Association Model Rules of Professional Practice.

[23] "The Code" [of conduct]…is not a code of law. It is a code of "honour" ─ per Lord Denning in *Rodel v. Worsley* (1966) 3 W.L.R. 950, at 963. In this regard, note that the emphasis in the definition of a lawyer's "disciplinary misconduct" is on "disgraceful or dishonourable conduct not befitting a lawyer".

principles of conduct. Infractions of these standards lead to disciplinary action at the hands of the profession itself.

Additionally, however, and mainly for purposes of protecting the general public[24] from the unacceptable conduct of members of the law profession, the State does step into the picture with its own set of regulatory legal framework, including specific Rules of Professional Conduct[25]— if not criminal proceedings against the offending lawyer.[26]These have the force of law – and are designed to serve, not as mere guidelines to the members of the profession; but, rather, as legal obligations to be observed by the profession for the good of the society as a whole.[27]

Usually, the rules regulate the training of newcomers into the profession; set the acceptable qualifications for their admission to the

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[24] The public needs protection from the unqualified lawyer, the unethical lawyer, the incompetent lawyer, the irresponsible lawyer, the fraudulent lawyer ─ a lawyer of no character, of no repute: a deficient lawyer. Similarly, for the integrity and reputation of the Bar, the legal fraternity too needs to be distanced from such a lawyer.

[25]Substantive Legislation: The Advocates Act, Cap. 267; Commissioners for Oaths (Advocates) Act, Cap. 5; The Evidence Act, Cap. 6 (especially provisions on lawyer-client relationship); The Civil Procedure Act, Cap. 71; The Criminal Procedure Code Act, Cap. 116; The Law Development Centre Act, Cap. 132; The Uganda Law Society Act, Cap. 276.

Ethics-in-Government Legislation: The Commissions of Inquiry Act Cap. 166; The Inspectorate of Government, Act, Cap. 167; and The Leadership Code Act, Cap. 168.

Subsidiary Legislation: The Advocates (Professional Conduct) Regulations, SI 267-2; The Advocates (Accountant's Certificate) Regulations, SI 267-3; The Advocates (Remuneration and Taxation of costs) Regulations, SI 267-4; The Judicial Service Commission's Regulations, SI No. 87 of 2005 (for discipline of Judicial Officers).

[26]Section 37 of the Advocates Act, Cap. 267.*SeealsoOging v. Attorney General* [2010] 1EA 309 CA; Uganda; and *Musharaf Akhtar* [1964] EA 89.

[27] The good of society demands from the lawyer a duty (a) to serve the interests of justice and the Rule of Law; (b) to serve the interests of the courts of law (which are the handmaidens of justice, and guardians of the rule of law); and (c) to represent clients whose causes are in disfavour with the general public ─ nor to reject the cause of the defenseless or the oppressed.

profession; stipulate the standards and conduct required of them to maintain and remain in good standing as fit practitioners of that profession; and, significantly, prescribe the enforcement of those standards and conduct through a system of legal sanctions and penalties for those who fall short of the required standards and conduct.

Serious failures in conduct may lead to suspension of the offender from membership of the profession, or to censure or reprimand. Grave failures, deficiencies, and inadequacies may lead to the ultimate sanction of casting the offender out of the profession altogether, by barring him from legal practice. Because of the severity of these sanctions, rules normally provide for due process that assures the affected member a fair and just procedure for prosecuting his case.

Typically, the process will ensure that the member is informed of the charge(s) leveled against him; is given the opportunity to prepare and present his defense – and to be heard, if need be, through representation by a professional lawyer of his own choosing; is tried by an impartial body[28]; is allowed to cross-examine opposing witnesses; and is allowed the opportunity to appeal his matter to a higher judicial authority or forum if aggrieved by the particular disposition of his case.[29]

1.4.2 Why Legal Ethics Matter

Do legal ethics matter? The answer to that question is a resounding "**Yes**". Peter MacFarlane posits thus:

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[28] The Disciplinary Committee of the Uganda Law Council, established in 1970 by Section 2 of the Advocates Act, Cap. 267. The Disciplinary Committee enjoys concurrent jurisdiction with the ordinary courts in trying disciplinary offences (see Sections 17, 37, 78 and 79 (2) of the Advocates Act).

[29] Decisions of the Law Council (and of the Judicial Service Commission) on disciplinary matters are appealed to the High Court sitting in a panel of three Judges (Sections 22 ─ 26 of the Advocates Act), or as a quorum of one judge in applications for judicial review. Decisions and Orders of the High Court on appeal are final and conclusive (i.e. not subject to any further appeal) ─ Section 26 (3) of the Advocates Act.

> *"[Yes]First because lawyers are integral to… the principles of justice, fairness and equity. If lawyers do not adhere to and promote these ethical principles, then the law will fall into disrepute and people will resort to alternative means of resolving conflict. The Rule of Law will fail with a rise of public discontent. Second… a profession's most valuable asset is its collective reputation and the confidence it inspires. Third, lawyers are officers of the court… [with] an obligation to serve the court and the administration of justice. And finally… only lawyers are [privileged] to take on the causes of others and to bring them before the court."*[30]

1.4.3 Enforcement

Enforcement of any Code of Ethics is always a delicate challenge. By its very nature, ethics is a creature of gentle conscience, not of brutal law. There is therefore a perpetual and inherent tension of whether to rely on morals or law for punishing unethical conduct on the part of an errant member of the profession. Clearly, there can be no single exclusive model to untangle the predicament. The answer must lie in applying both taking a portion from the sensitive cup of morals and a potion from the stern chalice of law.

Whatever the actual mixture of these parts, the enforcement formula must, at a minimum, reflect the following critical ingredients:

- Courage, sometimes brutal courage, to root out the weed from the true vine of the profession.
- Determination and resilience to do the uprooting without let or hindrance.
- Strict surveillance (to open wide the dark curtain, catch the errant member, investigate the matter with diligence and vigilance; and

[30] MacFarlane *supra* note 2, p. 5.

punish the offender sufficiently, with all due severity and stringency ─ to stem impunity).

- Adequate punishment for the offender – after due process of the law. The punishment should be proportionate to the gravity of the offence; with a sense of no kid gloves for handling the rotten apples, in order to stop those rotten apples from worming their infectious ways into the wholesome fruit of the professional basket. All these should be done promptly, and with no inordinate pity or mercy – all for securing, upholding, protecting and preserving the integrity of the profession as a whole.[31]

The lawyer assumes high duties, and has imposed upon him grave responsibilities. He may be the means of much good or much mischief. Interests of vast magnitude are entrusted to him; confidence is reposed in him; life, liberty, character and property should be protected by him. He should guard, with zealous watchfulness, his own reputation, as well as that of his profession.[32]

An efficient approach to redress abuse of the Code of Professional Conduct among lawyers would be to encourage robust resort to the tool of suing inept, incompetent, indolent and negligent lawyers for professional malpractice. Such suits go directly to the pocket and reputation of the offender ─ where it hurts the most. Moreover, such suits serve as a wake-up call for all other like-minded lawyers.

The advocate, being a professional service deliverer, owes the client a duty of care. That duty is a justiciable duty which, when breached, gives rise to juridical redress before the courts of law.

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[31] The good of society demands from the lawyer a duty (a) to serve the interests of justice and the Rule of Law; (b) to serve the interests of the courts of law (which are the handmaidens of justice, and guardians of the rule of law); and (c) to represent clients whose causes are in disfavour with the general public ─ nor to reject the cause of the defenseless or the oppressed.

[32] *People ex. rel. Cutler v. Ford*,54 Ill. 520, 522 (1870); also quoted in *State Board of Law Examiners v. Sheldon*, 43 Wyo. 522, 526, 7 P2d 226, 227 (1932).

Malpractice suits are widely used in other jurisdictions. The concept is best articulated and most practised in the diverse jurisdictions of the USA.[33] The efficacy of its use and spread in our East African jurisdiction[34] could be explored and discussed by the legal fraternity and other stakeholders. We should stress, nonetheless, that while malpractice actions and disciplinary proceedings serve to redress misconduct in the legal profession, malpractice serves to redress an injured client. Moreover, disciplinary proceedings serve to protect the public and the integrity of the profession[35.] In many jurisdictions, rules of professional conduct do not provide the basis for a civil action.[36]However, the plaintiff may seek to introduce evidence of those rules and/or their violation by the lawyer: and particularly so where the violation involves breach of a fiduciary duty.[37] Malpractice actions have an impact on disciplinary procedures; just as disciplinary processes have an effect on malpractice suits.[38]

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[33] Accordingly, the USA provides a vast and rich jurisprudence in the area of professional malpractice.

[34]A few local malpractice cases have come to the fore ─ e.g. *King Woolen Mills Ltd v. Kaplan & Stratton Advocates* [l990-l994] EA 244 (Kenya); and *Larb (U) Limited & Ors. V. Greenland Bank (ln Liquidation & Anor*., Uganda H.C. Miscellaneous Application No. 420 of 2010.

[35]*Hizey v Carpenter*, 830 P.2nd 646, 652 (Wash. 1992) citing Faure & Strong: The "Modern Rules of Professional Conduct: No standard for Malpractice 47 "Mont. L Review 363 at p. 375 (1985-1986).

[36]*Ex Parte Toler*, 710 So.2d 415 (Ala. 1998); *Cummings v. Sea Lion Corp*. 924 P.2d 1011 (Alaska 1996); *Television Capital Corp. of Mobile v. Paxson Communications Corp*. 894 A.2d 461 (D.C. 2006); *Liggett v. Young*, 877 N.E. 2d 178 (Ind. 2007); *Christensen v Jensen*, 194 P. 3d 931 (Utah 2008).

[37] See *Mirabito v. Liccardo*, 4 Cal App 4th 41, 5 Cal Rptr 2d 571 (1992); *Slater v Rimar, Inc.* 338 A. 2d 584, 589 (Pa. 1975); *Tydings v. Bark Enterprises*, 565 A. 2d 390, 393 (Md. App. 1989).

[38]*See* "Interface Between Professional Liability Defense Work and Discipline Cases": [USA] National Conference on Professional Responsibility, Thursday, 31 May, 2012─ Materials by Pamela A. Bresnahan, Elizabeth H. Mykytiuk: Vorys, Sater, Seymour and Pease LLP 1909K St. N.W. Ninth Floor, Washington D.C. 20006-1152.

In the midst of all these harsh but necessary punitive measures, lawyers may also wish to consider instituting a policy of appropriate incentives for members of the profession, to ameliorate the harsh sanctions - such as the rehabilitation, restoration and re-absorption of the prodigal member, upon satisfaction of suitable preconditions. A couple of practical examples here (by no means exhaustive) would suffice to tell the tale:

(i) The requirement of remedial ethics lessons – as part of continuing education for the more egregious errant members of the legal profession. This would be the equivalent, for instance, of requiring inebriated drivers to go back to driving school as a precondition for re-validating their driving permit – as an addition to the substantive penalty of a fine or a prison term for their particular offence;

(ii) The imposition of a mandatory number of free legal aid hours to be freely given to indigent litigants, as a condition for lawyers to get renewal of their practicing license.[39]

In the light of dire need to rid unethical conduct from all facets of Uganda society, the government has set up a variety of organs responsible for ethical governance. Consider the intricate – spider's web that our ingenious State has painstakingly woven in the area of ethical governance. We have:

- A whole Ministry of Ethics and Integrity within the President's Office to keep intact the chastity of the Nation;[40]
- A whole High Court Division (the Anti-Corruption Division) dedicated to combating graft from the face of the Nation;

[39]*Cf.* Uganda's mandatory requirement for every advocate to offer forty (40) hours per year of *pro bono* service to indigent litigants ─ under the Advocates (Pro Bono Services to Indigent Persons) Regulations, SI No. 39 of 2009.

[40]Including spirited legislative attempts in early 2013, to keep the Citizens free of homosexuality, pornography, and miniskirts;

- A whole Government Department of the Inspector General of Government (IGG) to keep the public garden free of troublesome weeds of corruption;
- A whole Directorate of Public Prosecutions (DPP) to pursue the lawless and the outlaws; the misfits and the non-conformists in society;
- A whole Department of State, the PPDA, to rid the Country of procurement pests, in the lucrative tender business;
- A whole Police Unit (the Anti-Fraud Unit) dedicated to forensic investigation of high financial shenanigans and of kindred white collar crime; and
- A whole Constitutional Office of the Auditor General – with its forensic flock of accounting eagles, kites and falcons, who keep a sharp hawks' eye on the balance sheets and the ledger books of the State – in order to ensure impeccable public accountability on the part of the governors who tend the national granary.

All these institutions collectively form an elaborate labyrinth and a formidable army of gallant warriors dedicated to but one purpose: to annihilate the iniquity of the errant, and the impunity of the abhorrent in our society. In this war, the legal profession must purpose to stand firm on the frontline of right against wrong; on the planks of good against evil; and at the rear guard of virtue against vice. In this fashion, the Profession will demonstrate a practical example of uprightness and discipline.

1.5 Ethical Violations In Need of Stigma

There are certain features of legal practice that cause great harm but are not considered unethical by many practitioners. These are ethical offenses in need of stigma. Hopefully this text will help the Ugandan

legal community to think of such ills of current practice in an ethical context.

1.5.1 Ethics and the High Cost of Litigation

In the area of finance and fiduciary duties of the lawyer, two thoughts (out of many) come uppermost to mind: stewardship-cum-accountability by the lawyer for the funds of the client; and the cost of access to justice (i.e. the lawyer's professional fees). Abuse of the former, constitutes the largest proportion of all disciplinary complaints brought to the Law Council against errant lawyers. Thus the former is a well-known ethical hazard. The latter however poses a substantial, if largely undisciplined, ethical challenge.

Dramatic increases in the latter (professional fees) broke all bounds in the recent Ugandan Court of Appeal case of: *Severino Twinobusingyev. Attorney General, Constitutional Petition No. 47 of 2011*, in which lawyers' fees were taxed at the hitherto unheard of figure of Uganda Shs13 Billion for a single case. With a flourish of the judicial pen, lawyers' fees did in that case break through the billion shilling barrier for the first (and most probably not last) time. Contemporaneously, a High Court Judge (in *Baleke Kayiira v. Attorney General & Anor.)*dropped a judicial bombshell on the Nation when he awarded costs of Shs. 37 Billion; condemned the losing Party and its "unscrupulous" lawyers or, in the alternative, the Uganda Law Society, the Uganda Investment Authority, and the Law Council (all non-Parties to the suit) to pay those colossal costs. Additionally, the judge forbade any appeal of that ruling unless those costs were first deposited in court within 30 days.

Without belabouring the merits of the awards in the above two cases, charging a case too high a cost, risks chilling the public's litigation ardour, by costing potential and prospective litigators out of litigation; and, therefore, denying them access to justice. Such hyper costs become

prohibitive when the court's own costs (filing, expert witness fees, etc.) are added. They become impossible where, under the indemnity rule, the losing party has to meet his own lawyer's fees as well as those of the opposing party. The Profession could consider gleaning, among others, the German approach[41] for home-grown solutions to limiting ligation costs.

It was against such iniquity, amongst many others, that (the then U.K. Chief Justice) Lord Woolf made his Report for the reform of civil procedure in England.[42] Statistics in that Report showed that from a sample of Supreme Court cases, average costs allowed in cases worth £12,500 or less, were £12,044. Assuming comparable costs for the losing side, then the transaction costs associated with the legal system exceeded the merits of the legal dispute by a factor of two to one.[43]

Moreover, a system driven by high disproportionate costs would augur ill for the already shaky reputation of the legal profession — exposing it to public odium: as a mean, greedy profession of grabbers with the stone cold, insensitive heart of Ebenezer Scrooge.[44] In this connection, as would be expected, the case of *Severino Twinobusingye v. Attorney General* opened a robust public debate, with shrill calls for strict State (not self) regulation of the allowable fees to be charged by lawyers.

Given the divergent, conflicting and oftentimes contradictory awards and decisions on the quantum of lawyers' costs, there is a gaping need

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[41] Dieter Leipold, "Limiting Costs for Better Access to Justice: in Zuckerman & Cranston's Reform of Civil Procedure, Essays on "Access to Justice", Clarendon Press, Oxford (1995), pp. 265-278.

[42]Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales* (June 1995)."

[43]Samuel Issacharoff "Too Much Lawyering, Too Little Law" in Zuckerman & Cranston's Reform of Civil Procedure Essays on "Access to Justice", Clarendon Press, Oxford (1995), p.245

[44] Charles Dickens, *A Christmas Carol*.

for review and appropriate amendment of the relevant rules. However, in such a review, the Bar should be wary of risking the possibility of change thrust upon the profession from without, emanating from an enraged public. Perhaps the profession itself could take the lead in exploring the feasibility of a legal expenses insurance scheme.[45]

1.5.2 Delays in Litigation: The Lawyer's Subterfuge

Delay is another area (like costs) at which the profession needs to work overtime. Sundry lawyers are time and again culprits in this area. Oftentimes, such delays arising from incessant adjournments, are the result of the lawyer's indulgence, indolence, ineptitude, greed, gluttony, or, even worse, contrived ingenuity to exploit especially the vulnerable elements of the adversarial style of our judicial process. These underhanded procedural devices stretch out the time taken to resolve the judicial dispute.

Litigation must not meander nor become dormant or sterile, especially on account of the lawyer's own ineptitude, indecision, indiscretion or ingenuity. A lawyer who engages in incessant technical applications while all the while skirting the core substance of the litigation, is in effect no better than his or her indolent, inept or incompetent counterpart.

Such a lawyer risks breaching the Constitutional requirement to seek to administer substantive justice without undue regard to technicalities.[46]

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[45]*See* Neil Rickman & Alastair Gray, "The Role of Legal Expenses Insurance in Securing Access to the Market For Legal Services", in Zuckerman's Essays..*(supra),* pp.305-325. Also Vivien Prais: "Legal Expenses Insurance", in Zuckerman, pp.431-446; and Neil Rickman: "The Economics of Cost-Shifting Rules", in Zuckerman, pp. 328-345.

[46]Article 126 (2) (e) of the Constitution of Uganda (1995). Cf. identical Article 159 (2) (d) of the Constitution of Kenya (2010); and Article 117(A) of the Constitution of Tanzania (1977).

In this regard, a disconcerting phenomenon in Uganda's advocacy has been developing concerning the use of the formidable tool of Constitutional petitions. Without a doubt, Constitutional petitions for the enforcement of the people's cardinal rights and foundational freedoms are provided for and duly protected under the Constitution (Article 50). They are a fundamental tenet of the country's jurisprudence; a veritable protection for the citizen's constitutional rights, and for the country's assurance of its constitutional dispensation. Nonetheless, we must guard against the misuse, overuse or abuse of this venerable tool. A case in point is the contemporary proliferation of Constitutional petitions, pressed in virtually each and every case filed in the trial courts.

These days, there is hardly any case in the trial courts of Uganda at least one or two of whose aspects do not somehow find their way to the Constitutional Court on an interim application of one kind or another, challenging the constitutionality of the substantive case. In many of these applications, the line is thin between genuine submission and contrived manipulation of the system. Invariably, the petition to the Constitutional Court stays the substantive matter in the trial court. The resultant snail's pace of the court process inevitably grinds to a complete halt — to await the fate of the Constitutional petition. Needless to say, the petition takes on a life of its own.

The proliferation of these bad faith Constitutional petitions as an extravagant technical procedural device to interpose layers of delay in the way of the litigation process should be given serious consideration. The lawyers themselves should take self-remedial measures to purge all hypocrisy from this otherwise noble Constitutional practice. They must eschew any unprincipled practices that verge on professional indiscipline through abuse of Court process.

The courts too, should do their part: through case management, properly applied.[47] The court must intervene in the pre-trial and the trial stages of the case to ensure that the process is properly marshaled[48]; and that the current system (of too much lawyering, producing too little law in the resolution of disputes)[49], is appropriately shifted or reversed. Perhaps the Constitutional Court, like the US Supreme Court, could be empowered to entertain not every petition filed, but only those that raise important or novel points of law.

All in all, extravagant recourse to technical and procedural devices is injurious to the attainment of substantive justice. Instead of substantive access to justice to assert or defend one's legal rights, the system ensures litigants unimpeded access to the full panoply of procedural devices.[50] Against such, the courts have inherent power to effect a fitting remedy[51]; including the right and power to discipline an attorney as an officer of court.[52]

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[47]*See e.g.* the Civil Procedure Code of Uganda (Amendment of 1998), Order X (discovery, inspection and interrogatories) and Order XII (scheduling conference). These provide for a mandatory pre-trial procedure aimed at transparency and expedition in the litigation process ─ SI No. 71-1.

[48]*Ashmore v. Corporation of Lloyds* [l912] 1WLR 446 4.L. See also the American counterpart ─ e.g. A. Miller, "The August 1983 Amendment to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyers Responsibility (granting greater discretion to federal courts to manage litigation, with increased power for judges to sanction wayward attorney conduct) ─ quoted by Samuel Issacharoff*(supra)* at p.246, footnote 5.

[49]Issacharoff supra note 45.

[50]A.A.S. Zuckerman: "Reform in the Shadow of Lawyers", in: Reform of Civil Procedure ─ Essays on Access to Justice, edited by A.A.S Zuckerman & Ross Cranston, Clarendon Press Oxford (l995), p.67.

[51]*Cf.* Rule 1 (2) of the Rules of Procedure (April 2013) of the East African Court of Justice (EACJ) proclaiming the Court's "inherent power … to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." All the courts in the E.A. Partner States have inherent powers identical to the above EACJ Rule. Similarly, Rule 2(2) of the COMESA Court of Justice Rules of Procedure (2oo6) is identical to the EACJ Rule.

[52]*SeeIn re Wilson*, 391 S.W. 2d 914, 917-18 (Mo 1965).

1.6 The Way Ahead

We stand at the dawn of an economic take off for Uganda and for the greater East African Region. Everywhere we look, we see opportunities. Everywhere we explore, we strike oil. Everywhere we drill, we find natural gas. Everywhere we swim or raft, we find a waterfall or two on which to construct a huge hydropower plant. Everywhere we go forest hiking or trekking, we plant a commercial sugarcane plantation. Every hill we scratch and every gorge we tap, we discover precious minerals and, even, strategic or rare metals to market globally.

Truly, we are on the move: an aggressive move to lay the foundations for a veritable investment destination, to industrialize, to have the economy of the Country and the Region booming; and, therefore, the potential for legal disputes, blossoming.

That can mean only one thing: bustling business for the next generation of lawyers. For its part, the East African Community Treaty has ushered in the Common Market Protocol which assures the various freedoms of the movement of goods, services, labour, capital and persons, as well as the rights of establishment and residence. This is a boon for cross border legal practice, and for the establishment (by enterprising lawyers) of legal services, including physical offices, in any Partner States of the East African Community.

In the meantime, out of the judgments of the East African Court of Justice (EACJ), the legislation of the E.A Legislative Assembly, and the Decisions and Directives of the E.A Council of Ministers and of the Summit of the Heads of State, a hefty body of "Community Law" is rapidly emerging in the Region: comprising an amalgam of Treaty Law, Common Law (of Uganda, Kenya and Tanzania), and Civil Law (of Rwanda and Burundi). It is quite evident then that the engine of the economic - cum - legal locomotive for Region-wide legal practice, is impatiently pressing the accelerator pedal. Lawyers should purpose to be

at the station to jump onto the bandwagon. Stand ready to seize your moment.

Nonetheless, in seizing and grasping that opportunity, do not grab. Do not hassle. Do not deal dishonestly. Do not do the double deal, nor dip the double dip. Do not cheat, or extort, or distort or defraud. Rather, let the best in your professional ethos always and invariably precede you. Adhere to the ethical code of this, your calling.

Uphold the highest standards of this, your noble Profession. Purpose to earn the reputation of your firm; to earn the respect and trust of the business community; to earn the grateful satisfaction of your clients; and to earn the aplomb of the Bench, and the confidence of the public at large. In doing so, let Honesty be your shield and helmet; let Transparency be your spear and staff; let Truth be your trumpet call and your war cry; and let Ethics be your compass and pilot!

1.7 Conclusion

The road ahead is lined with enormous professional opportunities and possibilities. Correspondingly, however, it is also strewn with mega ethical challenges and dotted with major moral dilemmas. To get to the destination of that road in one wholesome state, the legal fraternity will need to continually, diligently and vigilantly mentor its own membership against any and all infractions of the canons of professional conduct. All such deficiencies on the part of its membership should be nipped in the bud promptly, effectively and effectually – not only to stem individual impunity; but, even more importantly, to inspire collective trust and confidence in the Profession.

The fraternity will need to transfuse into the Profession's bone marrow the blood of moral high ground on which the lawyers of Uganda and of East Africa will stand like a hawk to survey the legal health of the Region; and to bring prosperity and good repute to themselves and to

their Profession – without engaging in the devious antics of Demetrius' riotous Silversmiths of Ephesus.

The fraternity should belabour all this, in the knowledge that **Ethics is the Heart and Soul of your Profession!**

Epilogue:
"*Then the righteous will shine forth as the sun*" (Matthew 13:43)

2

DUTIES OF THE UGANDAN ADVOCATE

Winifred Tarinyeba Kiryabwire[†]

> *"Membership in the bar is a privilege burdened with conditions"*. Benjamin N. Cardozo, In *re Rouss*, 221 N.Y. 81, 84 (1917).

2.1 Introduction

An advocate must serve many masters. The unique position advocates assume in society makes them answerable to a variety of stakeholders. An advocate owes duties to clients, courts, opposing counsel, opposing parties, and the wider community/nation. Along with those external duties, the advocate owes a duty to himself/herself.

Managing and fulfilling the many duties of an advocate can be challenging. This is particularly true in Uganda where a changing society and an increasingly competitive and commercialized environment places added demands on advocates.

In Uganda, the Advocates Act and various supporting regulation govern the conduct of advocates. This statutory and regulatory

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framework includes legal mandates concerning relations with clients, conduct in court, relations with opposing parties, and interactions with other relevant third parties such as witnesses and potential clients. Despite drastic changes in the legal marketplace, this statutory and regulatory framework has remained relatively unchanged for several decades.

This chapter will explore the many duties of the advocate within the Ugandan context. This includes a contextual assessment of the existing rules and guiding principles addressing the duties of an advocate. The chapter alerts the reader to instances where duties might conflict and will provide practical guidance for navigating such scenarios. Finally, it notes the overriding importance of the duty to oneself from a standpoint of integrity as opposed to selfishness.

> *"The public attitude towards lawyers is both unfortunate and understandable. 'All lawyers are liars' is a very old adage. We are thought to be capable of being purchased, willing to say anything and to espouse any cause provided the price is right….The layman also thinks the law is far too complicated and for that he blames the lawyers…The layman resents and mistrusts us and it is not difficult to sympathize with him…."*[53]

2.1 Duties to the client

"The extent to which lawyers have lost our sense of professionalism is precisely the extent to which we have lost our focus on our duties to others and on serving their best interests – and, not coincidentally, to the meaning and satisfaction of our vocations as lawyers. The less we

[53]Keith Evans: *Advocacy at the Bar, Financial Training*,London (1983) p.27 (as cited in Francis A. WazarwahiBwengye, Legal Practice in Uganda: The Law, Practice and Conduct of Advocates (2002) at page 1).

dwell on others and the more we serve ourselves, the weaker do our bonds of professionalism become."[54]

Preliminary Questions?

1. Who is a client?
2. Must there be an agreement or commitment for one to qualify as a client?
3. Do Lawyers owe duties to prospective clients?
4. Are there special duties owed to special categories of clients such as the vulnerable including women, the disabled, the poor and indigent and the illiterate?

The Advocates Act defines a client as including "any person, who as principal, or on behalf of another, or as trustee or personal representative, or in any other capacity, has power, express, or implied, to retain or employ, and retains or employs, or is about to retain or employ, an advocate, and any person who is or may be liable to pay to an advocate any costs."[55] Although this section focuses on duties to the client that the advocate has received instructions from and may be representing, it is important to highlight that the duties of the advocates extend to prospective clients and to those who may formally or informally seek counsel from the advocate.

Advocates are prohibited from acting for any person unless they have been duly instructed either by the client or by an agent of the client.[56] It is common to assume that the advocate owes duties to only those clients with whom he has a lawyer-client relationship. However, in

[54] Jordan Furlong, "*Professionalism Revived: Diagnosing the Failure of Professionalism Among Lawyers and Finding a Cure*" Paper Presented at the Chief Justice of Ontario's Tenth Colloquium on the Legal Profession, March 28, 2008, p. 5.
[55] Sec. 1 (b) Advocates Act, Cap 267.
[56] Reg. 2(1) of the Advocates (Professional Conduct) Regulations, SI 267-2.

some circumstances, the duties are broader. Consider the following two scenarios:

A 70 year-old man who owns 50 square miles of land has been informed that part of his land will be compulsorily acquired by the government to construct a major highway. He can neither read nor speak English. He inherited the land from his father who was a clan leader and all his ancestors are buried there. He does not fully understand why the Government is interested in his land and what will happen to him and his family. He knows that his neighbour's son is a lawyer. He informed the lawyer about it at a village gathering that the lawyer attended.

Questions

1. *Is the seventy year old man a client of the Lawyer?*
2. *Do Advocates owe any duties to clients who informally seek advice from them?*

Advocate X is highly specialized in criminal law and has not read any labour law since his undergraduate days at Makerere. There is a long-standing labour dispute involving former employees of a large formerly State Owned Company that was privatised resulting in several employees losing their jobs. The former employees wish to sue the company for unfair and unlawful termination. A representative of the employees approaches Advocate X and gives X confidential documents. Advocate X does not ordinarily practice labour law and is not conversant with the subject matter. However, he knows that this is a big case and whoever handles it will reap big rewards.

Questions

1. *If an advocate is not competent in a subject matter, does he have a duty to refer prospective clients to another advocate?*

2. In cases where an advocate receives confidential information from a prospective client, but the client engages another advocate, does he owe any duty to the client regarding the confidential information?

There are a myriad of duties owed by an advocate to the advocate's client. These duties include, *inter alia*: competency, timely work, clear and adequate communication, respect, fair billing, good counsel, listening, diligent record keeping, avoiding conflicts of interest, and the proper fiduciary care of client funds and assets. These duties will be explored in detail in Chapter 3 of this book titled "The Advocate Client Relationship in Uganda."

2.3 Duties to the court

The Advocates Act provides that every advocate and every person otherwise entitled to act as an advocate shall be an officer of the High Court and shall be subject to the jurisdiction of the High Court.[57] When representing clients, two maxims apply: first, the advocate is an officer of court, and second, the advocate is not a party to the dispute. These two principles undergird and inform several specific duties owed to the court. These include:

(a) The duty not to submit or aid the submission of false evidence in court:

Advocates shall not include in any affidavit, any matter which they know or have reason to believe to be false.[58] In addition, where an advocate becomes aware that any person, has before the court, sworn a

[57] Sec. 16 Advocates Act, Cap 267.
[58] Reg. 15 of the Advocates (Professional Conduct) Regulations, SI 267-2.

false affidavit, or given false evidence, he or she shall inform the court of his or her discovery.[59]

(b) To advise the court on matters within his or her special knowledge:

Advocates are under duty not to allow a court to be misled by remaining silent about a matter, which if made to court would affect the proceedings, decision or judgment. In addition, if an irregularity comes to the knowledge of the advocate during or after the hearing of a case but before verdict or judgment has been given, the advocate shall inform the court of the irregularity without delay.[60]

(c) The duty not to interfere with the due process of court:

This duty has several components including a duty not to hinder, intimidate or otherwise induce a witness whom the advocate knows has been or is likely to be called by opposite party with a view to departing from the truth or abstaining from giving evidence.[61] Advocates are also prohibited from coaching witnesses.[62] In addition, advocates are prohibited from making announcements or comments with respect to any pending, anticipated or current litigation.[63]

These provisions draw lines of demarcation where a duty to the court trumps the duty to one's client. It is important that advocates inform the client of the advocate's supreme duty to the court prior to any court appearance. Many clients do not understand that their advocate owes ultimate allegiance to the court in the court setting. Clients that understand an advocate's role as an officer of the court will be better

[59] *Ibid*. Reg. 2(1).
[60] *Ibid*. Reg. 17.
[61] *Ibid*. Reg. 19.
[62] *Ibid*. Reg. 18.
[63] *Ibid*. Reg. 20.

prepared for the trial setting and they will be disabused of the misconception that "lawyers are liars" who are willing to do anything to help their client win in court.

2.4 Duties to opposing counsel

The Advocates (Professional Conduct) Regulations do not contain any specific duties that advocates owe to opposing counsel. However, in the course of dealing with opposing counsel, advocates are expected to act professionally, particularly in the following circumstances:

2.4.1 Communication

In handling their client's matters, lawyers should behave professionally, diligently and courteously. Lawyers are not parties to their client's case. Therefore, advocates must endeavour to set aside personal feelings and prejudices. While an advocate may have strong feelings about the conduct of the opposing counsel, the advocate must refrain from using abusive or threatening language.

2.4.2 The Discovery Process

One area where counsel must work together in a cordial and professional manner is in the discovery process. The discovery process is the stage in a case where parties exchange documents and information about a case. Presently a great deal more effort and energy is expended in the discovery phase in jurisdictions outside of Uganda. However, given the rise in sophisticated commercial disputes and the proliferation of electronic data, we can expect an increased focus on the discovery stage in years to come in Uganda.

Discovery is an area where advocates must work together and resolve disputes outside of the courtroom. Discovery matters also focus on sensitive information and often place advocates in positions where

they are asked to produce documents or information that their clients do not want to share. Therefore, the discovery phase is an area where the demands of professionalism and cordiality are high. We can expect an increase in rules, standards and regulations concerning the obligations and duties of Ugandan advocates within the discovery process. Regardless of any legislative or regulatory developments, advocates can expect to face difficult and novel ethical challenges in the discovery phase.

2.4.3 In Court

In the course of representing their clients, advocates should not be blinded by the desire to achieve success for their client. They have duties to the court and to opposing counsel. They should act respectfully and avoid use of underhanded methods to win a case, such as withholding critical information, misleading and intimidating witnesses and refusing to serve court documents to opposing party.

Where the advocate has evidence that opposing counsel is engaging in unprofessional conduct, such as fraud, or attempting to pervert the course of justice, he may bring the matter to the attention of the court or file a complaint with Law Council. Nonetheless, advocates are under no duty to assist the opposing party or negligent and incompetent counsel.

2.5 Duty to opposing party

Advocates are expected to work in the best interests of their clients. However, they may not disregard the broader duties in the pursuit of their clients' objectives. Advocates have a conciliatory role to play and should encourage dispute resolution through mediation and other mechanisms that are not primarily litigation. Advocates should treat the opposing party fairly and courteously. Advocates should not intimidate the opposing party and his or her witnesses. Advocates should not

engage in opportunistic behaviour when facing an opposing party who is unrepresented by legal counsel.

2.6 Duty to the community/nation

Public perception: Where will justice be done?

A suspected notorious motorcycle (*bodaboda*) thief is arrested in Ntinda. Within a matter of minutes, he is surrounded by an angry mob armed with sticks and bricks. They start beating him up while others demand to burn him alive because they want to teach other thieves a lesson. The police arrive and try to disperse the crowd and demand that the suspect be handed over to police so that they take him into custody and charge him in courts of law. The crowd is opposed to this. They say whenever criminals are handed over to the police, they are treated as suspects and released without prosecution.

Public perception: The legal fraternity

My husband and I separated three years ago. He was very cruel to me and never supported the family. I have three children. All efforts to get him to pay child support have failed. I have now petitioned for divorce and requested him to pay child support. However, when we went to court, the case was adjourned and while we were outside the court, my lawyer was talking and joking with my husband's lawyer. I think he has been "bought." I do not think he will handle my case very well now that he has been compromised.

Ugandan advocates owe a special duty to their nation in the area of anti-corruption and trust-building. Many Ugandans believe that "lawyers are liars" and that justice in Uganda is only for the rich. As a result, many Ugandans do not trust their own legal system and choose to conduct their business and personal affairs outside of formal legal

structures. The only way to build trust in this context is for advocates to comport themselves in a manner beyond reproach and to battle and expose corruption when they encounter it. Building trust in this context will not happen quickly. It can only come as the result of a dedicated long-term effort.

Public perception about the justice system is further weakened by a lack of understanding. For example, many Ugandans do not understand the concept of bail. They view the release of criminal defendants on bail as an injustice. They do not understand that the right to bail is a constitutional right founded on important principles. Ugandan advocates have a duty to educate the wider public about the justice system so as to create confidence in the administration of justice. This includes reaching out to the poor and illiterate.

Another commonly held misconception that many citizens hold is that lawyers are parties to the disputes. Many people expect lawyers to be personally involved in their case and not to interact with counsel for opposing party and where this happens, it is often misconstrued as compromise or conspiracy by the lawyers to defeat the course of justice.

Advocates are key to building the trust of the Ugandan people. Advocates must make a concerted and consistent effort to explain the nature of the profession and their services to their clients. In all circumstances, advocates should ensure that justice is seen to be done. In the case of *Swinfen v Lord Chelmsford,*[64] it was stated that the duty undertaken by an advocate is one in which the client, the court and the public have an interest because the due and proper and orderly administration of justice is a matter of vital public concern. In Uganda the specter of mob justice brings this concern into stark relief. Ugandans will take matters of justice into their own hands if they do not believe that our legal system can deliver true justice.

[64][1967] 3 All E.R. 993.

Building trust in the Ugandan legal system is a key factor in promoting overall development and civic progress. A working legal system that warrants the trust of the Ugandan people will result in a stronger and more prosperous Uganda. In addition, a legal system that people trust will be used more extensively. This will result in more legal work for Ugandan advocates.

National Objective XXIX of the Constitution of Uganda provides that every citizen of Uganda has a duty to *inter alia* 1) to be patriotic and loyal to Uganda and to promote its well-being; (2) to engage in gainful work for the good of that citizen, the family and the common good and to contribute to national development; (3) to contribute to the well-being of the community where that citizen lives; and (4) to promote democracy and the rule of law.[65] Moreover, Article 17 of the Constitution provides in part that it is the duty of every citizen of Uganda to "cooperate with lawful agencies in the maintenance of law and order" and "to combat corruption and misuse or wastage of public property."[66] These Constitutional duties apply to practicing advocates as well as all other citizens of Uganda. For advocates who take these duties seriously, the practice of law is a great opportunity to contribute to Uganda as citizens. It is crucial that more advocates take the duty they owe to the wider community and nation seriously. A consistent commitment to uphold this duty will improve the broader society.

2.7 Hierarchy of duties

James has been charged with the murder of his wife. The key witness is his wife's sister who was living with them. James confesses to his advocate that he committed the crime but says he has found a doctor

[65] The 1995 Constitution of Uganda, National Objectives and Directive Principles of State Policy XXIX
[66] *Ibid*. Article 17 (f) and (i)

who will testify that his wife was mentally unstable and was considered a danger to herself and to those around her. In addition, he tells his advocate that his relatives have smuggled the key witness to a neighbouring country so that she does not testify.

Questions:

1. What are the advocate's duties in these circumstances?

2. Do advocates' duties to their clients prevail over duties to the court?

Although the duties of the advocate are fairly easy to understand, there are circumstances when the duties may conflict, and the issue of which duties take precedence is a matter of debate. This is especially the case between duties to the client and duties owed to the court. In some jurisdictions, the advocate's primary responsibility is to his client, while in other jurisdictions the duties to the court are paramount. There are those who argue that ultimately the balancing of the duties depends on the advocate's personal moral code. Others argue that advocates should act in a manner consistent with the values of the community. In the Commonwealth tradition, the duty to the court is often considered paramount.

In England, Lord Denning stated the primacy of the duty to the court as such[67]:

> *The advocate has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously misstate the facts. He must not knowingly conceal the truth…He must produce all the relevant authorities, even those that are against him. He must*

[67]Rondel *v. Worsley* [1966] 3 W.L.R. 950 at 962-63.

> *see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline.*

Australia and New Zealand take the same position as England:

> *"The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice."*[68]

In Canada, duties to the client and to the court are considered of equal prominence

> *"In the United States the duty to the client is generally seen as the lawyer's primary duty, while in Britain the duty to the court is preeminent. In our rules, the two duties are given equal prominence – which may make ethical choices in advocacy more difficult in our jurisdiction."*[69]

In Uganda, the Advocate's Act does not expressly state which duties take precedence over the others. However, the professional conduct regulations elevate certain duties to the court over the duties owed to the

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[68]Pagone, G.T. *The Advocate's Duty to the Court in Adversarial Proceedings* (Melbourne: Supreme Court of Victoria, 23 July 2008), citing *Giannarelli v. Wraith*, (1988) 165 CLR 543, 556-7.

[69]MacKenzie, Gavin "*The ethics of advocacy*", *The Advocates' Society Journal* (September, 2008), p. 26.

client. Regulation 16 imposes a duty on the advocate to inform court of his or her client's false evidence. Regulation 17 prohibits advocates from allowing court to be misled by remaining silent about matters within their knowledge. These provisions, along with Uganda's Commonwealth heritage, leads one to the conclusion that Lord Denning's words ring true in the Ugandan context as well. Ugandan advocates owe their highest professional duty to the Court.

2.8 Duty to yourself?

"To educate a man in mind and not in morals
is to educate a menace to society"
-Theodore Roosevelt

As noted in the chapter introduction, the duties of an advocate are not all outward-looking. As a future advocate, you owe a duty to yourself.

Shakespeare wrote the famous line "*This above all: to thine own self be true*." in his tragic play Hamlet.[70] Given that the character who says that line is a foolish old man, Polonius, one could conclude that Shakespeare actually believed that there is more to life than being true to yourself. Yet the words of the foolish Polonius still inspire and resonate with people today.[71]

So where does the wisdom end and the foolishness begin? Being true to one's self does not mean putting one's self first. For example, an advocate cannot justify convincing a client to pursue a frivolous matter

[70] William Shakespeare, *Hamlet*, Act 1, Scene 3
[71] Christiane Amanpour, *To Thine Own Self Be True—And Other Eternal Truths*, Huffington Post Blog, 3 October, 2011, available at http://www.huffingtonpost.com/christiane-amanpour/to-thine-own-self-be-true_b_990985.html

on the grounds that the advocate will benefit through fees. The duty to one's self cannot be used as an excuse for unethical conduct.

Being true to oneself is at its best when it is rooted in well-formed personal integrity. Hopefully you know what you want to do with your life. Hopefully your goals are noble and your aims are worthy. Hopefully you want to do more with your life than make money. You may have ethical beliefs and standards grounded in a religious faith or belief system to which you are earnestly committed. If you have a desire to live your life in a certain way, you must be ever vigilant to be true to your hopes, dreams and mission.

When you become an advocate, you are not required to sign away your soul. You do not lose the right to act on what you believe is right or wrong. If you find yourself working for things and causes that you do not value or believe in, you should be concerned and you should consider changing your course. It is true that as an advocate in an adversarial system, you play a component role. You are not asked to be advocate, opposing counsel and judge in the same matter. When you take on a role, you are bound to act in a manner in line with that role. However, it is important not to confuse your place in the system with an abdication of morality and integrity.

In order to be true to yourself, you must understand the rules. You must be able to identify situations that will compromise your beliefs and values and work to avoid them. You must understand where the professional rules give you the space, freedom and mandate to be the moral and ethical person you strive to be.

In sum, work to be true to your client, opposing counsel, opposing parties, the court, Uganda, your faith, your family, and you. It will not be easy. You cannot act in the best interest of all those concerns all the time. However, a career in law is a vigorous moral path. The right answers are not always clear. But you should never forget who you are

and who you desire to be when you are faced with ethical choices. In closing, please consider the quote below from Justice Julia Sebutinde.

> *Honour God and honour your profession by serving your fellow man faithfully. I believe the majority of us here do believe in a power higher than ourselves. If I stood here today and told you that I have achieved all these successes in my own strength, I would be the greatest liar. When you honour God he not only guides your choices but he also blesses and rewards your efforts.*[72]

[72] "10 Success Tips from Justice Julia Sebutinde" Remarks made at a Dinner in Honour of Justice Julia Sebutinde on her Appointment as the First African Female Judge to the International Court of Justice, organized by The Female Lawyers Committee of the Uganda Law Society. http://www.monitor.co.ug/artsculture/Reviews/10-success-tips-from-Justice-Julia-Sebutinde/-/691232/1617360/-/wpmafb/-/index.html

3

THE ADVOCATE-CLIENT RELATIONSHIP IN UGANDA

D. Brian Dennison[†] *and Winifred Tarinyeba Kiryabwire*[✱]

3.1 Introduction

This chapter addresses issues of ethics and professionalism pertinent to the advocate-client relationship. The chapter begins with a section on client centred practice. Next we discuss several of the core duties owed to clients. We then turn to a section on conflicts of interest. This is followed by guidelines regarding the establishment and termination of client relationships. The chapter concludes with sections on special types of advocate-client relationships. This chapter will not cover the topics of client funds and confidentiality. Those topics are addressed separately in subsequent chapters.

Future advocates would be wise to take heed of the contents of this chapter. Clients are both the source of financial remuneration in private practice and the primary source of ethics complaints. Properly managed client relationships are crucial to success in legal practice.

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3.2 Client Centred Practice

3.2.1 Is the Client Always Right?

A common refrain in business is "the customer is always right." However, this phrase does not necessarily ring true in the legal profession. For example, a client who wants an advocate to perpetuate a fraud on a court would not be "right", and an advocate should not comply with such instructions.

The advocate's role transcends mere customer satisfaction. Advocates occupy a special position in society that makes them beholden to a multitude of stakeholders. The client's needs and desires do not trump all other allegiances.

Although the client may not always be right, the needs and perspective of the client are of central importance to a private legal practitioner. The private practitioner is in business to meet the legal needs of clients. A client centred practice is grounded on this premise.

Henry has been sued by the children of his late friend John. They accuse him of fraudulently claiming compensation from Government for their father's land on which Government constructed a military installation. John left Henry as one of the executors of his will. The children have not received a single shilling, yet Government took over the land 5 years ago. Henry admitted to his lawyer that the money was paid to him, but he used it to pay tuition for his children studying abroad. He requested the lawyer to use all means to delay and frustrate the case because he has no defence.

Question

1. *What should an advocate do in this case?*

3.2.2 Client Centred v. Zealous Representation

Client centredness is not strictly synonymous with zealous representation. Client centredness is a concept that applies to the broader client experience. It includes client communication, client billing, client courtesy, strategic advising and many other attributes beyond mere representation. Zealous representation, on the other hand, primarily concerns what the advocate does in the context of client representation. It is a mentality that the advocate will always act vigorously on behalf of a client's legal cause.

3.2.3 The Advantages of a Client Centred Approach

A client centred approach has several advantages in the delivery and provision of legal services.[73] First, it enables the advocate to consider legal problems from the client's point of view. Second, the approach ensures that the advocate makes a thorough exploration of options with the client. This brainstorming aspect of the client centred approach can generate additional options and strategies. Third, the approach helps advocates represent clients in a way that respects and honours the values and beliefs of the client. Fourth, the approach takes relevant non-legal aspects, such as the emotional impact of a case on the client into consideration. Fifth, use of the approach helps the advocate to convey empathy and a desire to help the client. Sixth, client centredness improves communication between counsel and the client because it entails more interaction and client feedback.

3.2.4 Implementing a Client Centred Approach

The key to implementing a client centred approach is seeing your legal practice from your client's viewpoint. What would a prospective

[73]*See* Ocheng Kagoire et al, *Law Development Centre Clinical Legal Education Trainers Handbook*, 2006, "Topic Two, Client Centeredness," p.16-17

client think when entering your chambers? What message does your written correspondence send to the client? Would a client believe that their legal matter is important to you? Asking these types of questions will help you to remember to see things from the client's point of view.

A client centred practice focuses on improving the client experience. Clients should feel welcome when entering your chambers. Clients should not be forced to wait for an extended time for a scheduled appointment. Clients should receive timely written communication that is comprehensible to non-advocates. Clients should clearly understand what the advocate is actually doing for the client in a particular matter. Clients should know that their matters are important to the advocate and that the advocate respects the clients' wishes and desires.

The client centred approach can be integrated at every level of practice. The key to thorough integration is continually stepping into the shoes of the client and asking questions from the client's perspective. Over time an integrated effort to improve the client experience increases client satisfaction.

3.2.5 Client Centredness and Legal Strategy

One of the most important aspects of a client centred approach is the methodology for developing and choosing a legal strategy. A client centred practitioner is careful to create and adopt legal strategies that align with the needs and desires of the client. Often this means taking a course that will be less profitable to the advocate.

In order to develop a client centred legal strategy, the advocate must take the time to get to know the client. The advocate must know what is important to the client and what the client would like to accomplish through any legal action or defence.

Peter lost his wife when she was accidentally electrocuted at work. They had been married for 20 years, and she had worked for Zanzi Ltd from the time she joined as a graduate trainee. Zanzi Ltd's lawyers approached Peter's lawyers and requested for an out of court settlement of the matter. Although Peter is willing to agree to an out of court settlement, his lawyer is opposed to it. He wants to pursue the matter in court and "teach Zanzi a good lesson." Peter's lawyer also knows that a protracted legal battle will earn him more fees.

Question

1. *What principles should guide an advocate in this matter?*

3.2.6 Striking the Correct Balance between Paternalism and Client Autonomy

One of the primary challenges in client centred practice is striking the balance between paternalism[74] and client autonomy. As an advocate, you are an expert in legal matters. Therefore, clients expect you to develop a legal strategy based on your expertise. Clients seek and need your advice. On the other hand, the matter is the client's, and the client should have the ultimate authority on how to proceed. A client must actually endorse the legal strategy and desire the goals of that strategy. Client centred advocates must provide tangible guidance while conforming the legal strategy to the actual desires of the client. This balance can best be achieved by "establishing rapport, being responsive to client's concerns, assessing credibility, acquiring relevant facts, and providing helpful information to clients in an empowering but not demeaning fashion."[75]

[74] "Paternalism" is the policy or practice of people in authority to restrict the freedom and judgment of subordinates.
[75]Ocheng Kagoire *et al*. *Supra* Note 2 at pp.13-14.

3.2.7 Potential Pitfalls of Client Centredness

There are several potential pitfalls of client centred practice. One pitfall is allowing customer service to overly distract you from the practice of law. Ultimately the function of the advocate is to provide legal services. Successful advocates are busy with legal matters and have limited time to personally dedicate themselves to improving the client experience. Successful implementation of a client centred approach often requires other team members that understand their role in the hospitality process. Receptionists and secretaries are key players in creating a client centred atmosphere. Another key element is clearly communicating your function and role to the client. The client should also have a sense of how and where you must allocate your time to effectively represent clients.

Similarly, a client centred focus can shift the efforts of an advocate from the legal theatre to the peripheral concerns of the client. Many advocates spend an inordinate amount of time and effort "hand-holding" and coddling their clients. Other advocates spend more time trying to predict the outcome of cases for clients than they do preparing cases for trial. Effective advocates must strike the balance of reasonably informing their clients of risk and legal permutations while dedicating the necessary effort on the litigation itself.

A third pitfall worth noting concerns the personal lives of advocates. Client centred advocates are at risk of disregarding their personal, family and spiritual life for the sake of meeting client demands. A client might want to have an advocate that will take their phone call anytime, anywhere, for any reason. However, adopting such a practice can place a heavy burden on an advocate's personal life and relations. Advocates must be careful to strike a balance between their client's expectations and their personal lives. In the long run, the sacrifice of health and family for the benefit of clients can reap a whirlwind of troubles.

3.3 Duties of Good Practice

Advocates owe many duties to their clients. These duties fall into various categories. In this section we address duties of good practice. While many of these duties are grounded in ethical rules and regulations, the violation and neglect of these duties rarely result in ethical proceedings. Instead, these duties tend to have their real world impact in the areas of client retention, client satisfaction, professional reputation and exposure to monetary claims for professional negligence.

3.3.1 Communication

Advocates have a duty to communicate with their clients. Regulation 2(2) of the Advocates (Professional Conduct) Regulations provides in part that an advocate "shall conduct business on behalf of clients with due diligence, including, in particular, the answering of correspondence dealing with the affairs of his or her clients."[76]

Effective communication goes beyond meeting ethical requirements. Advocates should use communication to build a relationship of trust with their clients. Regular written correspondence conveys an advocate's interest in a client's matter.

It is a good idea to establish a communication protocol with a client at the onset of representation. The protocol should align with the client's needs and the requirements of the legal matter. There is no "one size fits all" communication strategy. Some matters could require daily phone calls. Some matters might require monthly or quarterly written updates. In addition, some clients might require more regular communication and more thorough explanations.

A clearly established communication protocol can establish reasonable expectations for communication. If client expectations are

[76]Reg. 2(2) of the Advocates (Professional Conduct) Regulations, SI 267-2.

established through a protocol, it is important to make sure that those expectations are met.

Communication needs can change over the course of legal representation. If an advocate determines that less regular communication is needed, the advocate should communicate the need for a change to the client and establish new expectations for future communications.

The duty to communicate includes the duty to listen. An advocate should provide the client with an adequate opportunity to provide relevant information, direction and feedback. Often times a client will not know what information is relevant or irrelevant to a particular matter. It is important for the advocate to create an atmosphere where the client is encouraged to speak freely and openly. The advocate can guide the discussion through active listening so that relevant information is brought out. Advocates must establish trust with clients in order to enable the honest discussion of sensitive matters.

The duty of communication does not entail an obligation to answer every client phone call. At times, the practice of law will keep you from being at a client's beck and call. However, you should make an effort to timely respond to all client communications that warrant a response. If an advocate will be in trial or otherwise unavailable for a period of time, it is best to instruct staff to advise clients that your response to their communication may be delayed by such circumstances. Email services can be programmed to provide "auto responses" that can notify those who contact you by email of any special circumstances that might prevent you from responding in the normal course.

3.3.2 Timely Work

Procrastination is one of the great banes of legal practice. Few traits will cause more problems for an advocate and the advocate's clients than a tendency to procrastinate.

Regulation 2(2) of the Advocates (Professional Conduct) Regulations provides in part that "an advocate shall not unreasonably delay the carrying out of instructions received from his or her clients." This provision is straightforward enough. Nonetheless unreasonable delays in legal practice remain commonplace.[77]

The failure to meet deadlines can be fatal in a legal case. When advocates fail to submit pleadings in a timely manner, they fail to meet the standard of care required in legal practice. Damages that flow from the failure to meet a filing deadline can be sought in an action for legal malpractice.[78]

If you have problems completing assignments in a timely manner, you need to break that habit. The price of procrastination in legal practice can be quite costly.

3.3.3 Court Appearances

Once an advocate has become engaged in a contentious matter that advocate has a duty to appear in court or to instruct a partner or associate to do so in cases where the advocate is unable to appear.[79]Failure to appear amounts to professional negligence. Where a client's case is dismissed or costs are awarded due to negligence of the advocate, the advocate faces personal liability.

John was informed by his lawyer that the hearing date for his case was on the 2nd of July. When John arrived at the court, he did not see his lawyer. John reached his lawyer by telephone. The lawyer informed John that he had another case to attend to in another court but assured John that he would arrive in time to handle his case. Unfortunately,

[77]*Ibid*
[78]*See e.g.* Bwengye, *Legal Practice in Uganda* (2002) at 157-158 for a discussion of case authority where failing to act within a limited period of time amounts to actionable negligence on the part of advocates.
[79]Reg. 5 of the Advocates (Professional Conduct) Regulations, SI 267-2.

when the case was called up, the lawyer had not arrived and the Judge dismissed the case.

Question

1. How can advocates ensure that they provide an effective and efficient service to their clients?

3.3.4 Document Management

The practice of law entails extensive record keeping. Clients entrust advocates with important papers and documents. Clients rely on their advocates to manage client legal files in a secure and orderly manner.

The poor physical management of files is a "red flag" to clients. The failure of an advocate to locate a client's document can shake a client's confidence. An office strewn with dishevelled legal files can scare clients away.

Advocates should develop a file management system to ensure orderly record keeping. Advocates should follow their system consistently. Advocates should also consider adopting electronic document management systems and engaging file management service providers. The generation of extensive paper files can overwhelm a law chambers and make it appear unattractive and dishevelled to clients and other visitors.

The client's file belongs to the client. When a client terminates the services of an advocate, the file in the possession of the advocate should be turned over to the client upon request. The file cannot be held hostage as collateral.

Advocates should develop a system for the destruction of documents. Any such system should establish a way of determining what files can be destroyed and how long certain files should be held before they are destroyed. Clients should be advised of this protocol in client engagement letters and in letters concluding legal matters. The

letter concluding a matter should provide the client with instructions as to how they can collect their file prior to its eventual destruction.

Finally, advocates should adopt a proper means of destroying documents. This means developing a schedule for destroying documents based on legal obligations for preserving records and proper client service. Given the tendency of documents in Uganda to be recycled as chapatti wrappers, advocates should invest in a shredder or a shredding service to see that sensitive documents to not resurface in surprising settings.

3.4 Duty of Competent Representation

Advocates have a duty to handle their client's affairs in a competent manner. In order to be competent an advocate need not display the highest skill or produce excellent results. However, a competent advocate must meet certain baseline standards of proficiency and capacity.

3.4.1 Element of Good Counsel

Clients come to advocates seeking good counsel and it is the duty of the advocate to offer as much. Good counsel should be wise, well-reasoned and given with the best interests of the client in mind.

Regulation 12 of the Advocates (Professional Conduct) Regulations requires advocates to advise clients in the clients' best interests. Regulation 12 prohibits advocates from knowingly or recklessly encouraging clients "to enter into, oppose or continue any litigation, matter or other transaction in respect of which a reasonable advocate would advise that to do so would not be in the best interests of the client or would be an abuse of court process."[80] Therefore, advocates in

[80] *Ibid*, Reg. 12

Uganda are ethically bound to offer legal advice that is in the best interest of the client. The standard that the advocate must meet is that of the reasonable advocate. Failure to meet the standard of reasonableness results in a violation of this standard of conduct.

Good counsel should also be wise, and wisdom is nurtured through experience. The Ugandan system of admission to legal practice is designed to ensure that advocates obtain some level of practical experience prior to taking on a client's case. Students pursuing a Diploma in Legal Practice from the Law Development Centre are required to participate in a practical clerkship under the supervision of qualified advocates. Regulation 12 of the Advocates (Enrolment and Certification) Regulations further provides that a person who has been entered on the Roll of Advocates only has the right of audience in Magistrate Court for the first nine months after entry on the Roll.[81] These experiential requirements ensure that practicing advocates in Uganda have some level of practical experience. Nonetheless, these minimal experiences fail to prepare advocates to handle many tasks. Therefore, it is incumbent on young advocates to acknowledge their limitations and acquire additional experiences that prepare them for the work they intend to do.

A third key element of good counsel is right perspective. An advocate must be able to look at a matter with the best interests of the client in mind. The advocate's judgment must not be clouded by self-interest or the concerns of other interested parties. Regulation 26 of the Advocates (Professional Conduct) Regulations addresses the issue of self-interest in one context by proscribing advocates from entering into contingent fee agreements. It provides that "an advocate shall not enter into any agreement for the sharing of a proportion of the proceeds of a judgment whether by way of percentage or otherwise either as (a) part of

[81] Reg. 12 of the Advocates (Enrolment and Certification) Regulations, SI 267

or the entire amount of his or her professional fees; or (b) in consideration of advancing to a client funds for disbursements."[82]Conflicts of interest can also cloud the advocate's judgment. Conflicts of interest are addressed in Section 6 below.

3.4.2 Element of Diligence

An advocate owes the client the duty of diligence. Diligence is defined as "careful and persistent work or effort."[83] The duty of diligence entails the adequate dedication of time and effort to a matter. Diligent counsel is prepared at every stage of a matter. Diligent counsel takes the steps necessary to become well versed with the facts and law relevant to any matter that counsel is handling.

The duty of diligence is enshrined within the Advocates (Professional Conduct) Regulations. Regulation 2(2) provides that "an advocate shall not unreasonably delay the carrying out of instructions received from his or her clients and shall conduct business on behalf of clients with due diligence, including, in particular, the answering of correspondence dealing with the affairs of his or her clients."[84] This provision indicates that the duty of diligence includes an aspect of timely action in managing the affairs of a client. Regulation 12 is entitled "Duty of Advocates to Advise Clients Diligently."

The duly of diligence applies to the manner with which advocates supervise and manage their staff. Advocates are personally responsible for work undertaken on behalf of a client including the supervision of both professional and administrative employees that are assigned to handle the client's work.[85]

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[82]Reg. 26 of the Advocates (Professional Conduct) Regulations, SI 267-2.
[83] New Oxford American Dictionary, Electronic Edition
[84]Reg. 2(2) of the Advocates (Professional Conduct) Regulations, SI 267-2.
[85]*Ibid.*

3.4.3 Element of Expertise

Any member of the Roll of Advocates must pass a threshold determination of competence. Primarily, advocates in Uganda must meet certain educational requirements. If you are reading this book in connection with your legal education, you should be well aware of these requirements. The two primary educational hurdles are (1) the completion of a Bachelors of Law degree from a law school accredited by both the National Council for Higher Education and the Law Council and (2) a postgraduate Diploma in Legal Practice. The degree and diploma programmes require students to demonstrate sufficient knowledge in a broad range of legal subjects. In addition to knowledge, the diploma programme places particular emphasis on legal skills and capacity for legal practice.

Despite these extensive educational requirements, membership on the Roll of Advocates does not ensure that an advocate is competent to take on every legal matter. There are times when an advocate's knowledge and experience is not sufficient to meet the needs of a client's particular matter. It is important that advocates have the good sense and discretion to refer matters beyond their competence to other counsel.

Legal observers have noted a tendency of Ugandan advocates to take on all matters. In his book *Legal Practice in Uganda,* Francis Bwengye writes, "I have not known any advocate who has sent away a client because such a client has brought a matter with which he is not acquainted or in which he has not specialized."[86] As the legal environment becomes more and more complex, this tendency to take on all matters will result in bungled cases and a grave disservice to clients. Ugandan advocates must learn to better utilise the expertise of their colleagues to ensure their clients receive competent legal representation.

[86]Bwengye, *Legal Practice in Uganda* (2002), p. 232.

In practice, formal complaints concerning legal competence normally implicate advocates for discrete performance-based failures, such as failing to appear in court, failing to become reasonably familiar with the facts of a case or the contents of a file, failing to comply with legal deadlines, or failing to communicate with the client. Rarely do ethical complaints concerning competency actually concern the legal expertise of an advocate in a particular area of the law. Nonetheless, the element of expertise is an important component of ethical and proficient representation.

3.4.4 Element of Mental Competency

People in all walks of life are susceptible to mental illness. The high-stress world of legal practice makes advocates particularly susceptible to mental health conditions, such as depression, anxiety and substance abuse.[87] These mental health conditions can have a devastating impact on the advocate's life and legal practice.

When an advocate is debilitated by mental illness, clients often suffer the consequences. This is not to say that advocates suffering from mental health disorders are incapable of competent practice. There are many advocates with mental illnesses that practice law at a very high level. Nonetheless, advocates within grip of conditions such as alcoholism and depression are far more likely to commit legal malpractice.

Due to the stigma associated with mental health conditions, many advocates choose to keep their problems to themselves. Advocates fear losing their reputation in the community. Many advocates choose not to

[87]*See e.g.* Eaton, *Occupations and the Prevalence of Major Depressive Disorder*, 32 Journal of Occupational Medicine 1083 (1990); Dolan, *Disenchantment Growing Pervasive Among Barristers*, Houston Chronicle, June 28, 1995, at 5A; and Jones, D. (2001); Career Killers. In Crowley & Winick (Eds.) "Career Killers" from *A Guide to the Basic Law Practice*. Alliance Press, pp. 180-197.

seek treatment and attempt to cope with their problems on their own. This prevents advocates experiencing mental illness from getting the professional help that they need.

Advocates must appreciate the importance of mental health. They should know that there is help and treatment available for mental illnesses. Advocates should not simply cover up their problems and leave clients in harm's way. Advocates that are impaired to the point of incompetence should also cease from representing clients until they are able to regain their mental faculties to the point of competence.

3.5 Duties of Decorum

Generally, most advocates treat their clients civilly. To do otherwise is bad for business. Nonetheless, certain advocates treat clients and former clients in a manner that is unfitting of the profession.

3.5.1 Respect

Respect can be a sensitive matter in advocate-client relationships. In many contexts an advocate may lose personal respect for a client as a result of the bad acts a client might have committed. Even then, however, the advocate must continue to respect the client as a person.

3.5.2 Courtesy

One of the most basic duties that we owe each other is courtesy. This duty extends to the advocate-client relationship.

The duty of courtesy extends to the most basic interactions in a law office. How a client is greeted when they enter the door. Do you honour the client's time by starting meetings on time? Are you cordial when communicating with the client?

Many advocates disregard the duty of courtesy. However, it is an important duty and good for business.

3.5.3 Propriety

The duty of propriety concerns how the wider community will perceive one's actions. In the context of legal practice, it is important for advocates to comport themselves in a matter that will be seen as above reproach. The requirement of propriety applies to the advocate-client relationship in many ways.

Regulation 30 of the Advocates (Professional Conduct) Regulations provides that "(a) n advocate shall not engage in a trade or profession, either solely or with any other person, which in the opinion of the Law Council is unbecoming of the dignity of the legal profession."[88] This prohibition is clearly directed towards the duty of propriety.

Advocates should be circumspect in their personal relationships with clients. Advocates should not engage in sexual relationships with clients. It is also best not to be beholden to your client in a manner that is capable of overriding your professionalism.

Propriety is also an ethical factor in certain transactions. At present there is no express limitation against buying real property from or selling real property to a client.[89] Nonetheless, an advocate must appreciate that any such transaction will be viewed with a great deal of scrutiny due to the fiduciary nature of the advocate-client relationship and the advocate's special access to the client and client information. In particular, an advocate should be wary of taking part in any transaction that could be seen as opportunistic. The exploitation of a client's shortcoming is proscribed by Regulation 11 of the Advocates (Professional Conduct) Regulations.[90]

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[88] Regulation 30 of the Advocates (Professional Conduct) Regulations, SI 267-2, Reg. 30

[89]*See* Bwengye *Supra note 15* at 140-141 citing *Demarara Bauxite C v. Hubbard*; [1923] AC 673 and *Halsbury's Laws of England*, 3rd Edition, Vol. 3.

[90]Regulation 11 of the Advocates (Professional Conduct) Regulations, SI 267-2.

3.5.4 Truthfulness

Advocates owe their clients a duty of truthfulness. Advocates should not mislead or misadvise clients. The client has the right to put special trust in the client's advocate. This trust should not be abused though false representations.

3.6 Conflicts of Interest

Advocates represent the interests of their clients. Advocates must avoid scenarios where they represent clients with conflicting interests.

3.6.1 The Absence of Laws and Regulations Concerning Conflicts of Interest in Uganda

In many jurisdictions there are detailed provisions to help advocates identify conflicts of interest and properly navigate conflicts as they arise. In Uganda, however, there is limited statutory and regulatory guidance on the issue.

There are no provisions in the Advocates (Professional Conduct) Regulations that speak directly to issues of client loyalty or conflicts of interests. Regulation 10 entitled "Advocates fiduciary relationship with clients" provides that an advocate shall not use his or her fiduciary relationship with his or her clients to his or her personal advantage and shall disclose to those clients any personal interest that he or she may have in transactions being conducted on behalf of those clients." While this prohibits an advocate from using insider information gleaned from one client to his advantage in another matter, it does not appear to prohibit counsel from representing parties where there is a conflict of interest between the parties. Instead, it appears from the face of the regulation that the advocate can disarm any potential conflict of interest through disclosure. Presumably, once the personal interest is disclosed the client can protect his or her interest by terminating the advocate-

client relationship or making any other demand the client feels is necessary to address the conflict.

Regulation 4 of the Advocates (Professional Conduct) Regulations provides that "an advocate shall not accept instructions from any person in respect of a contentious or non-contentious matter if the matter involves a former client and the advocate as a result of acting for the former client is aware of any facts which may be prejudicial to the client in the matter."[91] This provision also focuses on the information that an advocate has been able to access on behalf of a former client. It does not bar the advocate from taking a matter based on loyalty alone.

3.6.2 Bwengye on Conflicts of Interest in the Ugandan Practice

One of the most useful and authoritative treatments on conflicts of interest in the Ugandan context can be found in Bwengye's *Legal Practice in Uganda.* The absence of relevant Uganda authority on conflicts of interest is notable in Bwengye's discussion captioned "Counsel acting for both parties in a transaction."[92]Bwengye makes no reference to any Ugandan case, statute, or regulation. Instead, Bwengye cites somewhat dated British case law as well as case law from Tanzania and Nigeria that address a collection of instances where conflicts can arise ranging from document drafting to criminal representation.

Bwengye brings out three tests for detecting the presence of a conflict of interest. Bwengye cites the case of *Moody v. Cox & Hatt*[93] for the proposition that a conflict exists when an advocate's involvement in a matter is likely to create a claim of liability to one party under one scenario or to another party under the other scenario. Bwengye includes a quote from Platt J. which indicates that an advocate is forced to cease working on a case when an event occurs that would make the advocate

[91]Regulation 7 of the Advocates (Professional Conduct) Regulations, SI 267-2.
[92]Bwengye, *supra note 15* at142-144.
[93]*Moody v. Cox & Hatt*, [1917] 2 Ch. 71.

more useful as a witness in a dispute between the parties than a party's advocate.[94] Bwengye also cites the case of *Re Roger Wright*[95] where the test for a conflict barring further representation is whether the advocate knows or ought to know that a conflict exists between the parties.

It seems to be a given in Bwengye's book that a conflict of interest would require the conflicted advocate to withdraw from legal representation in a matter. This appears to be a longstanding requirement of the common law tradition that would presumably apply in Uganda. However, the examples and authority cited in Bwengye are indicative of an absence of instructive guidance and authority from Ugandan courts and Ugandan law.

3.6.2 Conflicts of Interest and Propriety

Many conflict of interest rules in other jurisdictions go beyond the prohibition of the use of one client's information or material to the detriment of another. Instead they are designed to avoid the appearance of impropriety and to prevent situations where advocates will be forced to work at mixed purposes. Such provisions ensure that advocates will not violate a duty of loyalty owed to the client.

3.6.3 Policy of Avoidance Concerning Conflicts of Interest

Other jurisdictions have instituted rules and regulations regarding conflicts of interest designed to prevent advocates from being embroiled in such conflicts. These provisions focus on the risk of a potential conflict instead of the existence of an actual conflict.[96] The philosophy

[94] *Javantilalnarbheram Gandesha v. Killingi Coffee Estate Ltd. & Anor* Civ.Rev.1-A-68.
[95] *Re Rogers Wright*, 13 W.A.C.A. 119
[96] *See e.g.* Georgia Rules of Professional Conduct 1.7 (U.S.A) which provides in part that "A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client."

behind these provisions is that conflicts should be avoided whenever reasonably possible. This philosophy is well grounded in the best interests of advocates and their clients. Advocates should not wait for the awkward moment when they must withdraw from an ongoing matter. Conflicts are expensive and troublesome things. Conflicts can force parties to obtain new counsel, and they turn advocates into witnesses and defendants. It is good practice for advocates to take the steps necessary to avoid them.

3.6.4 What Should Ugandan Advocates Do About Conflicts of Interest?

It is standard practice in many legal communities to conduct a "conflict check" prior to agreeing to represent a client. There are software packages that enable firms to conduct such searches electronically. Lawyers gather some initial information about the client and the opposing interests in any possible matter. The lawyers enter the information into a database that advises the lawyers whether or not the firm has any active matters or past history with any of the players involved. The lawyers can then take that information to determine whether or not they are "conflicted out of the case" when applying the legal standards for a conflict of interest in their jurisdiction.

As noted above, there are minimal legal restrictions regarding conflicts of interest in Uganda. Therefore there is no clear ethical guidance or disciplinary incentive in place to encourage the implementation of similar systems in Ugandan law firms. That said, the implementation of some system designed to avoid conflicts of interest benefits both clients and their advocates. A process for avoiding conflicts can provide clients with peace of mind and gives them confidence that a law firm is dedicated to working toward the best interests of its clients. Certainly, international clients will want law firms that are complying with internationally accepted standards for avoiding

conflicts of interest regardless of what limitations might be in place in Uganda. Avoiding client conflicts can also prevent conflict within a law firm between law partners. In short, a conflict check procedure is good practice and benefits various stakeholders.

3.7 Initiating Client Relationships

Clients are the lifeblood of private practice. The pressure to acquire clients is high. Many advocates adopt aggressive tactics for attracting and engaging clients. However, in Uganda there are strict limitations on the methods and means for initiating client relationships.

3.7.1 Communicating with Prospective Clients

An advocate must be scrupulous when interacting and communicating with prospective clients. Advocates are generally prohibited from touting or advertising their legal services.[97] The Advocates (Professional Conduct) Regulations forbid specific unprofessional "rainmaking" techniques such as approaching persons involved in accidents, using rewards schemes to encourage persons to consult advocates, and accepting work through organisations or persons that receive payments or benefits for pursuing claims in respect of accidents.[98]

Advocate self-promotion is stringently restrained. The Advocates (Professional Conduct) Regulations limit an advocate's freedom to offer public comment on legal matters, and advocates may only publish articles on legal topics in limited contexts.[99] The Regulations also preclude advocates from using commercial advertising outlets and trade

[97] Regulations 22 and 25 of the Advocates (Professional Conduct) Regulations, SI 267-2
[98]Reg. 22 of the Advocates (Professional Conduct) Regulations, SI 267-2.
[99]*Ibid*. Regs. 20 and 23.

directories to promote their practice.[100] There is even a regulation that sets limits and parameters on the use of signage.[101] The restrictions on marketing and promotion techniques are treated in greater detail in the chapter titled "Communication & Marketing by Advocates in Uganda."

3.7.2 Clients Represented by Other Counsel

An advocate can face harsh consequences for improper contact with the clients of other advocates. The Advocates Act provides that "(a)ny person who induces or attempts to induce any client or prospective client of any advocate to cease to be the client of such advocate in order to become the client of the advocate whom such person serves in any capacity shall be guilty of an offence."[102]

In general, an advocate may not act on behalf of a client in a matter where the advocate has reason to believe that another advocate is acting on behalf of a client.[103] However, there are exceptions to this limitation. First, the advocate is free to act on behalf of such a client with the consent of the advocate representing the party. Second, an advocate may represent such a client without the consent of the other advocate where "the other advocate has refused to act further" or where "the client has withdrawn instructions from that other advocate upon proper notice to him or her."[104]

3.7.3 Initiating the Attorney Client Relationship

In Uganda "(n)o advocate shall act for any person unless he or she has received instructions from that person or his or her duly authorised agent."[105]

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[100] *Ibid*. Reg. 25.
[101] *Ibid*. Reg. 24.
[102] Sec. 76, Advocates Act, Cap 267.
[103] Reg. 21 of the Advocates (Professional Conduct) Regulations, SI 267-2.
[104] *Ibid*. Reg. 21(2).
[105] *Ibid*. Reg. 2.

In addition to receiving instructions, it is also good practice to receive a payment from the client prior to initiating the advocate-client relationship. Legal retainers are permitted under Ugandan law. A retainer can be particularly helpful in criminal matters where a client might have difficulty raising funds, and courts are often unwilling to allow counsel to withdraw from a case where the client has failed to pay legal fees. The issue of retainers and client payment is addressed in more detail in Chapter 5 entitled "The Advocate and Money in Uganda."

A client engagement letter is another good practice for starting your representation on the right foot. An engagement letter can be used to establish the ground rules of an advocate-client relationship in writing. The existence of an engagement can later facilitate the rightful termination of representation when the express terms of the engagement letter are not met. The engagement letter can also enable you to establish client expectations with respect to the services to be provided and the means and method of client communication.

The engagement letter is particularly useful for establishing the scope of representation. Some clients believe that once they engage an advocate that the advocate becomes the client's advocate in all matters. Perhaps you as an advocate are hoping for the same. However, this is not good practice. It is best to define the exact scope of the representation. That way the client knows what tasks you will be performing on the client's behalf. This clarity can help avoid legal malpractice claims and disappointed clients when matters outside the scope of your representation are not attended to.

3.8 Terminating Advocate-Client Relationships

Most advocates focus on starting client relationships as opposed to terminating them. However, the proper termination of client

relationships is an important aspect of legal practice. This section outlines the basics of termination and withdrawal.

3.8.1 Grounds for Terminating the Advocate-Client Relationship

Once an advocate-client relationship is established, both the lawyer and the client retain the power to terminate the relationship. In the case of the client, the power to terminate is unfettered. A client can terminate an advocate-client relationship at any time for good reason, bad reason or no reason at all.

When there is no legal matter pending in the court system, the advocate also has broad powers to terminate a client relationship.

When a legal case is pending the advocate's power to terminate an advocate-client relationship can only be exercised under certain circumstances and is contingent on court approval. The Advocates (Professional Conduct) Regulations provide that an advocate may withdraw from a client's case where 1) the client withdraws instructions, 2) the advocate is permitted by court to withdraw, 3) the client disregards an agreement or obligation as to payment of fees and disbursements, or 4) the client instructs the advocate to engage in unprofessional conduct or requires the advocate to act contrary to his or her advice to the client.[106]

There is a certain degree of flexibility in this list. The second item on the list allows the advocate to withdraw from any matter as long as the court permits. This provision allows the advocate to make a case for withdrawal to the court.

The fourth item on the list allows the advocate to terminate representation in matters where the client is unwilling to take the advocate's advice or where the client has asked the advocate to act in a manner that is not in line with professional standards. This fourth

[106]*Ibid*. Reg. 3(1) (a)-(d).

provision for withdrawal helps preserve the advocate's ability to practice law as an independent moral actor.

3.8.2 Procedure for Withdrawal of Representation

In addition, the Regulations require an advocate who intends to withdraw from the conduct of a case to give his or her client, the court and opposing party sufficient notice of intention to withdraw, and to refund the client such proportionate professional fees as have not been earned by the advocate in the circumstances of the case.[107] Here it is best to err on the side of caution with respect to both requirements. When providing notice of withdrawal, it is best to do so as far ahead of any scheduled court proceeding as possible. When refunding unearned fees, it is best to be conservative when assessing the amount of the earned fee and generous with the amount refunded.

3.9 Duties to Vulnerable Clients

Regulation 11 of the Advocates (Professional Conduct) Regulations provides that "an advocate shall not exploit the inexperience, lack of understanding, illiteracy or other personal shortcoming of a client for his or her personal benefit or for the benefit of any other person."[108] In other words, advocates may not take advantage of the weaknesses of their clients. Advocates must be circumspect to ensure that vulnerable clients are not exploited in any way. Advocates must not only avoid client exploitation; they must take affirmative steps to demonstrate their fair and proper treatment of vulnerable clients.

Vulnerable clients include clients whose circumstances put them at risk of being exploited, such as those who are illiterate, unsophisticated or limited in terms of mental capacity. Such clients face an increased

[107] *Ibid*. Reg. 3(2)(a) and (b).
[108] *Ibid*. Reg. 11.

danger of being misadvised, misled or cheated. In Uganda, there is a significant portion of the population that is illiterate and ignorant of the law. Therefore, Ugandan advocates are likely to interact with vulnerable clients.

An advocate should conduct a vulnerable client's affairs in a way that will pass all scrutiny. For example, when representing an illiterate client, an advocate should make a record of the fact that he or she has read aloud any document for a client that the client is to sign. It is good practice to have someone in the advocate's law office witness to the fact that the document was fully and accurately read to the client. In other instances, if a client is not competent to handle his or her own matters, an advocate should see to it that a guardian is appointed to act in the best interest of the client. A guardian can ensure that there is sufficient legal capacity for client decisions.

An advocate's duty to the vulnerable also includes a duty to provide legal services to the poor. This duty is addressed in greater detail in the chapter titled "Pro Bono Publico."

3.10 Duties owed to Clients in the Corporate Context

A corporation within the common law tradition is a distinct legal person.[109] Advocates that are engaged to represent a corporation do not represent the individual people who work for the corporation. Instead, such advocates represent the corporation itself.

Often times a corporation's employee will interact with corporate counsel under the mistaken belief that the employee is the advocate's client. It is important in such instances for the advocate to clearly inform the employee of the advocate's role and the allegiance to whom the advocate owes his or her duty. Misunderstandings are particularly likely

[109] *Salomon v. A. Salomon & Co. Ltd*. (1897) AC 22.

to arise with upper management. Many a CEO is surprised to learn that an advocate's loyalty lies with the corporation and not the head of the corporation.

The corporate advocate also must be aware of special issues of confidentiality that arise in the corporate context. Most importantly, an advocate must be able to defend any privilege the advocate may assert that protects conversations with various employees of a corporation. While there is extensive judicial guidance on such issues in jurisdictions such as the United States,[110] in Uganda there is limited legal authority on the workings and scope of the advocate-client privilege in the corporate setting. Therefore, the Ugandan company advocate must use discretion and foresight when communicating with corporate employees and must be ready to proffer sound legal arguments for any application of the advocate-client privilege in the corporate setting that the advocate intends to stand behind.

Issues of corporate representation and client confidentiality are discussed further in the Chapter titled "Confidentiality and Privilege in the Ugandan Legal Profession."

3.11 The Special Role and Duties of the Prosecutor and Government Lawyers

Advocates in the service of the government have special obligations. Government advocates should be motivated by the desire to serve society and not the mere desire to win cases for clients. For example, an advocate working in the Director of Public Prosecution's (DPP) office should not be motivated by the desire to win a conviction in every action brought by the Government. Instead, an advocate in the DPP's office

[110]*See e.g. Upjohn Co. v. United States*, 449 U.S. 383 (1981) (holding that the attorney-client privilege can protect certain communications made between company lawyers and non-management employees under certain circumstances).

should be seeking that justice is done. This can mean dropping a case when a prosecutor determines that criminal charges are unwarranted or employing less aggressive trial tactics in order to not force facts into the record through skill or deftness.

Advocates employed by the government are also key players in the fight against corruption. Unfortunately, some government employees in Uganda believe that they are justified in obtaining remuneration through improper means. Such individuals believe that they are underpaid and seek additional remuneration through other means such as bribes. Government advocates must work diligently to combat this trend and build trust in government service.

4

CONFIDENTIALITY AND PRIVILEGE IN THE UGANDAN LEGAL PROFESSION

Patson Wilbroad Arinaitwe[†]

> *"Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth".* Chief Justice Warren Burger.[111]

4.1 Introduction

Professionally, lawyers are required to live by a code of silence and discretion - their duty of confidentiality - which prohibits disclosure of information concerning their clients' affairs. A lawyer has an ethical duty to hold in strict confidence all information concerning business and the affairs of his client acquired in the course of the professional

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[111] *United States v. Nixon*, 418 U.S. 683, 709-710 (1974).

relationship. An advocate may not divulge such information unless disclosure is expressly or impliedly authorised by the client or required by law or if confidentiality is affirmatively waived by the client[112]. Breach of this duty of confidentiality can result in disciplinary action against the lawyer.

Many question the utility of the lawyer's duty of confidentiality. Confidentiality can camouflage activities that cry out for scrutiny in the public interest. Critics note that lawyers are often in the best position to prevent and report nefarious wrongdoing. The lawyer's "sealed lips" are seen by some as boons to corruption, fraud and other criminal activities that do untold harm to the wider community. Others see the privilege as an impediment to justice, truth seeking and the free flow of information. These weighty countervailing interests provide reasons for limiting the scope and application of advocate client confidentiality. The result is a rich and developing area of law.

This chapter begins with a discussion of the advocate's duty of confidentiality and the exceptions where the veil of confidentiality is lifted. Then we address privilege. We begin with a general introduction to the advocate-client privilege. This is followed with a review of Ugandan law on advocate-client privileges. From the Ugandan context we will explore the Common Law heritage of advocate-client privileges. Next the chapter addresses the litigation privilege, the legal advice privilege, who is a client for the purpose of advocate-client privileges and the application of privilege within the corporate context. The chapter concludes with a look at challenges and practical concerns facing the future Ugandan advocate in the areas of confidentiality and advocate-client privileges.

A critic could argue that this chapter is too focused on the issue of privileges. After all, this chapter is part of a textbook on legal ethics not

[112]Per Lord Bruogham LC in *Greenoughvs Gaskell* (1833) 1 MY & K 618,620.

the law of evidence. However, in order to act ethically with respect to issues of confidentiality it is essential to understand advocate-client privileges. One cannot ethically represent a client without an understanding of how the law of privileges will apply to your interactions with the client.

In the Ugandan context it is especially important to understand privilege broadly, comparatively and theoretically as the law on privilege is in a relatively formative stage. As a future Ugandan advocate, you will have the opportunity to play a role in the development of this area of law. By thinking of privilege within an ethical framework you will be a more informed and capable participant in that process.

4.2 Confidentiality

4.2.1 Challenging Scenarios Concerning Confidentiality

Imagine the following scenario. You have been engaged to represent a man who is concerned about being charged with the rape and murder of a young girl. During a conference a new client tells you that he was the one who raped and killed the girl. Meanwhile another man has been charged with the crime. The other man is tried, convicted and sentenced to death. What do you do?[113]

Or imagine that you represent another man who is a suspect in a missing persons case. The man tells you that he did in fact kidnap and kill the missing people. He tells you where the bodies are. Meanwhile

[113]Crystal, N. *An Introduction to Professional Responsibility* "The Leo Frank Case: An Example of the Dimensions of Lawyer's Obligations," pp. 1-6, Aspen, 1998.

grieving family members are searching desperately for the people your client killed. What do you do?[114]

Both of the above scenarios are real. They are based on actual historic events. These scenarios bring home the weighty ethical implications of the advocate's duty of confidentiality.

The duty of confidentiality is grounded on the principle that the advocates play a role in society. That role is to represent the interests of their clients. In a criminal case the role is to minimize the criminal liability that their client will face. Advocates are not charged with the same duties as judges and investigators.

There are times when the role of the advocate may seem less morally and ethically appealing than others. Is it right to allow a man to be executed for a crime he did not commit while the real rapist and murderer goes free? Is it right to leave family members engaged in a desperate search for loved ones when you know where those loved ones are?

Hopefully these ethical dilemmas have caught your attention. Certainly the duty of confidentiality can present advocates with some of the most difficult ethical challenges imaginable.

4.2.2 Confidentiality in Uganda

In Uganda the law on confidentiality is concise and direct. Regulation 7 of the *Advocates (Professional Conduct) Regulations*[115] specifically protects information of clients from disclosure by their advocates. The Regulation reads as follows:

> "7. Nondisclosure of clients' information

[114] Nelson, B., *"Ethical Dilemma: Should Lawyers Turn In Clients? Pair Face Disbarment Threat After Keeping Two Slayings Secret,* "The Los Angeles Times, 2 July, 1974.

[115] Advocates (Professional Conduct) Regulations SI 267-1 Laws of Uganda.

> An advocate shall not disclose or divulge any information obtained or acquired as a result of his or her acting on behalf of a client except where this becomes necessary in the conduct of the affairs of that client, or otherwise required by law."

Case law has further established that this duty of non-disclosure enshrined in Regulation 7 is fiduciary in nature and continues after the conclusion of the relevant legal matter and the termination of the advocate-client relationship.[116]

The Pandora's Box in Regulation 7 is the clause "except where this becomes necessary in the conduct of the affairs of that client, or otherwise required by law." This clause provides for two exceptions to the rule of confidentiality. The first exception concerning necessity only applies in situations where the advocate is acting in furtherance of the affairs of the client. It would not apply in the difficult ethical situations discussed at the beginning of this section. The second exception is when law requires the disclosure. Here it is crucial for the advocate to know when and how the law will require disclosure.

It is impossible to know the full extent of scenarios where the law requires disclosure in Uganda. Although there are some clear instances where disclosure is required, there are others where the law is unclear. Since it has a common law system with limited precedent, Uganda is inherently murky in areas where there is no clear legislative or regulatory direction.

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[116] *Larb (U) Limited & others vs. Greenland Bank (Liquidation) & Anor* High Court, Miscellaneous Application No. 420 of 2010 (Uganda) citing *King Woolen Mills Ltd and another v Kaplan and Straton Advocates* [1990–1994] 1 EA 244 (Kenya).

4.2.3 Limits on Advocate-Client Confidentiality

The advocate-client privilege is not absolute. Under certain circumstances it can be waived. In Uganda, Regulation 7 of the *Advocates (Professional Conduct) Regulations* provides that "an advocate shall not disclose or divulge any information obtained or acquired as a result of his or her acting on behalf of a client except where this becomes necessary in the conduct of the affairs of that client, or otherwise required by law."

The question for Ugandan advocates is: when is disclosure necessary or otherwise required by law? Based on the existing law of Uganda and the broader common law jurisprudence there seem to be six basic scenarios where the duty of confidentiality to a client is waived. These are: 1) when the client is misleading the court; 2) where there is an instance of criminal conduct that requires compulsory criminal disclosure based on legislative decree; 3) where the client is attempting to use legal advice to accomplish a criminal or fraudulent act; 4) when the client sues the advocate or otherwise seeks to impugn the character or professional status of the advocate; 5) when the client waives confidentiality; and 6) where the advocate is required to make disclosures by court order. Some of these grounds for waiver have clearer support under the laws of Uganda than others.

4.2.3.1 When the Client is Misleading the Court

In Uganda[117], as an officer of court, an advocate is required to take corrective action when the advocate's client misleads the court. This duty trumps the advocate-client privilege to the extent that breaching such privilege is necessary to adequately inform the court.

[117] This is not a universal basis for waiver. In some jurisdictions (e.g. the United States) a lawyer should take other corrective measures such as withdrawal from the case, but the lawyer is generally not required to breach the attorney-client privilege as a matter of corrective action.

This is perhaps the clearest instance of waiver under the laws of Uganda. Regulation 16 of the *Advocates (Professional Conduct) Regulations* provides that "[i]f any advocate becomes aware that any person has, before the court, sworn a false affidavit or given false evidence, he or she shall inform the court of his or her discovery."

4.2.3.2 When there is a Mandatory Disclosure Provision in a Criminal Statute

In certain jurisdictions there are criminal statutes that place an affirmative duty on those with knowledge of certain criminal activities to report them. This is the case with the United Kingdom's Proceeds of Crime Act, 2002 which requires solicitors who are suspicious about acts of tax evasion or other criminal activity that has resulted in a financial benefit to report their suspicions to governmental authorities. At this time there are no similar statutes in place in Uganda.

4.2.3.3 In Order to Prevent a Client from Using Legal Advice to Accomplish a Criminal or Fraudulent Act

Another widely held basis of waiver of the advocate-client privilege is where the client is using legal advice or services to further a criminal or fraudulent enterprise. In the British case of *R vs. Cox and Railton*[118] Stephen J cautioned that the attorney-client privilege cannot be used to protect criminal communications. He asserts that communication in furtherance of a criminal purpose does not come within the ordinary scope of professional employment. In the American context a party seeking to use this waiver to breach the privilege must first show "a factual basis adequate to support a good faith belief by a reasonable person" that the client used the attorney to accomplish some crime or fraud.[119]

[118] *R vs. Cox and Railton* (1884) 14 QBD 153 at pg.167.
[119] *U.S. v. Zolin*, 491 U.S. 554, (1989).

In Uganda this exception is provided for under Section 125 of the Evidence Act[120], which allows for the disclosure of otherwise privileged advocate-client communications and material when there is a communication made for an illegal purpose or when the advocate observes a fact showing that a crime or fraud has been committed by the client after representation has begun.

4.2.3.4 Where a Client Brings a Civil, Criminal or Disciplinary Action against the Client's Advocate

In most jurisdictions advocates have the right to defend themselves from allegations lodged by clients arising out of the advocate-client relationship.[121] This exception to advocate-client confidentiality springs from the due process rights of the advocate. Certainly if a client chooses to sue or prosecute an advocate for alleged wrongdoing in that advocate's representation of the client, the advocate should be permitted to a defence. This defence must reasonably include the right to present evidence concerning and arising out of the advocate-client relationship that serves as the factual basis of the client's claim.

Notably this exception is not expressly found in the Advocates (Professional Conduct) Regulations or in the Evidence Act. However, a fair and expansive reading of Section 125 and 128 of the Evidence Act could be deemed to allow the Court to permit advocate testimony on otherwise confidential advocate-client matters when the client proffers information regarding the conduct of the advocate during the course of the advocate-client relationship. The Court could deem such a proffer as

[120] The Evidence Act Cap 6, Laws of Uganda

[121] *See e.g.* Rule 1.6 of the American Bar Association Model Rules of Professional Conduct which provides that a lawyer may reveal information relating to the representation of a client "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceedings concerning the lawyer's representation of the client.

amounting to a waiver of the advocate's duty of non-disclosure under Section 125 and as a waiver of the client's privilege under Section 128.

4.2.3.5 Where the Client Waives Confidentiality

The client's power to waive confidentiality is inherent to the right. The right of confidentiality and all resulting privileges belong to the client. Waiver may be express or implied from conduct. It may also be imputed from the relevant circumstances. For instance, if the client does not intend the discussion to be confidential or if the client discloses the matters to others. Since the privilege belongs to the client, no rule prohibits him/her from divulging his own secrets; and if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the advocate.[122] However, in most instances advocates should err on the side of presuming that confidentiality has not been waived. Moreover, advocates in Uganda should not use waiver as a reason for disclosing or divulging information acquired in the context of legal representation outside of the court setting as this in not an exception to the requirement of non-disclosure found in Regulation 7 of the Advocates (Professional Conduct) Regulations. A provision for waiver of an advocate's duty of nondisclosure is only found in Section 125 of the Evidence Act.

4.2.3.6 Where the Advocate is Required to Make Disclosures by Court Order

Finally, in most jurisdictions there is the court order exception to the duty of confidentiality. Certainly, advocates should not be disciplined for producing otherwise confidential information and material pursuant to a court order. However, advocates should endeavour to assert

[122]John W. Gergacz, "*Attorney- Corporate Client Privilege: Cases Applying Upjohn, Waiver, Crime-Fraud Exception, and Related Issues*" (1983) Vol.38 *The Business Lawyer*, 1653 at 1667.

available legal privileges against efforts to force production in the context of litigation. If an advocate fails to assert viable privileges and grounds for non-disclosure it could be considered malpractice. Without privileges, the litigation process could empower both courts and opposing counsel to eviscerate the legal protections afforded to the client based on the requirement of confidentiality. Where privileges are raised but the court still requires production, counsel must comply with the instructions of the court.

4.3 Legal Professional Privileges

We will refer to the category of privileges that arise in the context of legal practice and legal representation as the legal professional privileges. Legal professional privileges include the advocate-client privilege, the litigation privilege, the work product privilege, and the legal advice privilege. The advocate-client privilege largely concerns communications between the advocate and client. The litigation privilege, the work product privilege and the legal advice privilege tend to concern the legal work, investigatory work and strategy of the advocate. We will begin this section with a discussion of the advocate-client privilege and the historical roots of that privilege. Later we will address other legal professional privileges.

4.3.1 The Fundamentals of the Modern Day Advocate-Client Privilege

The advocate-client privilege is a key doctrine of legal practice. It protects the sensitive communications that take place between advocate and client. There are certain fundamental elements regarding the advocate-client privilege that cut across jurisdictions.

One universal quality of the advocate-client privilege is that it belongs to the client. The advocate does not have the power to waive the

privilege nor does the advocate have the power to stop the client from waiving the privilege. The privilege is there to protect the client's interests, not the advocate's. We see this quality reflected in Sections 125 and 128 of Uganda's Evidence Act that we will discuss in the subsequent section.

Another quality that cuts across jurisdictions is it that the privilege applies to communications between clients and advocates. The work product, research and the trial preparation work of counsel are not generally within the scope of the advocate-client privilege. This element seems straightforward. In order to have an advocate-client privilege there must be an advocate and a client. However, there are situations where this element can raise novel issues. For example, can the privilege extend to cover communications between a client and non-advocate staff of the law firm? What happens when the advocate is speaking to a guardian of the client or a corporate representative? The issue of client identity/scope is addressed subsequently in this chapter.

Another basic requirement for communications protected by the advocate-client privilege concerns the purpose and content. Typically the subject communication must arise out of and concern efforts to seek legal advice in order to be protected by the advocate-client privilege. This requirement is reflected in Section 125 of the Evidence Act as well.

Most jurisdictions also require that the communication must have been made in confidence if it is to be entitled to protection. In Uganda there is nothing in the law that specifically addresses this element. However, the element is arguably encompassed in the waiver exception as choosing to conduct communications with counsel in the public eye can amount to a waiver of the privilege by conduct.

A fourth commonly held element to the advocate-client privilege is that it must be asserted. Arguably this element is not a part of Uganda jurisprudence as Section 125 of the Evidence frames the privilege as an affirmative duty of nondisclosure on the part of the advocate. It does not

appear that the client is under any obligation to assert the privilege in Uganda.

The fifth basic element is that the privilege has not been waived. It is important to note that only the client has the power to waive the privilege. The privilege is also commonly waived when the client chooses to disclose information about his legal representation. We see this ground for waiver in Section 128 of the Evidence Act.

4.3.2 The Advocate-Client Privilege in Uganda

The law of Uganda concerning advocate-client privileges consists of two sources: 1) relevant provisions in the Evidence Act on privilege; and 2) the Common Law. The first source is concise, straightforward and domestic. The second source is expansive, amorphous and international.

One notable aspect of the law of advocate-client privilege in Uganda is the absence of domestic law outside of the Evidence Act and the Advocates (Professional Conduct) Regulations. There are two key reasons for the lack of development in this area of the law. First, Uganda has a limited amount of case law concerning evidentiary matters. There are no jury trials in Uganda. This is significant as evidentiary issues are more contested when evidence is going to a jury. In cases where the trial judge is left to make factual findings, appellate courts can presume that the trial judge considered only the proper evidence. Trials are rarely overturned based on evidentiary rulings. Second, Uganda is not home to a vibrant discovery practice. In jurisdictions where great amounts of energy and effort are spent on discovery, the laws of privilege are expounded upon. Courts in discovery intensive jurisdictions develop extensive case law on the scope and application of privileges. In Uganda the discovery process itself is in a nascent stage, and there is no real corpus of case law on matters of discovery.

Another noteworthy characteristic within Ugandan law is a focus on the advocate-client privilege. Other advocate-client privileges such as

the litigation privilege and the legal advice privilege appear to exist on the margins of the Ugandan law.

The Evidence Act[123] addresses advocate-client privileges in four consecutive sections. They are as follows:

> **125. Professional communications.**
>
> No advocate shall at any time be permitted, unless with his or her client's express consent, to disclose any communication made to him or her in the course and for the purpose of his or her employment as an advocate by or on behalf of his or her client, or to state the contents or condition of any document with which he or she has become acquainted in the course and for the purpose of his or her professional employment, or to disclose any advice given by him or her to his or her client in the course and for the purpose of that employment; but nothing in this section shall protect from disclosure—
>
> (a) any such communication made in furtherance of any illegal purpose;
>
> (b) any fact observed by any advocate in the course of his or her employment as such, showing that any crime or fraud has been committed since the commencement of his or her employment.
>
> It is immaterial whether the attention of the advocate was or was not directed to that fact by or on behalf of his or her client.
>
> *Explanation*.—The obligation stated in this section continues after the employment has ceased.
>
> **126. Section 125 to apply to interpreters, etc**.
>
> Section 125 shall apply to interpreters, and the clerks or servants of advocates.

[123] The Evidence Act Cap 6, Laws of Uganda.

127. Privilege not waived by volunteering evidence.

If any party to a suit gives evidence in the suit at his or her own instance or otherwise, he or she shall not be deemed to have consented thereby to such disclosure as is mentioned in section 125; and, if any party to a suit or proceeding calls any such advocate as a witness, he or she shall be deemed to have consented to such disclosure only if he or she questions the advocate on matters which, but for that question, he or she would not be at liberty to disclose.

128. Confidential communications with legal advisers.

No one shall be compelled to disclose to the court any confidential communication which has taken place between him or her and his or her legal professional adviser, unless he or she offers himself or herself as a witness, in which case he or she may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he or she has given, but no other.

These four sections provide the basic contours of attorney-client privileges in Uganda. What follows is a brief treatment of each of these sections outlining the practical implications of each section on advocate-client privileges.

Section 125 mirrors certain aspects of Regulation 7 of the Advocates (Professional Conduct) Regulations. Both provisions speak in terms of non-disclosure as opposed to admissibility.

Section 125 prohibits an advocate from disclosing any of three categories of information: 1) communications from the client made for the purpose of and in the course of the advocate's employment; 2) information pertaining to documents that the advocate has become familiar with as a result of the representation; and 3) the substance of

any legal advice given to the client during employment. Section 125 provides three exceptions to the duty of nondisclosure: 1) client waiver; 2) communications made in furtherance of an illegal purpose; and 3) factual observations of criminal or fraudulent actions occurring during the advocate's employment. Section 125 clarifies that it does not matter if the client is the one that alerts the advocate to the information and that the obligation of nondisclosure continues after the termination of the advocate-client relationship.

Section 125 is somewhat limited in comparison to legal frameworks on the advocate-client privileges in other jurisdictions. Section 125 does not speak of the evidence being inadmissible. It only speaks of the duty on the advocate not to disclose. There is no indication as to when the court has power to overcome this privilege. Certainly the advocate has the duty under Regulation 16 of the Advocate's (Professional Conduct) Regulations to inform the court when a client is misleading the court. One could imagine a scenario where this obligation would arise that would not fall under one of the exceptions of Section 125 allowing for disclosure. We do not see any reference to the power and discretion of the court until we get to Section 128.

Section 125 does not have any catchall/equitable exception for disclosure such as in the interests of justice, or when otherwise ordered by the court, or when otherwise required by law. Nor does it have an exception where the advocate determines that disclosure is in the best interest of the client. This is in contrast to Regulation 7 of the Advocate's (Professional Conduct) Regulations, which provides that disclosure can be made if it "becomes necessary in the conduct of the affairs of that client, or otherwise required by law." Instead, it appears that the enumerated exceptions within the Statute are the only exceptions allowing for disclosure. Perhaps the limited exceptions can be expanded through a broad application of the client waiver exception. For example, client waiver could be deemed to be the applicable

exception to an advocate's duty of disclosure per Regulation 16 of the Advocate's (Professional Conduct) Regulations when a client has proffered false evidence.

The focus of Section 125 appears to be oral communications as opposed to documentary evidence or attorney work product. Even when specifically addressing documents, Section 125 refers to nondisclosure of descriptions of the documents as opposed to the documents themselves. Perhaps references to communications in Section 125 could be read broadly to encompass a wide range of documents. However, given the specificity of the statute on other points it would have perhaps set out the categories of materials that it considered communications if the drafters intended communications between the client and advocate.

Section 125 does not appear to directly address the emergent advocate-client privileges known as the litigation (or work product) privilege and the legal advice privilege. Those privileges focus on the content created by the advocate in connection with the legal work. The privilege protection under Section 125 pertains more to communication than the work of the advocate. The result is a gap in the Evidence Act in comparison with broader legal developments under the Anglo-American common law tradition.

Section 125 has the potential of entangling advocates in discovery abuse and of empowering advocates to practice "trial by ambush". The modern global trend in litigation is for the parties to exchange documents. The obligation to make no disclosures about the documents they discover can engender advocate conduct that is contrary to honesty, fair play and openness. Moreover, Section 125 gives the client the power to decide what information about documents will be shared. The advocate is seemingly powerless to disclose such information in the interest of justice unless it becomes necessary under the advocate's obligation under Regulation 16 of the Advocate's (Professional Conduct) Regulations. The net result is forcing advocates into

obfuscation instead of engaging them into a truth-seeking process. Forcing advocates to assume such roles as a matter of law negatively impacts the ethical culture of legal practice.

Section 126 is a helpful clarification regarding the scope of Section 125. In Uganda the duty of nondisclosure extends to employees of the advocate and interpreters. The term "clerks and servants of the advocate" is broad enough to encompass administrative staff and legal assistants. One aspect of Section 126 that will likely be subject to future dispute concerns the use of investigators. In most cases investigators are independent contractors as opposed to servants of the advocate. Arguably only investigators employed fulltime by the advocate's law firm are servants whose investigative work is subject to nondisclosure under Section 125.

While Section 126 provides clarification as to who is encompassed as the advocate for purposes of applying Section 125, there is no guidance in any of the four sections as to who is the client. Therefore we are left to look outside of the Evidence Act for assistance on this issue. We will address this issue later on in this chapter.

Section 127 provides that the Section 125 nondisclosure requirements are not waived simply by bringing a case to court or calling an advocate to the stand. Instead, waiver occurs when the client actually questions the advocate about information otherwise subject to nondisclosure under Section 125. Section 127 is the only provision that uses the word "privilege" to describe the protection against nondisclosure.

Section 128 concerns the right of the client to preserve confidential communications unless the client testifies and the court finds that it is necessary to disclose such communications in order to explain any evidence that he or she has given. This section makes it clear that such a disclosure can only be forced when the client has chosen to testify about

matters that make the otherwise privileged communications relevant to the court.

The Evidence Act provides the Ugandan lawyer with a basic framework for the advocate-client privilege. However, as seen from the above analysis, it leaves many gaps. In Uganda these gaps are filled by the common law. What follows is a broad treatment of the common law concerning privileges generally and advocate-client privileges in greater detail. The law described therein is not binding authority in Uganda, but it is persuasive authority that might find its way into Uganda jurisprudence in the future.

4.3.3 Comparative Historic Review of Other Evidentiary Privileges

In order to understand legal professional privileges, it is important to have some familiarity with the privileges afforded to other relationships and professions under the common law tradition. Here we will consider the spousal privilege, the physician -patient confidentiality and the priest-penitent privilege.

4.3.3.1 Spousal Privilege

The spousal privilege prevents courts from compelling spouses to testify against each other[124]. The modern policy behind this privilege is the need for fidelity and communication between a husband and a wife and the maintenance of marital harmony[125].

Within the British historical context, this privilege originated from the Christian conception of husband and wife as one flesh. The early common law considered a spouse incompetent to testify, either for or

[124]Katherine O. Eldred, Comment, "*'Every Spouse's Evidence': Availability of the Adverse Spousal Testimonial Privilege in Federal Civil Trials*," (2002) 69 *U. Chicago Law Review* 1319, at 1322 (describing the transition from spousal incompetence to the spousal testimonial privilege).

[125]Sally Roberts, *Spousal Privileges*, at 767-782 available on http://www.bpslawyers.com accessed on 7th August, 2010

against the other spouse[126]. This flowed from two tenets of medieval jurisprudence; first, that the wife has no legal identity independent of her husband's, and second, that an accused could not testify on his own behalf. As Blackstone stated, "If they [the married couple] were admitted to be witnesses for each other, they would contradict the maxim of law, *Nemo in propria causa testis esse debet* (No one ought to be a witness in his own cause)."[127]

The rule that regarded a spouse to be incompetent to testify as a witness in any capacity was ingrained in English common law. Both spouses could exercise the privilege and prevent the court from compelling their testimony. This privilege was later limited to only the witness-spouse who could elect not to testify while they are validly married.[128]

4.3.3.2 Physician - Patient Privilege

Under British common law, there is no evidentiary privilege for the confidential information between a physician and a patient. The leading case holding that no such privilege exists is the *Duchess of Kingston's trial*[129].

The case was a criminal proceeding on the charges of bigamy. A physician who attended the accused and her alleged husband, when asked whether he knew from the parties of any marriage between them, replied "I do not know how far anything that has come before me in a confidential trust in my profession should be disclosed, consistent with my professional honour." To this the court replied that if a surgeon was to voluntarily reveal such secrets, for sure he would be guilty of a breach of honour and of great indiscretion. However, the court went further and

[126]*Ibid*.
[127]Eldred *supra* note 15.
[128]Roberts *supra* note 16.
[129]*Duchess of Kingston's trial* 20 how.St.tr.355 (1776).

stated that in civil or criminal proceedings, to give such information in a court of justice, 'which by law of the land is bound to do', will never be imputed to him as any indiscretion. This doctrine ever since has been accepted by the British courts[130] and developed as a common law principle that the relationship of doctor-patient is not accorded the protection of privilege.

Certainly there are weighty policy grounds in favour of a privilege against testimony for physicians. There are clear benefits when a patient is able to speak freely about all matters without fearing disclosure. Patients that fear disclosure might fail to disclose life-saving information or may choose not to visit a physician in the first place.

The absence of a privilege places physicians in difficult situations like the one in *The Dutchess of Kingston* where they must choose between violating the law or betraying the confidence of a patient. Many medical practitioners and hospitals respond to this "devil's choice" by requesting written authorization of disclosure from the patient at the time of admission

4.3.3.3 Priest-Penitent Privilege

English Courts have long recognized the existence of a priest-penitent privilege. For example, in the case of *Broad vs. Pitt* the court concluded that it "would never compel a clergyman to disclose communications made to him by a prisoner…"[131] While there is no express legal authority for this privilege in Uganda, we can find recognition of this common law privilege in other Commonwealth states.[132]

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[130]Rignal W. Baldwin, "*Confidentiality Between Physician and Patient,*" (1962) 22 Md. L. Rev. 181 at 184.

[131]*Broad vs. Pitt*, [1828] 3 Car. & P. 518, 519, 172 E.R. 528, 529, *quoted in R.* V. Gruenke, [1991] 3 S.C.R. 263, 304 (L'Heureux-Dub6 & Gonthier, JJ., concurring).

[132]R. vs. Gruenke, [1991] 3 S.C.R. 263.

The priest-penitent privilege has its foundation in the confidential nature of the religious practice of confession.[133] The privilege began based on the historic importance of confession in relation to the threat of eternal damnation. As such the basis behind the privilege under the common law is similar to the hearsay exception granted to dying declarations on grounds that those who are about to die are unlikely to lie for fear of damnation or some other consequence in the after-life.

The continued existence of the priest-penitent privilege is largely attributable to considerations of religious freedom and respect for the priesthood. Subjecting priests to testify about the confessions made by penitents would severely impact the practice of confession and would place priests in untenable situations. Bentham argues that compelling clerics to disclose confidential communications would violate one of their most sacred religious duties.[134] He further argues that any coercion upon priests to divulge the content of a secret confession would be "inconsistent and incompatible" with toleration.[135]

4.3.4 History of Advocate-Client Privilege

As seen from the above examples, common law testimonial privileges arose more from Christian beliefs and historic accident than from any explicit policy or rationale. The spousal privilege arose from the Christian doctrine of considering man and wife to be one flesh. The priest – penitent privilege arose out of the serious need of confessional based on the threat of eternal damnation. Meanwhile, despite clear

[133]The 1983 Code of Canon Law of the Catholic Church, which obliges those who know the contents of penitential communications to maintain the secrecy. Rites of the Catholic Church**,** Rite of Penance, para.10(d) (emphasizing secrecy). The Rite of Penance states: "conscious that he has come to know the secrets of another's conscience only because he is God's minister, the confessor is bound by the obligation of preserving the seal of confession absolutely unbroken."

[134]Jeremy Bentham, *Rationale of Judicial Evidence*, 1st ed., (1827) vol. IV. 586-592

[135]*Ibid.* Pp. 588-89

policy needs, the physician-patient privilege, devoid of any special religious status or helpful legal fiction, never materialized in the English common law.

Fortunately for the advocate-client privilege, there was an historic accident in its favour. It concerned the special status of the English Barrister. The original English barristers were more than mere lawyers who could appear in court; they were lords. As such, barristers received special consideration from the court. The barrister (i.e. advocate) – client privilege was formulated to protect the honour and integrity of the 'gentleman' bearing the confidential information.[136]

The barrister was protected by the notion of honour. The privilege belonged to the barrister[137] and the courts recognised the right of gentlemen not to violate a pledge of secrecy.[138] It was for the barrister to decide whether to protect the communication by claiming privilege or waiving it.

The solicitor also began to acquire a certain privilege against testimony based on the solicitor's historic status in English society. The solicitors were men of business and servants of the family whose business and affairs they managed. There was widely held sentiment that servants must keep the secrets of the master.[139] The Roman doctrine that

[136]*See Annesleyvs Anglesea* (1743) 17 st.Tr.1139, quoted in Maria Italia, "Gentleman or Scrivener, 'The History and Relevance of Client Legal Privilege To Tax Advisors" (2010) Vol. 6, No.1 *International Review of Business Research Papers*, 391-403.

[137]Barristers were trained lawyers who would represent clients in court. These are the equivalent of Advocates in Uganda under the Advocates Act Cap 267, Laws of Uganda.

[138]John T. Noonan, "*The Purpose of Advocacy and the Limits of Confidentiality*" (1965-1966) Vol. 64 1485. The notion was that the barrister as a gentleman of character could not disclose secrets of his clients.

[139]J.A. Gardner, "*A Re-evaluation of the Attorney-Client Privilege*" (1963) Vol. 8:3 *Villanova Law Review* 279, at pg. 289.

the servant could not testify against his master is also believed to have influenced the principle of solicitor confidentiality.[140]

The early 1800's heralded major developments within the English common law concerning the advocate-client privilege. Privilege as a rule of evidence came to the fore in conjunction with the universal duty to testify and the imposition of compulsory process to secure the testimony of witnesses in open court.[141]

This duty to testify altered confidentiality. Persons who received confidential information were obliged to disclose such information when compelled by a court of law. The judicial search for truth could no longer be frustrated by a voluntary vow of secrecy. Judges decided that legal communications formed a special category of communication because of the importance of obtaining legal advice. Thus, advocate-client privilege and confidentiality developed to protect legal communications from compelled disclosure.[142]

4.3.5 Documentary Privileges: the Litigation Privilege and the Legal Advice Privilege

Historically, there were few concerns over the privilege afforded to documents in an advocate's file in the British common law tradition. Litigation was a purely adversarial exercise. Parties had no right to see their opponent's brief and as they had no right to see their adversary's evidence. The lawyer's file was protected from disclosure. The lawyer's file, or "pleadings" as it was called, included communications between either lawyer or client and a third party for use in litigation and a lawyer's own documentary preparation. It was the party's prerogative to

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[140]*Ibid* p. 290.
[141]Hazard, G.C, '*An Historical Perspective on the Attorney-Client Privilege*' (1978) Vol. 66 *California Law Review* 1061.
[142]John H. Wigmore, *A Treatise on the Anglo-American Law of Evidence*, Rev Edn, Little Brown, Boston (1961) p.169.

determine how such materials were to be used and whether (or when) such materials would be disclosed.[143]

Things have changed. Parties are now required by courts to exchange documents and to participate in open discovery. Judges conduct pre-trial conferences and require parties to generate pre-trial orders designed to make both sides in a case put their proverbial cards (and documents) on the table. The discovery process varies by jurisdiction, but the old form of "trial by ambush" is dying out.

This brave new world requires new approaches to determine what documents and materials need not be shared. Whether or not a document is privileged is determined at the time when it is created, by the purpose for, and in the circumstances in which, it is created.

Within the British Common Law tradition the protection afforded to materials arising out of the advocate-client relationship and the resulting legal work fall into two categories: 1) the litigation privilege and 2) the legal advice privilege.

4.3.5.1 Litigation Privilege

The litigation privilege protects an advocate's trial preparation efforts by safeguarding certain information and materials from forced disclosure and admission into evidence. The doctrine is rooted in the desire to foreclose unwarranted inquiries into the lawyer's files and mental impressions in the guise of discovery.[144] For litigation privilege to apply there must be a reasonable likelihood of litigation. A mere vague possibility that proceedings may arise in the future is not

[143]The dominant purpose test set down in Waugh case was adopted in Canada in *General Accident Assurance Co. v. Chrusz*(1999), 45 O.R. (3d) 321 (C.A.) and the High Court of Australia in *Esso Australia Resources Ltd. v. Federal Commissioner of Taxation(*1999), 168 A.L.R. 123 (H.C.A.).

[144]Douglas R. Richmond, "*The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post- Enron Era*" (2005-2006) Vol. 110:2 Penn State Law Review 381 at 391.

sufficient to establish the privilege. The subject communications must be made for the dominant purpose of advancing the prosecution or defence of the matter or for the seeking or giving of legal advice in connection with the contentious matter.[145]

The dominant purpose test was established in *Waugh vs. British Railway Board*.[146] In that case, the plaintiff's husband had died in a train collision while employed by the defendant railway board. An internal report prepared for the "information of the Board's solicitor" was held by court not to be privileged. Lord Wilberforce noted that unless the purpose of submission to the legal advisor in view of litigation was at least the "dominant purpose for which the relevant document was prepared, the reasons which require privilege to be extended to it would not apply."[147] The Court found that, while anticipation of litigation was one of the reasons for which the report was created, the main reason for its commission was to further public safety objectives.

In the United States the "work product" privilege closely resembles the litigation privilege. It is worthwhile examining the American "work product" privilege as it is more extensively developed through judicial opinion than the litigation privilege.[148]

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[145]*See; Sheldon Blank v. Canada (Minister of Justice)* [2006] 2 S.C.R. 319, 2006 SCC 39 (Supreme Court of Canada)

[146](1979), 2 All E.R. 1169 (H.L.).

[147]*Ibid*. at 1174. Lord Russell agreed with this observation and stated that in order to attract privilege from its production, it was essential that the joint internal report owe its genesis to either the sole or the dominant purpose that it should be used for the purpose of obtaining legal advice in possible or probable litigation (at 1184).

[148] American jurisprudence is far more extensive with respect to evidentiary and privilege issues than any other system in the world. In American courts trials often hinge on evidentiary rulings so such rulings are the subject of countless appellate decisions. In addition, American jurisdictions tend to generate extensive regulations, guidance materials and disciplinary hearing proceedings that address matters of legal ethics. As such, the American context proves to be a rich resource for the jurisprudential exploration of such issues.

The US Supreme Court established the attorney "work product" in *Hickman vs. Taylor*.[149] *Hickman* concerned statements of crew members of a sunken tug boat taken by attorneys for the defendant tug boat owners. Despite finding that the documents were not shielded by the attorney-client privilege, the Court held that the documents were protected. In his majority opinion, Justice Murphy referenced the existence of the English privilege covering all documents prepared by or for counsel with a view to litigation as persuasive authority for establishing the work product privilege.[150] Thus the American "work product" privilege shares its pedigree with the British common law's litigation privilege.

The US Supreme Court placed limits on the work product privilege. Justice Murphy writes:

> *We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had.*
>
> 329 U.S. 495, at 511

Since *Hickman*, American courts have divided work product privilege into fact work product and opinion work product. This division has been described as follows:

> *To differentiate work product that is considered absolutely protected from disclosure and work product that is a qualified privilege, work product is generally viewed as having two distinct classifications: opinion work product and fact work*

[149] 329 U.S. 495(1947).
[150] *Ibid* at 510 at (n. 9)

> *product. Fact work product is discoverable by an adversary upon a showing of good cause and substantial need. […] Conversely, opinion work product includes the attorney's mental impressions, ideas, opinion and litigation strategies, etc., and it is considered to be an absolute privilege.*[151]

The fact work product privilege can be overcome if the product of a lawyer contains evidence essential to the preparation of the adversary's case that is not otherwise available. Such necessity may arise when the work product could lead to the discovery of relevant facts, when the work product would be useful for purposes of impeachment or corroboration, or when the information contained in the work product is no longer available or can only be reached with substantial difficulty.[152]

America's necessity exception for factual information makes the work product doctrine less protective than Britain's litigation privilege. However, the litigation privilege appears to be moving towards the American approach. Current British legal trends favour disclosure.[153] In the case of *re L*[154] the House of Lords noted the changing landscape of a legal system that is in many respects no longer adversarial and predicted future impacts on the litigation privilege.[155]

The House of Lord's opinion in *re L* proved prescient in *General Mediterranean Holdings vs. Patel.*[156] In *Patel*, the Court held that the litigation privilege can be derogated by a specific provision in the

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[151]Jody E. Okrzesik, "*Selective Waiver: Should the Government be Privy to Privileged Information Without Waiving the Attorney-Client Privilege and Work Product Doctrine*?" (2003) 34 U. Mem. L. Rev. 115 at 126 to 127.
[152]*Ibid* at para. 25
[153]*See* Order 12 of the Civil Procedure Rules S1 71-1 on Scheduling Conference, discoveries, interrogation and inspections.
[154][1997] AC 16
[155]Much as Lord Scott expressed willingness to restrict litigation privilege and to revise the earlier House of Lords Judgment in *Re L* [1997] A.C 16, he did not review it since it was not subject of discussion in *Three Rivers case*.
[156]*General Mediterranean Holdings vs. Patel* [2000] 1WLR 272 QBD.

substantive legislation. The Court then held that the litigation privilege was overridden by the new disclosure provision in the Civil Procedure Rules (applicable to England and Wales).

The shift towards greater disclosure has been recognised by courts in Uganda and given legislative force with the Civil Procedure amendment of 1998 that introduced scheduling conference under Order X11 of the Civil Procedure Rules.[157] During scheduling conferences lawyers are required to disclose all the relevant facts and documents pertinent to the trial on the premise that mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The discovery, inspection and interrogatories procedure provided for under Order X of the Civil Procedure Rules[158] further advance the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.

Going forward we can expect courts and rule makers to adopt more flexible and situational approaches for materials generated in connection with litigation. The days of simply withholding all material in possession of counsel have largely passed. Disclosure is quickly becoming the new default rule. Taking stock of developments in American work product doctrine might be useful in predicting the future evolution of the litigation privilege within Commonwealth states.

4.3.5.2 Legal Advice Privilege

The legal advice privilege protects communications between a lawyer, acting in his professional capacity, and his client, provided that the communication is confidential and for the purposes of seeking or giving legal advice. The key difference between litigation privilege and

[157] Civil Procedure Rules Statutory Instrument 71-1 Laws of Uganda.
[158] *ibid*

legal advice privilege is that correspondence with an independent third party is not covered by legal advice privilege.

The legal advice privilege is widely accepted across the common law tradition. The privilege generally protects all communications pertaining to legal advice, including both advice as to substantive rights and liabilities and advice as to rights and liabilities in respect of litigation.[159]

The House of Lords recently reaffirmed the legal advice privilege in the case of *Three Rivers District Council and Others vs. Governor and Company of the Bank of England.*[160] There the Court pronounced an expansive approach to the privilege holding that the privilege was not limited to advice about a client's legal rights and obligations but included all confidential communications relating to what should be done in any given legal context. The Court further held that the legal advice privilege covers all communications between the lawyer and his client prepared in his role as a legal adviser.

4.4 Issues of Agency and Context

4.4.1 Who is the Client?

The question of who is the client rarely causes difficulties in the context of clients who are natural persons. However, there are scenarios where this question proves complex.

Lawyer communications within the corporate context bristle with legal issues. Corporate clients communicate through employees and other agents. The result is a body of law that concerns the extent that

[159]John L. McDougall & Earl A. Cherniak, "*Privilege issues and the Barrister's Brief*" (June 2004) A Conference Paper presented at the Joint Conference of the American College of Trial lawyers and Advocates' Society of Ontario on April 2, 2004.

[160]*Three Rivers District Council and Others vs. Governor and Company of the Bank of England* [2004] UKHL 48

advocate-client privileges apply to communications to corporate agents and employees.

The English Court of Appeal has provided guidance on the issue of who is the client within the corporate setting.[161] The Court indicated that not all employees of a large organization will be considered to be the client for the purposes of legal advice privilege.[162]Where communications pass between an advocate and an employee who is not considered to be a client that documentation may not be subject to privilege. The Court's guidance seems to limit who constitutes "the client" to certain specified persons who have most contact with their legal advisers.

A highly influential decision in the corporate context is the U.S. Supreme Court decision in *Upjohn Co. v. United States*.[163] The question facing the Court in *Upjohn* was whether employees had to be in the "control group" of the company in order to have their communications with counsel protected by the attorney-client privilege. Under the "control group test", the privilege only extended to corporate officers who played a substantial role in deciding and directing the corporation's legal response.

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[161]The issue of "Who is the Client" was not addressed in the decision of the House of Lords. The House of Lords was invited to express its view on the correctness of the Court of Appeal's decision in Three Rivers (No.5). Although the Law Lords all but indicated that they did not approve of the Court of Appeal's decision, they declined to comment on the correctness of the decision. In the Kenyan case of *Uhuru Highway Development Limited & others vs. Central Bank of Kenya [2002]2 EA 655,*the Court of Appeal of Kenya adopted the definition of a client under section 2 of the Kenyan Advocates Act to '… to include any person who, as a principal or on behalf of another, or a trustee or personal representative, or in any other capacity, has power, express and implied, to retain or employ an advocate and any person who is or may be liable to pay an advocate any costs…"

[162]That position was neither overturned nor reviewed on appeal in the House of Lords.

[163] 449 U.S. 383 (1981)

The Court in *Upjohn* rejected the "control group" test and expanded the scope of the attorney-client privilege in the corporate context to include communications with non-management employees. The Court reasoned that the privilege covered employee communications when those communications are within the scope of the employees' corporate duties and when the employees themselves are sufficiently aware that communications were conducted so that the corporation could obtain legal advice.[164] In rejecting the control group test, the Court noted:

> *[t]he control group test thus frustrates the very purpose of the attorney-client privilege by discouraging the communication of relevant information by employees of the client corporation to attorneys seeking to render legal advice to the client. The attorney's advice will also frequently be more significant to non-control employees than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy.*[165]

The Court in *Upjohn* also provided protection to factual statements taken from employees. The Court held that the statements taken could be reflective of the attorney's mental processes. Thus the disclosure of employee statements would not be required simply on showing of substantial need and inability to obtain the equivalent without undue hardship.

We do not know what test courts will employ for applying the advocate-client privilege in the corporate context in Uganda. Therefore, advocates representing corporate clients in litigation must stay abreast of persuasive authority from other jurisdictions and conduct corporate client communication in a conservative matter with an eye towards those

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[164] 449 U.S. 383, 394-395 (1981)
[165] *Ibid* at 392

decisions. Failure to develop a wise and informed approach to corporate client communication can amount to a breach of one's duty of confidentiality and competency.

Finally, regardless of the protective scope of the advocate-client privilege, advocates must be cognizant of the fact that the employees of a client are not the client. At times an employee will be under the mistaken impression that the advocate owes the employee the duty of confidentiality. That is not the case. In the context of corporate representation, the corporation is the client and the corporation has the power to waive the privilege. The employee does not have that power unless counsel personally represents the employee. It is essential that advocates clarify their relationship with employees and put them on notice of the advocate's duties and allegiances.

4.4.2 Advocate-Client Privilege in the "In House" Counsel Context

"In house" counsel are lawyers employed by a company on a full-time basis to serve legal functions for the company. These lawyers perform a wide range of sensitive functions ranging from litigation management to regulatory and legal compliance. Based on their job duties, "in house" counsel are typically sending and receiving communications in connection with a wide range of confidential matters.

The law of privilege is a key issue for "in house" counsel. If their work and communications are protected by privilege, it affects how they interface with employees and how they do their work.

English and American courts have generally not distinguished between "in house" counsel and external counsel when determining whether an advocate-client privilege applies. However, the European Court of justice has taken a different course. The ECJ has declined to extend advocate-client privileges to communications between a client

and "in house" counsel.[166] According to the ECJ, the attorney-client privilege is only justified when a lawyer is independent from the client. The ECJ rejected bar membership or subjection to ethical rules as grounds for extending the privilege to "in house counsel."[167]

There might be some erosion in the privilege afforded to "in house" counsel in the United States as well. The Public Company Accounting Reform and Investor Protection Act of 2002 ("Sarbanes-Oxley Act), passed in the wake of the Enron debacle, arguably signals an erosion of the attorney-client privilege in respect to "in house" lawyers in the United States.[168]

While Courts in Uganda have not grappled with this issue, it is important that Ugandan advocates understand that the status of "in house" counsel as bearers of the advocate-client privilege is unsettled. Ugandan advocates should proceed with caution knowing that communications with "in house" counsel might not be protected by Section 125 of the Evidence Act. If "in house" counsel is enmeshed in particularly sensitive matters, it would be wise to bring outside counsel into the loop to ensure that the communications are officially attorney client communications. "In house" counsel should also advise their employers on their somewhat unsettled status.

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[166]*AM & S vs. Commission*, ECJ judgment of 18 May 1982, Case 155/79, ECR 1982; and *Akzo Nobel Chemicals Ltd. and Akcros Chemical Ltd. vs. Commission of the European Communities*(C-550/07).

[167] Opinion of Advocate-General Kokott in *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission*, Case C-550/07 at paras. 61-62.

[168]Tom D. Snyder, *"A Requiem for Client Confidentiality?: An Examination of Recent Foreign and Domestic Events and their Impact on the Attorney-Client Privilege*"(2004) Vol. 50 Loyola Law Review. 439 at 452.

4.5 Challenges to Privilege and Confidentiality

4.5.1 Ethical Challenges

There are four major categories of ethical abuse related to the advocate-client privilege. The first concerns abuses of disclosure. The second concerns abuses on non-disclosure. The third concerns the ethics of diligence, competence and communication. The final concerns the balancing act of professional duties verses wider duties.

The first concern is relatively straightforward. As a matter of ethics, no advocate should voluntarily disclose facts he has learnt in his professional capacity which conceivably could harm, embarrass or affect the reputation of a client. Yet this fundamental principle is often violated in clubs, bars, and drawing rooms. Some advocates prefer to indulge in gossip and storytelling regardless of their ethical obligations. Moreover, in the current context some advocates have expanded their ethical violations to the Internet. It is not unusual to read ill-advised posts and status updates from advocates that discuss cases and clients. Gratuitous "tweeting" about a client is both unprofessional and unethical.

The second category of abuse is more nuanced. It concerns the abuse of privilege and confidentiality to prevent the disclosure of matters that should be in the public eye. Such instances include public bodies going into private sessions with legal counsel to discuss matters that they want to keep out of the public eye. In litigation this can occur when parties attempt to aggressively use the litigation privilege to withhold documents that should be produced. As noted earlier in this chapter, the wording of Section 125 of the Evidence Act can be used as grounds for hiding evidence found or reviewed by the advocate. Advocates who adopt an expansive and opportunistic approach to nondisclosure requirements can use assertions of privilege to thwart criminal and government investigations. Given the extent of self-regulation within the

legal profession, it is incumbent upon the Bar to vigilantly monitor the use of privilege by members.

The third category concerns diligence and communication. As noted in prior chapters, an advocate owes his client a duty of diligence, competence and proper communication. These duties are paramount in the context of confidentiality and privilege. An advocate must exercise diligence to preserve confidentiality. The advocate must be competent in understanding how the law of confidentiality and privilege applies so as to best preserve client confidences. Lastly, the client must communicate well. This entails both advising clients and others properly about the law of confidentiality and privilege and communicating in a manner that will preserve confidentiality. This includes ensuring that the phrase "attorney-client privilege - prepared for the exclusive purpose of legal advice" is marked on envelopes, at the top of documents and in the email subject lines on all communications entitled to nondisclosure.

Finally, there are the types of ethical challenges we cited at the beginning of this chapter. These are the challenges presented when the advocate has crucial information but is unable to produce it based on the duty of nondisclosure. Here advocates must understand their role within the adversarial framework and play their role as ethically as possible. Ultimately, regardless of professional obligations, advocates must be true to their own ethical standards and not be lulled into a sense of ethical unaccountability based on their professional role.

4.5.2 Challenges Presented by Technology

Electronic forms of communication have come to the fore in legal practice. Email is fast replacing faxes and letters as a dominant means of advocate-client communication. However, issues of security in electronic communication can undermine a lawyer's ability and ethical

duty to protect his or her confidential information[169]. Some critics question whether email is secure enough to support a reasonable expectation of confidentiality that will sustain the privilege and satisfy the attorney's ethical obligations to preserve client confidences.[170]

The ethical question is whether the lawyer has breached the ethical duty to safeguard confidential communications by exchanging sensitive email with a client or posting sensitive information to the social networks. Arguably email is an inappropriate mode of advocate-client communication unless precautions are taken to preserve the confidentiality of the information being transmitted.[171] It is imperative that lawyers exercise self-restraint and caution in this age of technology. Is it necessary to tweet that you are having a meeting with your client? Lawyers should take confidentiality seriously.

4.5.3 Challenges Presented by the Abuse of Public Power

Uganda is home to another serious challenge to the advocate-client confidentiality: the abuse of public power. Recently a law firm in Uganda was the target of a police raid seeking evidence pertaining to a client in police custody. There are also well-founded concerns about wiretapping and the monitoring of electronic communications. Advocates must be extremely vigilant in such an environment. Ugandan advocates cannot merely assume that rights of privacy and confidentiality will be protected and honoured by public authorities. Instead they must fight for these rights[172] in the courts of law and the

[169]Amy M. Fulmer Stevenson, "*Making a Wrong Turn on the Information Superhighway: Electronic mail, The Attorney-Client Privilege and Inadvertent disclosure*" (1997) Vol.26 Capital University Law Review, 347 at 351.
[170]Robert A. Pikowsky, "*Privilege and Confidentiality of Attorney-Client Communication via Email*" (1999) Vol. 51:3 Baylor L. Rev.483 at 484.
[171]*Ibid* at 485.
[172]*See* the Judgment of Egonda Ntende, J (as he then was) in *Uganda vs. Kalawudio Wamala* Crim. Session Case no. 442 of 1996 (unreported) available on www.ulii.org/ug/judgment/high-court/1998/5 accessed on 1st December

courts of public opinion. Most of all, Ugandan advocates must operate at a heightened level of vigilance and caution in order to preserve client confidentiality in this present environment.

4.6 Conclusion

The advocate's duty of confidentiality and legal professional privileges are crucial elements in an adversarial legal system. We have seen the advocate-client privilege evolve from a gentleman lawyer's shield to a key right held by the client. The burning question is how far may a lawyer go in supporting a client's cause?[173] The rules recognize the need for zeal in pursuing the client's interests, but the lawyer must obey his own conscience and not that of his client. A lawyer must not degenerate into a mere technocratic tool of the client. Lawyers must remain mindful of the broader considerations of personal integrity and the wider society. Ethical and moral concerns come into play in executing the lawyer's brief. In a society where the character of lawyers is questioned and the justice system is viewed with mistrust, it is imperative that courts and regulatory bodies swing into action to preserve advocate-client confidentiality in a way the promotes both individual justice, the legal process and the common good.

2012 which held that evidence could be kept out of court on the ground that it was obtained as a result of violation of human rights.

[173]John T. Noonan, "*The Purpose of Advocacy and The Limit of Confidentiality*" (1965-1966) Vol.64 Michigan Law Review, 1485 at pg., 1490.

5

ADVOCATES AND MONEY IN UGANDA

Samuel Kiriaghe[†]

5.1 Introduction

This chapter concerns ethical matters pertaining to money and finances relevant to the practice of law in Uganda. The chapter begins by addressing the commonly held belief that legal practice is a path to wealth. Next, the chapter presents common financial pressures that impact legal practitioners in Uganda. The chapter then turns to technical and rule-based concerns regarding financial transactions arising in legal practice. The chapter will cover practical and important topics such as the management of trust accounts, client billing, and transactions with clients peripheral to the attorney client relationship.

5.2 Legal Practice as a Path to Riches

"Why do you want to be a lawyer?"

As a law student, you have likely answered this question several times. Often times we are not satisfied with our answer.

Many aspiring lawyers respond to the question by talking about all of the good things they will do. They want to be a "voice for the voiceless." They want to stand up for the rights of those who cannot defend themselves. They want to make a positive difference in the

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world. Some will mention the respect afforded to lawyers in society. Others will say that they have always been fascinated by the law or even that they have "always loved the law." Others might even mention a family member or a television show that inspired them to pursue a career in law. Finally, a few honest respondents will mention a more practical influence --- the desire to make money.

For many a career in law is seen as a path to material wealth. Countless aspiring lawyers believe that legal practice will provide them with a posh lifestyle. But is this really true? Is a practicing certificate a ticket to riches? Do outside perceptions match reality?

5.2.1 The Myth of the Lawyer Wealth

The truth concerning lawyer wealth tends to fall well short of the myth. The practice of law does not always result in material wealth. Many lawyers work long hours in high-pressure situations with little to show for their efforts in terms of material gain. Other advocates, particularly those who have just completed their educational requirements, find it very difficult to find remunerative legal work. Some advocates find themselves looking for a job well over a year after completing their legal studies.

Outward appearances drive the myth of lawyer wealth. Many advocates market themselves with their lifestyle. They believe that if they drive a nice vehicle, dress in expensive clothes and live in well-heeled neighborhoods they will be perceived as successful lawyers. However, many of these advocates stretch their finances to put on such appearances and fail to build up real wealth.

5.2.2 Roads to Wealth

Advocates that acquire wealth quickly often do so under dubious circumstances. Some advocates get rich quick by leveraging the corruption that exists within the Ugandan system. An advocate that is

willing to do whatever it takes to get the desired results for a client might be well paid for such efforts. It is also common to find stories of lawyers who are said to have accumulated ill-gotten wealth by failing to account to their clients. The media in Uganda often runs stories of lawyers who fail to account for clients' money.[174] These paths to riches are criminal, and the Ugandan legal community must be vigilant to expose and discipline advocates who commit such abuses. Failure to take action against such practices damages the justice system and erodes the quality of legal practice in Uganda.

Advocates that acquire wealth the right way typically acquire wealth over a long period time. Advocates charge for the work they perform. Therefore, fees must be earned task by task. Often times the fees that an advocate is entitled to charge increases as an advocate's reputation and expertise increase. To grow wealth steadily, the practice of law requires patience, honesty and trust. The more trustworthy the lawyer, the more the lawyer's clientele will grow and economic opportunities will increase.

If your overriding desire in life is the acquisition of material wealth it might be wise to pursue a career other than legal practice. Opportunities in business and finance can often outpace the financial rewards of legal practice. It is often the risk-taking entrepreneur who obtains the greatest financial success. Legal practice can be a good source of safe and steady income, but it generally does not produce great riches.

5.2.3 Right Motivations for a Career in Law

If you choose to pursue a career in law you need to be motivated by more than financial gain. Otherwise, you are likely to be disappointed by

[174]*See e.g.* Edward Anyoli: *City Lawyer Appeals against Law Council Suspension*, The New Vision, Tuesday, December 10, 2011, at page 2 in which two advocates were reportedly found guilty by the Law Council Disciplinary Committee for, *inter alia*, failing to account for the client's money and conducting a fraudulent land transaction.

your career choice. An advocate must always remember that the law is a learned profession. As a profession, the practice of law is about more than making money. It is about service to a system of justice and service to people. As a learned profession, it is about intellectual challenges. If you are not motivated by service and intellectual stimulation you are likely to be disappointed with a career in the law. There are certainly easier and better ways to make money.

5.3 Financial Pressures on the Legal Practitioner

Various financially-related stressors exert pressure on legal practitioners. How advocates cope with financial pressure is an important aspect of legal practice. This section addresses some key areas where financial pressures impact advocates and provides practical advice for coping with these pressures.

5.3.1 The Desire for Instant Success

Many new lawyers often want to be "mega rich really fast." They do not want to be categorized as struggling lawyers but crave to start at the top. Many do not really love the law or the pursuit of justice, but care simply about making money. Their sole professional objective is to make as much money as possible in the shortest amount of time possible. Their focus may be on what is the best way for a lawyer to get rich quickly. New advocates must remember that the good things in life come through hard work, commitment and sacrifice.

5.3.2 "Keeping Up with the Joneses"

Young advocates should avoid making comparisons with colleagues whose social and economic circumstances may be different. Advocates should not be concerned with keeping up with the financial gains of others. Many advocates believe that they will be judged based on the

vehicle that they drive. They think that they will not be perceived as a successful advocate unless they drive a vehicle that is comparable to those driven by other apparently successful advocates. In truth however, the outward display of wealth is often an illusion.

The spending habits that result in the purchase of flashy vehicles are the same habits that keep people from acquiring real wealth. It is better to invest your income in assets that will grow in value and generate financial returns over time. Vehicles are "wasting assets" whose value depreciates dramatically over time.

5.3.3 Perceived Just Desserts

Many lawyers feel they are smarter than other members of society and deserve more. Some advocates become troubled by the fact that they are making less money than the businessmen with little or no formal education. Advocates with such feelings might be temped to find a way to get more out of a transaction than they should. Advocates who are harboring such feelings would be well-advised to ground their self-worth in something other than material wealth.

5.4 Viewing Clients as Economic Opportunities

Many advocates view clients as little more than economic opportunities to be exploited. Money-hungry lawyers encourage their clients to undergo expensive but unnecessary legal procedures. These lawyers fail to act in the best interests of their clients. Such behavior is both unethical[175] and shortsighted. Over the long term advocates that

[175]*See* Reg. 12 of the Advocates (Professional Conduct) Regulations, SI 267-2 which provides: "It shall be the duty of every advocate to advise his clients in their best interest and no advocate shall knowingly or recklessly encourage a client to enter into, oppose or continue any litigation, matter or other transaction in respect of which a reasonable advocate would advise that to do so would not be in the best interest of the client or would be an abuse of court process."

exploit their clients will have a more difficult time attracting business and their "bottom line" will suffer. It is important to remember that most new business comes from satisfied clients.

5.5 Real Wealth

Lawyers must be careful not to be obsessed with outward manifestations of wealth. Real wealth entails making more income than one spends. Lawyers should adopt life styles that are within their means. If a lawyer is able to save money, the lawyer can invest those funds in assets that will grow in value over time. Such prudent practices can lead to substantial financial gains over time.

5.3.6 The Struggle to Make a Living

A common challenge, especially for new lawyers, is the struggle to make a decent living. Lawyers joining the work force face various financial demands as they seek to establish themselves. Common needs include decent housing, a suitable wardrobe, and transport.

Young lawyers should live within their means. One key step in managing one's personal financial affairs is developing a budget. The budget should be realistic and in line with available financial resources. Young lawyers should also avoid unnecessary expenses and focus on needs rather than wants. Young lawyers that keep their financial demands in check are better positioned to practice law with integrity and avoid ethical pitfalls.

5.3.7 Family and Community Pressure

Many advocates in Uganda face financial pressure from families and home communities. Family and community members often presume that all lawyers are rich. Many family and community members look to lawyer relatives and acquaintances for financial assistance. This places

pressure on lawyers to produce an income that will meet the needs of family and community members.

Pressure to offer financial assistance can be particularly strong on recent graduates. Often times people who have assisted young lawyers with their education will expect an immediate return on their investment in that lawyer. Unfortunately in many instances young lawyers have yet to establish a remunerative legal practice.

It is important to tactfully disabuse others seeking assistance of any false conception they might have about your financial status. This is not to say that you should not assist others. However, you should be careful not to provide financial assistance that is beyond your means.

5.3.8 Cash Flow Pressure and Other People's Money

One of the pressures that many businesses face concerns cash flow. Cash flow is a business's ability to access money when it needs the money. Cash flow problems are particularly acute in a place like Uganda where credit can be difficult to obtain and interest rates are exceedingly high.

When an advocate needs cash to pay bills and other pressing concerns, the advocate may be tempted to access funds held in trust for a client or other third party. The advocate can rationalise the use of such funds in a variety of ways. One advocate might convince himself that he will pay the funds back before they are needed. Another advocate might tell herself that other people owe her money so it is OK to take the funds out of trust.

As we will see later on in this chapter, the improper use of trust funds or the mixing of trust funds with other accounts is strictly prohibited in Uganda. Such actions can result in the loss of one's practicing certificate and criminal sanctions. Therefore, advocates must resist the temptation to utilize funds held in trust to meet cash flow needs.

Notes from the Field: Money and Injustice in the Legal Marketplace by Samuel Kiriaghe

There have been some complaints against some lawyers who compromise their clients' cases because the other party has offered these lawyers more money. This is unfortunate as such lawyers allow monetary concerns to corrupt their practice of law. In upcountry courts such as in Rukungiri, Arua, Kasese, Mbarara, there are many potential clients who would prefer to instruct Counsel based in Kampala Chambers rather than lawyers within their town. When asked why they desire a lawyer from outside the community the potential clients claim that lawyers within their locality are too easily corrupted with money. These individuals believe that a lawyer from Kampala will be more inclined to handle their case without being corrupted by the other party. These potential clients are willing to pay the extra cost for a lawyer from Kampala based on their belief that such lawyers will be more ethical and exhibit a greater loyalty to their clients.

This phenomenon demonstrates a clear market need for advocates who will place professionalism and the duty owed to their client above the prospect of financial gain. This phenomenon also shows that there is substantial business for advocates who can establish a reputation for ethical practice.

5.4 Fees for Legal Services

In general, an advocate is entitled to be paid for the legal services the advocate provides.[176] The fee an advocate is entitled to charge is

[176] One exception to this general rule concerns the provision of *pro bono* legal services that are provided at no cost.

regulated by the Advocates (Remuneration and Taxation of Costs) Rules, SI 367-4.[177] Every advocate is required to charge fees in compliance with the scales of fees set out in the Rules. This chapter discusses key limitations concerning what an advocate can charge a client for legal services.

5.4.1 Minimum Fees for Legal Services

Under Rule 4 of the Advocates (Remuneration and Taxation of Costs) Rules[178], no Advocate shall accept or agree to accept remuneration at less than that provided by these Rules except where the remuneration assessed under these Rules would exceed the sum of twenty thousand shillings, and in that event the agreed fee shall not be less than twenty thousand shillings.

The Advocates Act[179] under section 74 (1) (g) and (h) makes it unlawful for an Advocate to undertake professional business for any fee or consideration which shall be less than the scale of charges, if any, for the time being in force.

Section 74 (1) (g) thereof provides:

No advocate shall directly or indirectly hold himself or herself or permit himself or herself to be held out, whether by name or otherwise, as being prepared to undertake professional business for any fee or consideration which shall be less than the scale of charges, if any, for the time being in force.

Under section 74(1) (h):

No advocate shall agree with his or her client either before, during or after the conduct of any non contentious professional business to

[177] These Regulations were made pursuant to the mandate provided under Sec. 77 (1) (e) of The Advocates Act, Cap 267.
[178] Rule 4 of the Advocates (Remuneration and Taxation of Costs) Rules, SI 267-4
[179] Cap 267

undertake such business for any fee or considerations whatsoever that shall be less than that set out in the scale of charges, if any, for the time being in force.

These rules are known as rules against "undercutting." The rules are intended to avoid unfair competition and ensure adherence to professional standards in legal practice. It is an offence for an advocate to engage in undercutting.[180]

5.4.2 Fees in Excess of the Minimum Fees

The fee scales in the Rules are floors and not ceilings. Advocates may charge fees above the scale as long as those fees are reasonable. In fact, in some cases advocates are entitled to receive more than the amount designated in the fee scale. Such matters include matters of exceptional complexity, matters of high importance and matters where exceptional dispatch (speed) is required.[181]

The test for excessive fees is a matter of degree. According to Regulation 28(2) of the Advocates (Professional Conduct) Regulations advocates may not charge fees that are "excessive or extortionate." What amounts to excessive and extortionate is left for the fact finder to determine.

5.4.3 Fees Taxed as Costs

It appears from the rules that the discretion to charge additional fees is limited to remuneration between advocate and client. As such, party-to-party costs should be charged on scale.

That said, the Court/Taxing Master has wide discretion in fixing fees when taxing costs. In *Patrick Makumbi & Another v. Sole Electronics (U) Ltd*, Civil Application No. 11 of 1994 (Supreme Court of Uganda),

[180] *See* Sections 74(2) and 20 Advocates Act, Cap 267.
[181] Rules 5 and 6 of the Advocates (Remuneration and Taxation of Costs) Rules, SI 267-4,

the Court noted *inter alia*: "that there is no mathematical or magic formula to be used by the Taxing Master to arrive at a precise figure. Each case has to be decided on its own merit and circumstances. For example, a lengthy or complicated case involving lengthy preparations and research will attract high fees…. Fifth, in or variable degree, the amount of the subject matter involved may have a bearing…. Sixth, while a successful litigant should be fairly reimbursed the costs he has incurred, the Taxing Master owes it to the public to ensure that costs do not rise above a reasonable level so as to deny the poor access to Court. However, the level of remuneration must be such as to attract recruits to the profession."

5.4.4 Retainers

An advocate may be engaged on retainer basis. When a retainer is provided, the advocate should be careful to keep those funds in a separate account and only take down the retainer to the extent that fees or costs accrue. The retainer agreement may require that the client replenish the retainer as needed or otherwise agreed.

In accordance with regulation 8 (3) of the Advocates (Professional Conduct) Regulations, an advocate shall return the portion of the retainer in excess of the value of the work done and disbursements made on behalf of the client.

5.4.5 Fees in Connection with Land Transactions

One other area that commonly raises ethical issues is land transactions. The Advocates (Remunerations and Taxation of Costs) Rules lay down various scales for charging fees for the vendor's and purchaser's advocates.

Rule 14(a)[182] provides that subject to rule 19 of these Rules, the scale of charges by an advocate in respect of conveyancing and general business (not being business in any action or transacted in any court or in the chambers of any judge or registrar) shall be regulated in respect of sales, purchases, mortgages and debentures completed, the remuneration shall be that prescribed in the First Schedule to these Rules. The Second Schedule regulates fees in respect of leases, agreements for lease or conveyances reserving rents or agreements for the same completed.

Under the First Schedule, the vendor's advocate, purchaser's advocate, mortgagor's advocate or mortgagee's advocate is entitled to charge 15% on the first 1,000,000/=; 10% from 1,000,000/= to 10,000,000/= and 5% where the value is over 20,000,000/=. It should be noted that the minimum fee under this schedule is 2,000/=.

The Second Schedule contains similar scales for advocate's commission for successfully negotiating a sale of property by private treaty or negotiating a loan.

In practice, many clients are not willing to pay the stipulated fees as per scale. This is more common where the transaction is over 100,000,000/=. Many lawyers often find themselves in an ethical dilemma when charging fees in such transactions. Lawyers that are hungry for business are often willing to charge less than the fee amount stipulated by the Rules.

When there is a disconnection between practice and rule it is often a good time to reassess the rule. In this instance perhaps the fee schedule did not contemplate the dramatic increases in real property values that have occurred since its adoption. As a result, legal fees have risen to very high amounts that might not reflect the value of the legal work that needs to be done to accomplish such transactions. However, unless and until the fee schedule is adjusted advocates must appreciate the fact that

[182] Rule 14(a) of the Advocates (Remuneration and Taxation of Costs) Rules SI 267-4

charging a fee below the current fee scale is a violation of the Advocates Act.[183]

Another special ethical consideration in land cases are situations where the advocate's fee is paid with real property. Given the high cost of legal fees in land transactions, parties to the land transaction might ask the advocate to agree to payment through receipt of a portion of the subject land. Here the advocate should take steps to make sure that the value of the land is in line with the amount owed for legal services. It is wise to engage an assessor to establish the market value of the portion of land the advocate is to receive. The cost of engaging the assessor should be borne by the party paying the fee through the provision of land. It is a cost of the suggested form of transaction.

5.4.6 Non-Monetary Fee Payments

The Advocates (Remuneration and Taxation of Costs) Rules envisage that fees should be paid in monetary terms. Similarly, the advocate should strongly encourage their clients to pay their legal fees in cash. In practice, however, some clients may not have access to cash but may have access to property that has substantial monetary value. It is common for such clients to suggest alternative means of payment. The payment of an advocate's fee through a piece of land described above is an example of a non-traditional fee payment.

Property proffered as a non-monetary payment should be appraised by a neutral third party. This third party should have the experience or knowledge needed to accurately value the property. The appraisal will help to ensure the advocate is not paid below scale and that the client is not overcharged. The appraisal also prevents clients and others from coming back and accusing the advocate of taking advantage of a client's

[183]*See* Sec. 74(1)(g) of the Advocates Act, Cap 267

inability to access cash. The appraisal ensures that the parties enter the transaction with their eyes wide open.

5.4.7 Contingent Fee Arrangements

Contingent fee arrangements are agreements that enable lawyers to receive a percentage of a recovery a client makes in a legal action. Such arrangements are very common in the United States where they are considered a way for litigants who could not otherwise afford legal services to access justice. The agreements are called "contingent" because the lawyer does not receive a fee unless the client makes a recovery in the matter either through settlement, award or judgment. There are many critics of such arrangements as they enable some lawyers to extract very large fees that are sometimes well beyond what they would earn if they were being paid by the hour. Contingent fee agreements also offend the sensibilities of some because they are more lucrative to lawyers when the damages to the client are high. The existence of contingent fee arrangements in the United States is one of the reasons that some people refer to advocates as "ambulance chasers" because they enable lawyers to reap large fees from the injuries of others.

Uganda follows the British tradition that prohibits such contingent fee arrangements. In Uganda "(a)n advocate shall not enter into any agreement for the sharing of a proportion of the proceeds of a judgment whether by way of percentage or otherwise either as (a) part of or the entire amount of his or her professional fees; or (b) in consideration of advancing to a client funds for disbursements."[184]

Despite the ban on contingent fee arrangements, the Advocates Act[185] provides mechanisms for facilitating legal work through anticipated payments derived from the subject matter of the legal work.

[184]Reg. 26 of the Advocates (Professional Conduct) Regulations, SI 267-2.
[185] The Advocates Act, Cap 267, Sections 48, 50, and 51.

These statutory allowances enable clients that might not otherwise be able to afford legal representation to access justice. However, such arrangements merely provide for the eventual payment of the cost of the legal services provided and do not enable advocates to reap a defined percentage of a legal recovery. Section 48 of the Advocates Act applies to legal services in non-contentious matters and Section 50 applies in contentious matters. Section 51 of the Advocates Act sets out the procedure for such agreements. Specifically, Section 51(1) provides as follows:

> (1) An agreement under section 48 or 50 shall -
> (a) be in writing;
> (b) be signed by the person to be bound by it; and
> (c) contain a certificate signed by a notary public (other than a notary public who is a party to the agreement) to the effect that the person bound by the agreement had explained to him or her the nature of the agreement and appeared to understand the agreement. A copy of the certificate shall be sent to the secretary of the Law Council by prepaid registered post.
> Section 51(2) further provides that:
> (2) An agreement under section 48 or 50 shall not be enforceable if any of the requirements of subsection (1) have not been satisfied in relation to the agreement, and any advocate who obtains or seeks to obtain any benefit under any agreement which is unenforceable by virtue of the provisions of this section shall be guilty of professional misconduct.

It is important for advocates to follow the requirements in Section 51 as non-compliance with Section 51(1) renders such an agreement with a client unenforceable.[186]

[186]*See Kituuma Magala & Co. Advocates v. Celtel (U) Ltd* SCCA No. 09 of 2010, available at http://ulii.org/ug/judgment/supreme-court/2011/21

5.4.8 Terminating the Advocate/Client Relationship for Non-Payment

As noted previously, with the exception of pro bono work, an advocate must charge a private client the minimum fees as prescribed by the scale of fees. Fees should be received promptly when due or after taxation of the bill of costs. In many cases, an advocate will not be properly instructed until such fees have been paid.

In addition to being billed, the client must also actually pay the minimum scale fee. If the advocate fails to demand and require the payment of the minimum scale fee that advocate is facilitating an "end run" around the rule against undercutting.

Failure to pay the fees in accordance with the fee arrangement is grounds for termination of the advocate client relationship. The advocate also has the right to collect unpaid fees through legal action.[187]

5.5 Fiduciary Responsibilities Regarding Fund Management

From a global standpoint, the mismanagement of client funds is the number one cause of legal professionals losing their right to practice law. Thanks to banking records it is often an easy offense to prove and due to the widespread nature of financial pressure and greed it is all too common an occurrence. Advocates must manage trust and client funds with utmost care and circumspection. To do otherwise is to gamble one's livelihood and freedom.

5.5.1 Client Funds

Advocates are accountable for all money they handle on behalf of clients. Serious consequences follow failure to account for a client's

[187] *See* Sec. 57 of the Advocates Act, Cap 267.

money. An advocate who fails to account for client funds is subject to disciplinary proceedings before the Law Council in Uganda.[188]

The Advocates Accounts Rules[189] require every advocate to keep proper account of clients' money. For purposes of these rules, "client" means any person on whose account an advocate holds or receives client's money. A "client's money" is defined to mean money held or received by an advocate on account of a person for whom he or she is acting in relation to the holding or receipt of money either as an advocate or, in connection with his or her practice as an advocate, as agent, bailee, stakeholder or in any other capacity, except in cases stipulated in Rule 1 (1) (e), i.e. money held or received on account of the trustees of a trust of which the advocate is advocate-trustee, or money to which the only person entitled is the advocate himself or herself, or in the case of a firm of advocates, one or more of the partners in the firm.

Advocates are required to pay client's money into the client account.[190] Money paid into the client account can only be withdrawn in accordance with Rules 6 and 7 thereof. Exception is given from payment into the client account where money is received in cash and without delay paid in cash in the ordinary course of business to the client or a third party as provided under Rule 8.

5.5.2 Trust Accounts Generally

Section 40 of the Advocates Act[191] obliges every advocate in connection with his or her practice as an advocate to keep accounts in compliance with the rules entitled "The Advocates Accounts Rules" and "The Advocates Trust Accounts Rules" contained respectively in the First and Second Schedules to this Act. Therefore, every advocate must

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[188]*See Joseph Mpamya & 30 Others v. Matovu Kimanje Nsibambi & Co. Advocates* LCD 5/2001 before The Disciplinary Committee of the Law Council
[189] First Schedule of the Advocates Act, under section 40 Cap 267
[190]*See* Rules 2 & 3 of The Advocates Accounts Rules, SI 267-3
[191] The Advocates Act, Cap 267

set up a Trust Account separate from the Firm Account. An advocate who contravenes or fails to comply with any of the Advocates Accounts Rules or the Advocates Trust Accounts Rules shall be guilty of professional misconduct and of any offence against the provisions of this part of this Act.[192]

5.5.3 Abuse of Trust Accounts and Consequences

As noted above, section 40 of the Advocates Act places an obligation on every advocate to keep accounts in compliance with the Advocates Trust Accounts Rules. These rules are contained in the Second Schedule to the Advocates Act, Cap 267.

Rule 2 thereof provides that Subject to Rule 8, every advocate-trustee who holds or receives money subject to a trust of which he or she is advocate-trustee, other than money paid into a client account as permitted by the Advocates Accounts Rules, shall without delay pay the money into the trust bank account of the particular trust.

Under Rule 1(1)(a), "advocate-trustee" means an advocate who is a sole trustee or who is co-trustee only with a partner, clerk or servant of his or hers or with more than one of such persons. Rule 1(1)(c) defines "trust bank account" to mean a current or deposit account in the title of which the word "trustee" or "executor" appears, kept at a bank in the names of the trustees of the trust and kept solely for money subject to a particular trust of which the advocate is advocate-trustee. Client account is defined to mean a current or deposit account at a bank in the title of which the word "client" appears, kept and operated in accordance with the Advocates Accounts Rules.[193]

The types of funds that can be deposited into trust accounts are delineated under Rules 2, 3 and 4 of the Advocates Trust Account Rules. Generally such funds include money subject to a the particular trust,

[192] *Ibid*. Sec. 43(1).
[193] Rule 1(1)(b) of The Advocates Trust Accounts Rules

money belonging to a trustee that is necessary for opening or maintaining the trust account and money paid into the trust to replace funds that were improperly withdrawn by mistake or accident.[194] Rule 4 of the Advocates Trust Account Rules provides permissible protocols for holding and receiving cheques that include money that is subject to a trust or trusts.

Rule 6 provides for money that may be drawn from a trust bank account. This includes money properly required for a payment in execution of the particular trust; money to be transferred to a client account; such money, not being money subject to the particular trust, as may have been paid into the account under Rules 3(b) of these rules; or money which may, by mistake or accident, have been paid into the account in contravention of Rule 5 of these Rules.

No money, other than money permitted by Rule 6 of these Rules to be drawn from a trust bank account, shall be drawn unless the High Court upon an application made to it by the advocate, expressly authorizes in writing its withdrawal. It would be professional misconduct if an advocate wrongfully withdrew money from a trust bank account. While these rules seem cumbersome, they are intended to ensure proper dealings with trust money for the protection of the persons entitled to it.

Rule 8 waives an advocate's obligation to pay into a trust bank account money held or received by him or her which is received in cash and without delay paid in the execution of the trust to a third party or in form of a cheque or draft which is without delay endorsed over in the execution of the trust to a third party and is not passed through a bank account.

Every advocate-trustee shall at all times keep accurate written books and accounts as may be necessary to show separately all his or her

[194] Rule 3 of The Advocates Trust Accounts Rules

dealings with money held, received or paid by him or her on an account of each trust of which he or she is advocate-trustee and to distinguish that money from money held, received or paid by him or her on any other account. Such advocate-trustee is required to preserve, for at least six years from the date of the last entry therein, all books and accounts kept by him or her.[195]

Serious consequences follow the abuse of trust accounts. Under Section 45 of the Advocates Act, any advocate who is found guilty of an offence against any of the provisions of this part (including section 40) of the Act in any disciplinary proceedings is subject to disciplinary punishment, an assignment of costs, and the assignment of a fine.[196] In addition, Regulation 8 (1) of The Advocates (Professional Conduct) Regulations[197] makes it unlawful for an advocate to use money held on behalf of his client for the benefit of himself or of any other person. Such an advocate could be charged with theft.[198]

5.5.4 Practical Advice Regarding the Management of Trust Accounts

An advocate-trustee should establish a separate trust account on which all money due to the trustees under the trust is to be kept. This account should be set up separate from the client account as required by the Advocates Accounts Rules in the 1st Schedule to the Act.

In setting up a trust account, the advocate-trustee should ensure that the words "trustee" or "executor" appear in the account name. The account is to be kept at a bank in the names of the trustees of the trust.

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[195] *See* Rules 9 (1) & (2) of The Advocates Trust Accounts Rules.
[196] *See also* Francis A. Wazarwahi Bwengye, *Legal Practice in Uganda, The Law, Practice and Conduct of Advocates*, Marianum Publishing Company, Kisubi, Uganda, 2002, p. 167.
[197] Reg. 8 (1) of The Advocates (Professional Conduct) Regulations, SI 267-2
[198] *Uganda v. Mashrak Akttar* [1964] EA 89, *See also* Bwengye, *supra* note 23, page 167.

Such account must be kept solely for money subject to a particular trust of which the advocate is advocate-trustee.

With regard to management of the said account, the advocate-trustee must take caution to ensure that he does not mix his own money with the money rightly payable into the trust account. He or she must also ensure that he does not wrongly withdraw money from the said account.

It is preferable to keep the account at a bank that has minimum operation charges so that the trustees do not lose money in unnecessary bank charges.

5.6 Peripheral Transactions Involving Advocates and Clients

There are certain transactions that raise special ethical issues for the advocate. Among these are property transactions with clients, wills where an advocate is a beneficiary and advancements of funds by advocates to clients. In several instances, the above transactions, if not well handled, may result into conflicts between the client and advocate.

5.6.1 Wills and Testamentary Instruments

A will is a document by which a person indicates how his assets and liabilities shall be dealt with or distributed upon his death. Before a client instructs an advocate to draft or prepare a will for him or her, he or she will normally have a high level of trust in the advocate/attorney. An advocate instructed to prepare a client's will must take caution to ensure that he or she does not breach this trust. The advocate instructed to prepare a will must ensure that he or she maintains a high level of secrecy and confidentiality in relation to the contents of the will. He or she must not disclose the contents of the will to the named executors or legatees or other person intended to benefit under the will or a member of the public.

There is no statute or regulation that expressly forbids advocates from being listed as beneficiaries in a will that they have assisted in drafting for a client. However, the practice is not advisable and should be avoided when possible. It is preferable to have an independent advocate prepare the will where a client notifies the assisting advocate of the client's desire to name that advocate as a beneficiary to the will.

An advocate is prohibited from using "his fiduciary relationship with his clients to his own personal advantage."[199] Therefore, an assisting advocate named in a bequest must not have unduly influenced the testator.[200] A court probating a will that lists the drafting attorney as a beneficiary will apply scrutiny to the bequest. Such a court will want to be certain that the testator knowingly approved such a bequest.[201] Given the discrete and confidential nature of the will preparation it can be difficult to present evidence that will allay a Court's concerns about the legal legitimacy of such a bequest.

5.6.2 Business Transactions with Clients

In some instances, an advocate may enter into a business transaction with a client. Some clients will offer to sell, for instance, motor vehicles, land and other products to the advocate. The client may propose or offer to sell something to the advocate or buy something from him or her. In most of such transactions, the advocate may be more knowledgeable than the client with regard to the legal requirements of the transaction. The advocate should ensure that he or she does not take advantage of the client or exploit their position.

An advocate transacting business with a client must always treat his fiduciary duty to the client as paramount. The advocate should also

[199] Reg. 10 of The Advocates (Professional Conduct) Regulations of Uganda, SI 267-2.
[200] *Craig v. Lamoureux* (1920) AC 349; *Garret Botfield* v. GB (1901) p. 335.
[201] *Wintle v. Nye* [1959] ALL ER 522.

ensure that the client will benefit as if he had been transacting with someone else. The advocate should take reasonable steps to ensure that the price is fair and that the client has an opportunity to seek independent advice, if he or she so desires.[202] Section 74 (1) (j) of the Advocates Act makes it an offence for an advocate to deceive or mislead any client or allow him or her to be deceived or misled in any respect material to the client. An advocate should never engage in a business that is incompatible with his practice at the Bar.[203]

Mortgages involving advocates have their own special requirements. Section 49 (1) of the Advocates Act[204] provides that "If a mortgage is made to an advocate, either alone or jointly with any other person, he or she or the firm of which he or she is a member, shall be entitled to recover from the mortgagor in respect of all business transacted and acts done by him or her or them in negotiating the loan, deducing and investigating the title to the property, and preparing and completing the mortgage, or the security created by the mortgage or the property comprised under it, then he or she or they shall be entitled to recover from the person on whose behalf the business was transacted or the acts were done, and to charge against the security such usual costs as he or she or they would have been entitled to receive if the mortgage had been made to and had remained vested in a person who was not an advocate and that person had retained and employed him or her or them to transact that business and do those acts".

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[202] *See Demarara Bauxite v. Hubbard* [1923] AC 673; *Halsbury's Laws of England*, 3rd Edition, Vol. 3.
[203] *See* Bwengye, *Supra* note 23, at page 126
[204] The Advocates Act, Cap 267

5.6.3 Monetary Advancements

At times a client may request an advocate to lend him or her money upon such terms as may be agreed upon. Such requests raise special concerns given the ethical rules concerning the advancement of funds.

Regulation 27 of the Advocates (Professional Conduct) Regulations provides that "(a)n advocate representing a client shall not advance any money to the client except only for disbursements connected with the case on the matter in which he or she is instructed." A loan to a client could be considered an end run around this provision particularly if there is an expectation that the loan will be paid off after the resolution of a matter that the advocate and client believe will result in a financial benefit to the client.

5.7 Conclusion

In conclusion, money matters are important matters in legal practice. Advocates must be circumspect and beyond reproach in the way they handle financial matters. Advocates must be guided by their fiduciary duty to clients and their status as professionals and officers of the court. While advocates are entitled to make a living, advocates must be concerned with more than making money in order to meet their special obligations to clients, courts and society.

6

ADMISSION TO LEGAL PRACTICE, THE UNAUTHORISED PRACTICE OF LAW AND LEGAL SPECIALISATION IN UGANDA

D. Brian Dennison[†]

> *"The practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character."- The United States Supreme Court*[205]

6.1 Introduction

What does it take to become an advocate in Uganda? Who are the gatekeepers and watchdogs of legal practice in Uganda? What tasks can only be performed by an advocate? What is legal specialisation and what is its relevance in Uganda?

This chapter addresses these questions. This chapter covers admission to practice, the unauthorised practice of law, the role of non-advocate staff in legal practice, and specialisation in legal practice. These issues make up a broader theme regarding the proper functions

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[205] *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971)

and introductions to the roles of an advocate within the context of efficient legal practice.

The first section of this chapter concerns admission to legal practice. This section includes brief historical treatment concerning access and admission to formal legal practice in Uganda. This section also outlines the current process for admission to the Roll of Advocates in Uganda and introduces the reader to the institutions involved in the qualification and certification process.

The second section addresses the unauthorised practice of law. We begin by establishing the legal parameters for functions that may only be performed by certified advocates. Next, we address law office tasks that non-advocates may perform. This section includes practical guidance on managing, supervising and utilising paralegals and non-advocate staff.

This chapter's third section covers the emergent trend of legal specialisation. We address the global rise of legal specialisation and its implications and application within the Ugandan context.

6.2 Admission to Legal Practice

Admission to legal practice is a challenging and lengthy process. In Uganda, future advocates must clear many hurdles before making it onto the Roll of Advocates. Once on that Roll, Ugandan advocates must satisfy several continuing obligations to maintain their privileged status.

This section addresses the admissions process in Uganda and the institutions involved in the process. As a prelude, we offer a brief historic treatment that outlines the emergence of a professional class of advocates within Uganda.

6.2.1 History of Admission and Access to Formal Legal Practice in Uganda

6.2.1.1 Legal Practice in Pre-Colonial and Colonial Era Uganda

There is no technocratic tradition of legal practice in Uganda that predates the colonial era. In many pre-colonial societies within the borders of modern-day Uganda, community members brought their disputes before chiefs and elders. These traditional leaders often emphasised reconciliation and principles of community when meting out resolutions. This brand of dispute resolution eschewed abstractions and legal technicalities. Indoctrinated legal technicians were largely superfluous in such systems.

In the colonial era, European models of legal formalism encroached upon and in some instances superseded traditional African forms of dispute resolution. In Uganda, the British Empire imported a version of its own formalised system.

The British legal system was officially introduced in Uganda in 1902. This system featured a dual system of courts consisting of central government courts and native courts. Professional colonial lawyers staffed the central government courts, and chiefs and elders manned the native courts. The dual court system persisted in Uganda until Uganda's independence in 1962.

Up until 1962, ethnically African advocates were for all practical purposes excluded from appearing in the central government courts.[206] Practice in government courts was limited to advocates admitted to practice in other dominions, commonwealth countries, or self-governing

[206] F.A.W. Bwengye, *Legal Practice in Uganda, The Law, Practice and Conduct of Advocates*, Marianum Publishing Company, Kisubi, Uganda, (2002) pp. 16-23.

colonies of the British Empire. This limitation made it very difficult for indigenous Ugandans to obtain the legal training needed to practice in government courts.

6.2.1.2 Admission to Practice in Uganda after Independence

In the wake of Ugandan independence, systems and paths pertaining to access to formal legal practice underwent rapid and drastic change. 1963 saw the establishment of the Faculty of Law at Dar-es-Salaam University. The law school at Dar-es-Salaam enrolled indigenous Ugandans who returned to Uganda to practice law. Accessibility for indigenous Ugandans further improved through the establishment of Makerere University's undergraduate degree programme in law in 1968 and Ugandan Law Development Centre's one-year post-graduate diploma in legal practice in 1970. The successful completion of studies at both Makerere and the Law Development Centre (hereinafter "LDC") became the primary hurdles of academic qualification for Ugandans seeking to practice law in their home nation.

In recent years the number of undergraduate law programs in Uganda has grown drastically.[207] The trend in liberalisation of legal education in Uganda began with the introduction of evening classes in law at Makerere University in 1992 and the establishment of a Faculty of Law at Uganda Christian University in 1998.[208] Since that time many other universities have launched law programmes. As the number of institutions offering law increases, so does the number of students graduating with Bachelors in Law. The growth in law graduates could

[207] For a detailed treatment on this topic *See* P. Tibihikirra-Kalyegira, *Liberalization of Legal Education in Uganda, Policy Considerations*, Law Africa (2011)

[208] The Law Programme at Uganda Christian University was subsequently accredited in 2002.

be further spurred in the future by the increased access to education though the introduction of Universal Primary Education and Universal Secondary Education.

While undergraduate opportunities for studies in law increase, the options for a diploma in legal practice in Uganda have not. The LDC remains as the only programme offering a diploma in legal practice in Uganda. The result is an increased number of graduates seeking admission to LDC.

Unable to accommodate the increased numbers and skeptical about the overall quality of law school graduates, LDC implemented a more selective admissions process incorporating the use of a written entry exam.[209] The revised selection process has limited the number of enrollees at the Centre.

In addition to having to overcome the hurdle of admission, a large percentage of the students who are admitted to LDC struggle to pass. The high attrition rates at LDC make the programme a "hot-button" issue. There are movements afoot for the establishment of additional post-graduate programmes that can serve the same function as LDC. Others have suggested jettisoning the Diploma in Legal Practice altogether and adopting alternative systems that would include longer periods of clerkship and an examination alone without the requirement of a graduate course of study connected to the examination. However, at this time LDC remains the only Ugandan programme authorised to prepare and certify law graduates for admission to the Roll of Advocates.

[209]*See* The Advocates (Professional Requirements for Admission to Post-graduate Bar Course) Notice, Legal Notice No.17 of 2007 as amended by Legal Notice No. 12 of 2010.

6.2.2 Admission to Legal Practice in Uganda

Admission to practice in Uganda is governed by the requirements set out in the Advocates Act[210] as well as its supporting regulations and the actions of the bodies established to educate, train, regulate and discipline legal practitioners in Uganda. This section provides a basic introduction to the current procedures and requirements for admission to legal practice in Uganda.

6.2.2.1 The Roll of Advocates

In order to practice law in Uganda one must be a current, certified member of the Roll of Advocates. Members to the Roll of Advocates are entitled to carry out all legal functions both inside and outside of court.[211]

Admission to the Roll of Advocates is limited to Ugandan Citizens and individuals who are holders of a degree in law granted by a university in Uganda or a university or institution outside Uganda whose law programme is recognised by Law Council. Ugandan citizens, irrespective of where they obtained their law degree, must earn a Diploma in Legal Practice from the Law Development Centre in order to gain admission to the Roll of Advocates. In the alternative, Ugandan Citizens who have practiced law for an aggregate of at least five years in certain countries designated by the Law Council may gain admission to the Roll of Advocates by first practicing for six months under the chambers of a Ugandan advocate or state attorney.[212]

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[210] The Advocates Act, Cap 267

[211] Uganda has not adopted the British distinction between barrister and solicitor.

[212] *See* Reg. 2(b) the Advocates (Enrollment & Certification) Regulations, SI 267-1.

6.2.2.2 Temporary Admission to Practice

Uganda makes an allowance for practitioners from other jurisdictions to appear before Ugandan courts in isolated matters. Non-Ugandan lawyers who are not members of the Roll of Advocates in Uganda can obtain the right to practice law in Uganda in a given case if certain requirements are met. Section 13 of the Advocates Act provides for temporary admission to legal practice and sets forth the applicable requirements for such admission.

Lawyers admitted on a temporary basis may only appear in court with co-counsel properly certified as a current member of the Roll of Advocates in Uganda. Admission under Section 13 entails the payment of a designated fee and an agreement by counsel to submit to the authority of the Advocates Act and the applicable regulations promulgated there under.

6.2.2.3 Personal and Ethical Requirements for Admission to the Roll of Advocates

Members of the Roll of Advocates must meet certain personal and ethical requirements established in Section 12 of the Advocate's Act. Section 12 provides that the Chief Registrar of the High Court shall refuse to issue or renew a practising certificate to an individual when the date of his or her application for certificate "(a) is an undischarged bankrupt or in respect of whom a receiving order in bankruptcy is in force; (b) is a person adjudged to be of unsound mind under the Medical Treatment Act; (c) has not paid any fine or costs awarded against him or her under this Act; (d) has not satisfied any regulations made by the Law Council with regard to annual submission of his or her accounts; (e) has not paid his or her subscription as a member of the Uganda Law Society for the current year; (f) is serving the Government under a contract, and

the period of the contract has not yet expired; (g) is being processed against for professional misconduct under this Act[213]; (h) has been convicted of a criminal offence involving moral turpitude[214] and sentenced to imprisonment of a term of one year or more, without the option of a fine[215]; (i) is employed by a public body as defined in the Prevention of Corruption Act, unless the advocate is permitted by his or her employer and the Law Council; except that the advocate shall not be refused a practising certificate solely on the basis that the certificate is for doing legal work for the public body; or (j) has no chambers which have been duly approved by the Law Council."

6.2.2.4 Reissuance of Certificates of Legal Practice, Suspension and Restoration to the Roll

Once a Ugandan lawyer joins the Roll of Advocates, that lawyer must satisfy certain ongoing requirements to remain on the Roll. These include the requirements for reissuance of a certificate set forth in Section 12 of the Advocate's Act as well as attending courses in continuing legal education, satisfying pro bono service requirements and paying requisite fees.

The practicing certificate can also be lost through cancellation or suspension. Section 14 of the Advocates Act concerns the cancellation or suspension of the practicing certificate. Section 14 expressly provides

[213] However, the Advocate's Act also provides that "the chief registrar shall only refuse to issue or renew a practicing certificate, or in the case where a practicing certificate has been issued or renewed the certificate may by suspended by the Disciplinary Committee, if the Disciplinary Committee is of the view that there is a prima facie case against the advocate and the alleged misconduct of the offence is one involving gross moral turpitude." And the refusal under this section and the aforesaid suspension shall stand until the matter is disposed of by the Disciplinary Committee."

[214] "Moral turpitude" includes fraud and dishonesty.

[215] In the case of an advocate falling under paragraph (h) above, the chief registrar may, if the advocate has been granted free pardon, issue or renew his or her practicing certificate.

that whenever an advocate's right to practice is removed or he or she is struck off from the Roll for any cause, his or her practicing certificate shall be immediately deemed cancelled.

Section 29 of the Advocates Act provides that the cancellation or suspension of a practicing certificate within another state or jurisdiction leads to an automatic and commensurate suspension within Uganda.

Section 32 of the Advocates Act sets forth requirements and procedures for restoration to the Roll of Advocates. Under this section, the Disciplinary Committee has power to order the registrar to replace on the roll the name of any advocate whose name has been struck off the Roll for professional misconduct and may revoke any order made suspending an advocate's right to practice. The right of the Disciplinary Committee to take such action is limited to a period of two years from the Committee's striking off of the name from the registrar or suspension unless the restorative action is based on newly discovered evidence.

6.2.3 The Organs and Bodies Overseeing and Directing the Practice of Law in Uganda

There are several key institutions that oversee, direct and control access to the practice of law in Uganda. These include Law Council, the Law Council's Disciplinary Committee, the Law Development Centre, and the High Court.

6.2.3.1 Law Council

According to Section 2 of the Advocate's Act, the Law Council consists of "(1) a judge, appointed by the Attorney General after consultation with the Chief Justice, who shall be chairperson of the Council, (2) the president of the Uganda Law Society, ex officio, (3) the director of the LDC, ex officio, (4) the head of the department of law at Makerere University, *ex offcio*, (5 and 6) two practicing advocates

elected by the Uganda Law Society, and (7) one officer with legal qualifications in the service of the Government, appointed by the Attorney General."

The functions of the Law Council are set forth in Section 3 of the Advocates Act and are as follows: (a) to exercise general supervision and control over professional legal education in Uganda; (b) without prejudice to the generality of paragraph (a), to approve courses of study and to provide for the conduct of qualifying examinations for any of the purposes of (the Advocates Act); (c) to advise and make recommendations to the Government on matters relating to the profession of advocates; (d) to exercise through the medium of the Disciplinary Committee, disciplinary control over advocates and their clerks; (e) to exercise general supervision and control over the provision of legal aid and advice to indigent persons; (f) to exercise any power or perform any duty authorised or required by this or any other written law.

6.2.3.2 The Law Council's Disciplinary Committee

The Disciplinary Committee consists of members of the Law Council and is established in accordance with Section 18 of the Advocates Act. The Committee is made up of the Solicitor General or his designee, the Director of the LDC, the President of the Uganda Law Society and any other two members appointed by the Law Council. For the purpose of this chapter it is important to understand that the Disciplinary Committee is charged with handling complaints against advocates. The Disciplinary Committee is addressed in greater detail in Chapter 11 of this book entitled "Discipline and Whistle-Blowing."

6.2.3.3 Law Development Centre

The Law Development Centre Act established LDC in 1970. The LDC's mandate is "(t)o provide legal education to lawyers and non lawyers, undertake research in topical legal issues, contribute to legal reform, produce legal publications, teaching materials, law reports and also provide community legal services." LDC's supreme administrative and policy body is the Management Committee.

LDC offers a one-year course in legal practice to admitted individuals. The course in legal practice was developed pursuant to guidelines issued by the *Gower Committee* on legal education in Uganda.[216]*The Gower Committee* recommended the replacement of an existing apprenticeship system of legal training with a formal system of institutional training designed to impart practical legal skills.

In order to be admitted to LDC's course in legal practice, one must hold a degree in law granted by a University in Uganda whose programme has been accredited by the Law Council or be a Ugandan citizen who is a holder of a degree in law obtained from a University recognised by the Law Council in a country operating the common law system. Satisfactory performance on a pre-entry examination and assessment has been added to these requirements as noted earlier.

6.2.3.4 The High Court of Uganda

The High Court of Uganda issues practising certificates to eligible advocates on the Roll of Advocates. An advocate may not practice in Uganda without such a certificate. The importance of this certificate makes the High Court a key player in ensuring advocate compliance

[216] For a detailed treatment of the role of the Gower Committee and its report in the development of the institutions of legal education in Uganda *see* Tibihikirra-Kalyegira, *supra* note 4, at Section 2.1 "Historical Background."

with respect to payment of fees, continuing legal education requirements, *pro bono* services requirements and other requirements.

6.2.3.5 The East African Community

The development and emergence of the East African Community will likely impact admission and access to legal practice in Uganda. As the East African Community moves to strike down barriers between nations, access to the practice of law could be substantially liberalised. If the East African Community seeks to increase access to legal practice by advocates from sister Community states, the Community is likely to work towards standardising and unifying admission requirements. Thus, the ultimate impact of the rise of the East African Community on admission and access to legal practice in Uganda could be massive. The following note by Pamela Tibihikirra-Kalyegira provides informed insight on the current state of the coordination of legal practice within the East African Community.

Special Note on East African Community Regarding Practice Standards and Lawyer Mobility

By Dean Pamela Tibihikirra-Kalyegira, Uganda Christian University

Article 76 of the East African Community Treaty (1999) establishing a Common Market among partner states allows for the free movement of labour, goods, services and capital. For East African lawyers, this presents the opportunity for cross-border legal practice in any of the partner states. Cross-border legal practice could take various forms like partnership with a law firm in the host country, providing services as a legal consultant on foreign law etc. Benefits of cross-border legal

practice include access to a wider market of legal services particularly for the business community, growth of local law firms with a presence in more than one partner state, local and regional courts and tribunals could enhance their practice and jurisprudence by the appearance before them of experienced counsel from other jurisdictions etc.

The above-envisaged cross-border activity of advocates makes it necessary to establish common rules to regulate cross border practice within the East African Community. This is the subject of the East African Community Cross Border Legal Practice Bill which, at the time of writing, is yet to be passed by the relevant organs of the community.

There are several on-going discussions by national societies / associations and by the East African Law Society on the harmonization of legal systems and curricula as a way of enhancing the efficiency of cross border practice activities of advocates within the community. For example, the East African Law Society, under its Professional Development Programme, is working towards the adoption of a common code of practice, conduct, ethics and etiquette to enable the adoption of regional best practice and absorption of enhanced knowledge and skills of East African lawyers on litigation and application of community law.

The East African Community has also commissioned a regional study, carried out by the International Law Institute, with a view to harmonize legal training curriculum and harmonize legal and regulatory framework governing legal training, certificate and practice within the community. The final report of this study was submitted in March 2011. The Cross Border Legal Practice Bill mentioned above forms part of this study.

The envisaged criteria for cross border legal practice would include: a recognized law degree; membership of national and East African Bar associations; certification as advocate in home country; being subject to disciplinary procedures in home and any other East African community country where the advocate wishes to practice, professional liability and fidelity insurance, compliance with ethical and practice rules in host country.

As a recent development, cross-border legal practice is faced with a number of challenges. For starters, the East African partner states have different legal systems. Uganda, Kenya and Tanzania have a common law background while Rwanda and Burundi have a civil law background. The partner states also speak different languages; while English is the official language in Uganda, it is only one of the official languages for Kenya, Tanzania and Rwanda with Burundi having French as its official language. Sometimes the regional integration process is also met with nationalistic tendencies for protectionism where competition from outsiders is resisted.

Limited resources compound all the aforesaid challenges to cross-border legal practice. Moreover, as relates to legal practice, there are disparities in the partner states Bar Associations which call for an amendment of national advocates laws to facilitate cross-border legal practice.

Given the much needed legal services in the continued integration of the East African Community, coupled with already existing forms of cooperation between advocates in the region, it is imperative that every effort is made to encourage the various on-going initiatives to harmonize legal systems and curricula, to regulate cross-border legal practice and to sensitize all stakeholders in this respect.

(Author's Note: The relevant regulations regarding Article 76 are the East African Community Common Market (Free Movement of Workers) Regulations, Annex II, 2009 and The East African Community Common Market (Schedule of Commitments on the Progressive Liberalization of Services), Annex V, 2009.)

6.3 The Unauthorised Practice of Law

The establishment of a professional, certified class of legal practitioners is built on the premise that legal practice is not open to anyone. Nonetheless, uncertified "lawyers" and others offer legal services to the public. The performance of legal services by non-advocates in Uganda is common and widespread. This section addresses such practices and provides guidance on acceptable ways for advocates to use non-advocates when providing legal services within a firm.

6.3.1 Definition and Criminal Aspect of the Unauthorised Practice of Law

The unauthorised practice of law is a criminal offence. Section 15(1) of the Advocates Act provides that "(a)ny advocate not in possession of a valid Practising Certificate or whose Practising Certificate has been suspended or cancelled who practises as an advocate shall be guilty of an offense." Section 64(1) of the Advocates Act provides that any person other than an advocate who shall either directly or indirectly act as an advocate or agent for suitors, or as such sue out any summons or other process, or commence, carry on or defend any suit or other proceedings in any court, unless authorised to do so by any law,

commits an offence.[217] Section 65 of the Advocates Act further provides that it is an offense to pretend to be an advocate, or take or use any name, title, addition or description implying that he or she is qualified or recognised by law as being qualified to act as an advocate or to use a name, title, addition or description implying that he or she holds any legal qualification unless he or she in fact holds that qualification.

The prohibition on the unauthorized practice of law in Section 15 of the Advocates Act begs the question: What is legal practice? Section 1 of the Advocates Act broadly defines "legal practice" as "include(ing) carrying out work of a nature normally performed by an advocate, such as receiving instructions to sue or defend a client in contentious matters, carrying out any form of representation in non-contentious matters such as drawing of documents of conveyancing, agreements, mortgages, floating of companies, registration of trademarks and patents, negotiations, writing legal opinion, legal correspondence, witnesses and certifying and notarising miscellaneous legal documents."[218] More specific limitations are found in Section 66 of the Advocates Act, which prohibits any person other than an advocate with a valid practicing certificate to draw papers or prepare an instrument (a) relating to

[217] This limitation is subject to any regulations made by the Law Council for the provision of legal aid and advice to indigent persons, and no person who acts in accordance with those regulations commits an offence under that subsection. Sec. 64 (2), Advocates Act.

[218] Ugandan law establishes a few exceptions for tasks falling under the general definition of "legal practice" that may be performed by non-advocates. Section 66(2) of the Advocates Act permits public officers to draw or prepare instruments in the course of their duty, persons employed merely to engross instruments, applications or proceedings to perform said functions, and any person in the full time employment of a limited liability company to draw or prepare instruments in the course of his or her duty for and on behalf of that company. In addition Section 66(3) provides that individuals that are not certificated advocates may draft wills and other testamentary instruments, powers of attorney and the transfer of stock shares containing no trust or limitation.

movable or immovable property or any legal proceeding; (b) for or in relation to the formation of any limited liability company whether private or public; or (c) for or in relation to the making of a deed of partnership or the dissolution of a partnership.

There are many anecdotes about "lawyers" who hold themselves out to the public as advocates and perform legal practice without obtaining active membership within the Roll of Advocates. Such instances of unauthorised practice of law can be expected to increase due to the large number of individuals with undergraduate law degrees who are unable to gain entry or successfully complete studies at LDC. Ugandan judges and advocates must realise that the unauthorised practice of law is illegal and harms Ugandans. Rogue "practitioners" who do not meet the requirements to practice law in Uganda should be publicly identified and excluded from legal practice. Ugandan advocates should not simply "keep quiet" if they see the unauthorised practice of law taking place. If not reported and prosecuted, it will continue unabated.

Ugandan law provides certain protections for clients and litigants who have been represented by individuals not properly licensed to practice law in Uganda. Section 15A(1) of the Advocates Act provides that "where an advocate practises as an advocate contrary to Sub-section (1) of Section 15 or in any proceedings, for any reason, an advocate is lawfully denied audience or authority to represent a party by any court or tribunal; then 1) no pleading or contract or other document made or action taken by the advocate on behalf of any client shall be invalidated by any such event; and in the case of any proceedings, the case of the client shall not be dismissed by reason of any such event; 2) the client who is a party in the proceedings shall, where necessary, be allowed time to engage another advocate or otherwise make good any defects arising out of any such event." In addition Section 15A(3) provides that clients of individuals committing the unauthorised practice of law are entitled to a refund from that individual of "any fees paid to that

advocate by the client and also to compensation in respect of any costs or loss incurred by the client as a result of the conduct of the advocate."

The legal protections provided to the clients of unauthorised lawyers place incentives on properly authorised advocates to make certain opposing counsel is on the Roll of Advocates. Failing to do so exposes one's client to the risk that the opposing party might not be legally bound by actions performed through an unauthorized lawyer. It is prudent practice to check the status of individuals who claim to be advocates if you are not certain that such individuals are certified members of the Roll.

Finally, it should be noted that there are provisions that allow persons other than advocates to provide legal aid and advice to indigent persons. This special allowance appearing in Section 64 of the Advocates Acts expands access to legal services to the indigent by allowing law students enrolled in legal clinics to perform legal aid services under certain regulatory frameworks.

6.3.2 Law Office Staff and Paralegals

The business of legal practice consists of more than just advocates and judges. Clerks, law office staffers, secretaries and paralegals are part of the teams that deliver legal services. Globally, opportunities for non-Advocates within the legal services market have expanded in recent decades. This is particularly the case with paralegals.

The aggressive utilisation of staff and paralegals within legal practice is a double-edged sword. In many ways it is highly beneficial. Through the extensive use of non-lawyers, advocates can provide legal services to their clients at lower costs. In addition, through leveraging staff, advocates can free up their time to perform higher-level tasks that are commensurate with their training and fee level. On the other hand, advocates can also use non-lawyer staff to increase their profitability at the expense of quality and care. In some cases, greed replaces efficiency

as the root cause of staff and paralegal utilisation. While a lucrative law practice is not a bad thing, clients suffer and professionalism degenerates if non-lawyers are assigned tasks and functions that require the expertise and professionalism of a licensed advocate.

The rise of the paralegal presents legal and ethical challenges for practitioners. Paralegals have special training that enables them to perform legal tasks that regular administrative staff members are not equipped to perform. However, expansive limitations on the unauthorised practice of law make it difficult for advocates to know how much authority and discretion can be delegated to a paralegal. Legal authority within Uganda regarding the proper use of paralegals is quite limited. We can expect to see greater regulatory and administrative guidance within Uganda in the future as paralegal service becomes more common and prevalent.

As we await future official guidance in Uganda, prudent advocates should apply certain general principles when utilising paralegals and administrative staff. Advocates should understand that they are held responsible for the legal services provided by their chambers. The delegation of duties is not a defense to legal malpractice. Systems must be put in place to ensure quality control. In particular, any legal services that are provided through a firm must pass under the careful inspection and approval of a certified advocate. Advocates are responsible for the supervision of all work performed in their chambers. The extent and level of supervision will likely go undefined, but advocates must have an adequate method of supervising the quality of all the legal work their chambers generate.

6.3.3 International Outsourcing of Legal Services

International outsourcing is a burgeoning global trend. The internet and technology have made it possible for businesses in the United States and Europe to access cheaper skilled labour in places such as India.

Certain industries have led the way in the global outsourcing. The extensive use of outsourcing in telemarketing and computer programming is well known. Other fields such as animation and radiology have also experienced outsourcing success.

Legal services have not been outsourced as successfully as others services. The practice of law is relational and often requires personal interaction with clients, witnesses and courts. The relational aspect of legal practice limits the ability of firms to export legal work. National and territorial restrictions on the practice of law also work against legal outsourcing across borders. In addition, the fact that law varies significantly from place to place makes legal outsourcing more complex than outsourcing functions that are largely universal such as reading X-rays and writing computer code.

Despite these restraints and barriers, legal outsourcing is on the rise. Law firms in richer nations now use lawyers, paralegals and administrative staff from lower-wage economies to perform tasks such as basic document drafting, legal research and document review. Legal outsourcing will likely present opportunities in East Africa based on the large number of English speakers with legal training in common law systems who are willing to work for relatively lower wages than the lawyers in other Commonwealth nations or the United States.

6.4 Specialisation

Many a legal wit has noted that one merely “practices” law. In other words, one can never truly master it. Advocates are always learning, and no advocate knows everything. Indeed, a key skill set for any advocate is the ability to “find” the law and properly assess the lay of the legal landscape through research.

Many legal practitioners in Uganda accept every task that their clients present to them. This approach generates well-rounded advocates

that might be accused of being "jacks of all trades and masters of none." The current global trend in the legal profession cuts against this approach. Modern advocates in large cities are more likely to focus on certain areas of the law that best suit their training, ability, likes and expertise. This is known as legal specialisation.

6.4.1 Legal Specialization in Today's Global Legal Market

The modern legal environment necessitates legal specialization. Today it is impossible for a legal practitioner to be conversant in every area of the law. Law inevitably grows in size and complexity over time. Laws and regulations are added to the books through legislative and administrative action. International law grows in size and in importance. Judges in common law jurisdictions continue to issue more legal precedent through case law.

In addition to the growth of law, certain areas of the law are so complex that they tend to require the singular focus of advocates that practice in those areas. Examples include anti-trust law, environmental law and intellectual property law. The expectation in much of the global marketplace is that only full-time specialists are capable of handling matters in such areas.

The modern global marketplace rewards specialisation. Specialists tend to be paid more for their work than general practitioners. Also, due to the increase in information sharing in the Internet age, it is easier for businesses to identify specialists that can handle certain matters. Finally, the large firm model tends to house a collection of specialists that work together to handle the myriad of legal issues experienced by large corporate clients.

There are clear advantages to specialisation. The specialist should be better equipped to spot issues and identify a strategy that will best address the matter at hand. A specialist should also be in the position to

spend less time doing legal research to get "up to speed" with the issues presented.

However, the trend towards specialisation presents problems. First of all, specialisation can result in a compartmentalised approach to representation where the advocates might lose sight of the "big picture." Second, it presents problems with respect to advocates declaring themselves experts.

Lawyers all over the world face limitations on how they promote themselves. When a lawyer presents himself as an expert in a certain area, that lawyer is effectively "touting" his abilities. The lawyer is essentially telling the world that he is good at something. Such a practice often runs contra to the ethical rules designed to prevent self-promotion or attorney advertising.

Despite ethical limitations on self-promotion, it is difficult to prevent an advocate from presenting himself as more proficient and capable in the areas of law that the advocate prefers. Certainly all advocates tend to be more comfortable with some areas of the law over others. Financial pressures and *pro bono* service requirements aside, advocates largely enjoy the freedom to decide what types of cases they want to handle. Advocates will always utilise permissible methods to inform the broader market of the matters they want to take on.

With these challenges in mind, certain jurisdictions have adopted a proactive approach to the issue of legal specialisation. These jurisdictions do not consider specialisation to be a bad thing as long as the lawyers who claim to be a specialist meet certain objective standards. Theses jurisdictions adopt policies to ensure that such lawyers are truly experts in their declared fields.

One example of this approach can be found in the State of California in the United States. California allows attorneys to become certified in eleven areas of the law including Admiralty and Maritime, Appellate Law, Bankruptcy Law, Criminal Law, Estate Planning, Trust & Probate

Law, Franchise & Distribution Law, Immigration and Naturalisation Law, Legal Malpractice Law, Taxation Law, and Worker's Compensation Law.[219] In order to be identified as a "certified" specialist in California, an attorney must 1) pass a written examination in their specialty field; 2) demonstrate a high level of experience in the specialty field; 3) fulfil on-going education requirements; and 4) be favourably evaluated by other attorneys and judges familiar with their work in the field of specialisation.[220]

Similarly, the State of Texas certifies specialisations in 20 areas of the law including civil trial, consumer and commercial, family, juvenile, labour and employment, heath, oil, gas and mineral and real estate.[221]Board-registered specialists in Texas must 1) have been in practice a minimum of five years with three years of substantial involvement in the area of specialisation; 2)complete approved continuing legal education course requirements in the area of specialisation; 3) furnish at least ten qualified references;4)provide documentation of extensive experience in the field of specialisation; and 5) pass a comprehensive examination.

Along with setting clear standards for becoming a certified specialist, both California and Texas place strict limitations on other practicing advocates that prohibit them from making any representation that they specialise in a field for which they have not received certification.

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[219] The State Bar of California's Legal Specialization Program's website address is http://ls.calbar.ca.gov

[220]*See* Rules Governing the State Bar of California Program for Certifying Legal Specialists, as adopted by the Board of Governors on 27 August, 1994 and last revised on 16 May, 2008 available online at http://rules.calbar.ca.gov/LinkClick.aspx?fileticket=J4JjKpi5lp0%3d&tabid=1149

[221] The Texas Board of Legal Specialization is established by an order from the Supreme Court of Texas entitled *Texas Plan for Recognition and Regulation of Specialization in the Law* as amended in 2010. Information about the Texas initiative in attorney specialization including is available at http://www.tbls.org/

6.4.2 Legal Specialisation in Uganda

Legal specialisation does exist in a nascent stage in Uganda. In Kampala, advocates position themselves as experts in various areas ranging from criminal law, land law and intellectual property. Websites for certain legal chambers and consultancies list their advocates in connections with various areas of specialisation. Clearly many Ugandan advocates are holding themselves out as specialists.

According to the Advocates Professional Conduct Regulations, no advocate may do any act or thing which can be reasonably regarded as touting.[222] There is also a ban on advocate advertising and strict restrictions on what can be included on an advocate's nameplate.[223] Even the publications of advocates must be anonymous.

The line between specialisation and touting is fast becoming blurred. Advocates in Uganda will certainly use communication and marketing techniques in an attempt to define their practices and attract the type of work they seek. As legal practice in Uganda becomes more complex and the business community becomes more sophisticated, there will be a greater need for lawyers that specialise in certain fields and transactions. This trend has consequences and the Advocates (Professional Conduct) Regulations will likely require modifications to address this trend.

[222] Reg. 23 of the Advocate's (Professional Conduct) Regulations
[223] *Ibid*. Reg. 25

7

COMMUNICATIONS AND MARKETING BY ADVOCATES IN UGANDA

Hope Atuhairwe[†]

7.1 Introduction

Are law firms fit for the 21st Century? Have they embraced communication and information technology for growth and visibility? Are they able to meet their clients' needs in a timely manner? Are the limitations on communication, and specifically advertising and marketing justifiable, or are they a hindrance to the profession? These are some of the issues to be explored in this chapter in light of the dynamic business environment within which the profession operates.

This chapter begins by covering the basic and ethical dimensions of communications by advocates. Next, it addresses communication in the context of self-promotion. In the Ugandan context this concerns forms of communication referred to as advertising and touting. Lastly, the broader concept of marketing is considered, in which ways of establishing a thriving legal practice in Uganda without running afoul of ethical rules is discussed.

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7.2 Communication

Communication can be defined as the process of conveying ideas and feelings to produce a given result. Communication is both verbal and non-verbal. Communication is important to an advocate, as the advocate is in constant communication with clients, opposing parties, judges, court officials and others. The purpose of this chapter is to discuss communication within the context of legal practice in Uganda. Please note that the portion on communication basics is limited with respect to aspects of general application.

7.2.1 Communication Basics

7.2.1.1 The importance of listening

Some authors have defined listening as giving attention in order to hear and understand the meaning of a message.[224] Hearing and listening are different activities. Hearing is merely sound waves being processed to the brain.[225]

Listening is important because it helps one: gather information; understand the other's interests and concerns; determine what is needed and prepare a proper response; determine how the other feels; note inconsistencies in what is being said; and keep a sufficient record of prior discussions for future reference.

An advocate should practice good listening behaviour, which includes: facing and maintaining appropriate eye contact with the speaker; looking interested in what is being said; appearing patient; asking relevant questions; and showing empathy and understanding of feelings expressed. On the other hand, poor listening behaviour includes:

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[224]Mary T. Ocheng Kagoire & Steven, (2006), *Law Development Centre Clinical Legal Education Trainers Handbook*, p. 57.
[225]*Ibid*.

staring away; looking bored and acting impatient; frowning at the person speaking; turning your body away; getting up and walking away; whispering or passing notes to other people; and laughing inappropriately.

It is important for the advocate to actively listen to his or her client, opposing party, witnesses, and the court. Listening to the client enables the advocate to understand the nature of the client's problem, make further inquiries where necessary, and understand the client's instructions. The advocate can then meaningfully collaborate with the client in developing a course of action that will best serve the client's needs and desires. On the other hand, failure to listen can result in a legal approach and strategy that is not tailored to the client. The same principles apply to the opposing party and the witnesses. Listening to court is crucial because comments from court can be very telling, and instructions from court should be precisely followed.

7.2.1.2 Writing a letter when you are angry

Advocates should refrain from becoming embroiled in conduct unbecoming to the profession. This includes avoiding behaviour grounded in anger. Letters written in anger have a permanence that should be considered. They can be particularly damaging to relationships and reputations, can show a lack of courtesy on the part of the writer, and lead to a break down in communication and failure to resolve any matter amicably. Advocates should constantly know that their clients' problems are not their problems, and therefore, whatever ill feelings may exist between the clients should not influence them in their conduct and demeanour towards each other or their clients.[226]

[226] *See* Rule 4.12 of the Uniform Rules of Ethics of the South African Bar.

7.2.1.3 Use of email

Digital communication grows in importance every year. Advocates should stay current on technological developments in order to best serve their clients. Use of email is one of the fastest and least expensive ways to communicate with clients, opposing counsel, and third parties. Emails can be sent and received instantly at little or no added cost to a party with access to a computer and Internet. However, despite its advantages as a communication medium, email presents its share of pitfalls as well. Advocates should take special care to edit, revise and carefully consider their email communication. Inappropriate comments should be avoided. If you would not say it in a letter, do not say it in an email. Emails should also not be sent while the advocate is angry or frustrated, as they will offend the recipient. While communicating with the client through email, it is important to indicate that it is a privileged attorney-client communication. However, even when care is taken to label electronic communication as privileged, emails often find their way into the hands of unintended parties. Moreover electronic discovery techniques can uncover emails that one thought destroyed or deleted, and today it is very common for emails to end up in court as key pieces of evidence.

7.2.2 Communication & Contact with Third Parties

7.2.2.1 Communication and interaction with witnesses prior to trial

An advocate may interact with witnesses for purposes of obtaining information that may assist him or her in preparing and presenting a client's case. The interaction should be limited to obtaining factual information and not for fabricating evidence.

The Advocates (Professional Conduct) Regulations[227] (herein after referred to as the Regulations) have provisions on what advocates should not do regarding witnesses.

Regulation 18 states:

> *An advocate shall not coach or permit a person to be coached who is being called by him or her to give evidence in court nor shall he or she call a person to give evidence whom he or she knows or has a reasonable suspicion has been coached.*

Parties and witnesses testify for the purpose of providing courts with the facts needed to assess disputed matters. When clients and witnesses are coached to present evidence this process is corrupted. The rule against coaching keeps counsel out of the witness box and prevents the use of witnesses as puppets. The court has the discretion to disregard the evidence of a person who has been coached.

As written, Regulation 18 arguably limits all efforts to prepare a client for his or her testimony. However, seasoned advocates know that a client must be prepared to testify or the testimony will not go well. For example, an unprepared client might not understand why the advocate is asking non-leading questions. Similarly, a client might be caught off guard by a probing cross-examination full of leading questions. Therefore some level of preparation is in order. It would be unreasonable to extend the ban against coaching to matters beyond the fabrication and manipulation of evidence. Nonetheless, the broad language of the current Regulation leaves advocates to act at their peril when preparing clients for trial.

The ban against coaching presents other practical problems. Coaching could be used to disqualify witnesses, and this may result in a

[227]Statutory Instrument (SI) 267-2.

denial of due process if it prevents parties from testifying in their own cases or calling on the witnesses necessary for a fair trial.

Regulation 19 states:

> *An advocate shall not, in order to benefit his or her client's case in any way, intimidate or otherwise induce a witness who he or she knows has been or is likely to be called by the opposite party or cause such witness to be so intimidated or induced from departing from the truth or abstaining from giving evidence.*

Thus an advocate may not hinder or suppress facts through intimidation, blackmail or bribery.

7.2.2.2 Communication with opposing parties, and employees of opposing parties

An advocate may communicate with an opposing party or his or her employees for purposes of obtaining information concerning a client's matter. However, where such party has legal counsel, an advocate should communicate with an opposing party through that party's advocate. If the party is not represented the advocate may communicate directly with the party. The advocate should also not interview an opposing party without the consent and possibly the presence of his or her advocate. During trial, however, an advocate has the right to cross-examine an opposing party and his or her witnesses.

7.2.2.3 Communication with judicial officers

Judicial officers must be treated with utmost respect, both in and outside the court. The Judge's proper appellation is 'My Lord', 'Your Lordship', 'His Lordship' or 'Lord Justice' for male judges, and 'My Lady', 'Your Ladyship', 'Her Ladyship' or 'Lady Justice', for female judges. Magistrates and Court registrars are referred to as 'Your Worship', 'His worship' or 'Her Worship.' Alternatively, all High Court

judges and Magistrates can also be referred to as 'Your Honour',[228] although advocates should use discretion prior to using this title as some view it unfavourably as an American import. If any information, other than pleadings, needs to be brought to the attention of a judicial officer, a formal letter should be written.

Ex parte communications are communications with a judicial officer outside the presence of opposing counsel. Advocates must be careful to avoid *ex parte* communications with judicial officers, unless they are legally permitted. Generally speaking, opposing counsel should have the opportunity to be present at all exchanges with the court. This rule against *ex parte* communication also applies to written communication. Formal letters to court should be copied to opposing counsel.

7.2.3 Communication in the Public Sphere

7.2.3.1 Publications by advocates

Regulation 23 states:

> *(1) Subject to sub regulations (2) and (3) of this regulation, an advocate shall not knowingly allow articles (including photographs) to be published in any news media concerning himself or herself, nor shall he or she give any press conference or any press statements which are likely to make known or publicise the fact that he or she is an advocate.*
>
> *(2) An advocate may answer questions or write articles that may be published in the press or in news media concerning legal topics but shall not disclose his or her name except in circumstances where the Law Council has permitted him or her so to do.*

[228] Francis A. W. Bwengye, *Legal Practice in Uganda: The Law, Practice and Conduct of Advocates*, pp. 153-154.

> *(3) Where the Law Council cannot readily convene, the chairperson of the Law Council may grant the permission referred to in sub regulation (2) of this regulation to the advocate.*
> *(4) This regulation shall not apply to professional journals or publications or to any publications of an educational nature.*

The restriction to legal topics in sub-regulation (2) above is arguably an infringement on the right to freedom of speech and expression as provided for in the Constitution of the Republic of Uganda.[229] This broad limitation on freedom of speech is dubious in a free and democratic society. Similarly, the requirement that the Law Council must authorize the disclosure of an advocates name is a prior restraint on freedom of speech and expression, which also offends the Constitution.[230] Moreover, advocates are the most knowledgeable members of society with respect to matters of the law. As matters of the law are in the public interest, the gagging of the foremost experts on the subject is a serious impediment on the public's knowledge of the law and legal matters.

7.2.3.2 How advocates in Uganda use the media

Despite the limitations on public communications, advocates in Uganda are actively involved in public dialogue concerning legal and other matters. The Executive Council of the Uganda Law Society (ULS)[231] calls press conferences, or makes press statements to comment, and also inform the general public on issues of public interest, such as

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[229] Art. 29(1) (a).
[230] *See* Art. 43 for a general limitation on fundamental and other human rights and freedoms.
[231] The Uganda Law Society is the umbrella body of all advocates in Uganda established by the Uganda Law Society Act, Cap 276, Laws of Uganda.

human rights, rule of law and good governance[232]. This is in line with the duty of the ULS towards the public: to protect and assist the public in Uganda in all matters touching, ancillary or incidental to the law.[233]The Council uses the media to inform the public about the role of advocates in the administration of justice.[234]

Despite official limitations on public communication, Ugandan advocates tend to find ways of communicating in public forums. Many advocates write articles in newspapers and other media on topical issues, and disclose their names, the fact that they are advocates, and sometimes the name of their law firm.[235] Other advocates often give interviews to the media about cases they are handling, especially where the media has given the cases publicity.[236] Advocates appear on radio talk shows to educate the public on matters of public interest. In other cases, advocates issue press statements on behalf of their clients concerning matters they handle. Advocates also communicate through the media by publishing court orders, attending press conferences and responding to media interviews and inquiries.

Given the extensive public communication by Ugandan advocates, it appears there is a disconnect between the letter of the law and the

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[232] For example, during the "walk to work" protests in 2011 during which violations of human rights were witnessed, the Executive Council issued a press statement about the rights of citizens to freedom of expression, assembly and demonstration, calling upon the Uganda Police to respect the said rights, and the unconditional release of those arrested while exercising the said rights among others.

[233]*See* Sec. 3 of the Uganda Law Society Act, Cap. 276, Laws of Uganda, for the objectives of the Law society.

[234] For example, when an advocate who was offering legal representation to a murder suspect (Thomas Nkurungira) was threatened and attacked by unknown assailants, the Executive Council of the ULS issued a press statement condemning the attack and calling upon the public to respect the right to legal representation.

[235] In most cases, permission is not sought from the Law Council as is required by Reg. 23.

[236] For example, election petitions involving high ranking public officials, cases involving leaders of political parties.

activities on the ground. This is problematic both for those who violate the law due to potential sanctions and for those that choose to follow the law due to the fact that they are operating on an uneven playing field in terms of public exposure and public influence.

7.2.4 Res Sub Judice

Sub judice is a Latin word which means 'under judgment' or 'under judicial consideration.' It is a common law rule that prohibits the publication of matters before court. The rule applies to parties to the case, their lawyers and the entire public. However, the rule allows fair and accurate reporting by the media on the factual content of the matter provided in doing so they do not prejudge it. Violation of the rule amounts to contempt of court.

The *sub judice* rule reinforces the right to a fair hearing as provided for in Article 28(1) of the Constitution of the Republic of Uganda.

Regulation 20 states:

> *An advocate shall not make announcements or comments to newspapers or any other news media, including radio and television, concerning any pending, anticipated or current litigation in which he or she is or is not involved, whether in a professional or personal capacity.*

The exception, however, is that advocates can make such comments in an educational or academic context, in line with academic freedom in institutions of learning as stipulated in Art. 29 (1) (b) of the Constitution of the Republic of Uganda.

In Uganda, advocates, whether having personal conduct of the matter before court or not, have commented on such matters especially when interviewed by the media. On some occasions, they have expressed personal opinions which can prejudice the matter.

7.2.4.1 Justification for the sub judice rule

The *sub judice* rule seeks to avoid bias, prevent the prejudgment of cases and promote fair trials. The rule prevents the 'back-door' entry of inadmissible evidence which would compromise the fairness of the trial process through exposure with judges, assessors or witnesses.[237] It also protects against the appearance of decisions that seem to be based on published material[238] so as not to undermine the public's confidence in the justice system.

Courts prefer to handle legal matters within a controlled and ordered environment. Advocates making public statements on legal matters infringe on the sovereignty and autonomy of the judicial process. Engaging the media in a legal matter undermines the judicial system.[239] Justice should not only be done, it should be seen to be done.

In addition, the media can be used to wage a campaign for or against any of the parties to the case. Media influence and impact has the potential of undermining the justice system and invading the province of the court.[240]

Actions that would amount to breach of the rule of *sub judice* include:

a) Statements about the anticipated result in the matter.
b) Statements urging the court to decide the matter in a particular way.
c) Comments about the strengths and weaknesses of witnesses and other evidence, a party's case or issue in the case.

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[237] Law Reform Commission, New South Wales, Discussion Paper 43 (2000): *Contempt by Publication*, accessed at www.lawlink.nsw.gov.au/lrc.nsf/pages/dp43chp02, visited on 26/8/2011.
[238] *Ibid*.
[239] *Ibid*.
[240] For a recent case in Uganda concerning the role of media relating to ongoing litigation *See Alcon International Limited v. The New Vision Publishing Co. Ltd., The Editor in Chief, New Vision and Sunday Vision*, Supreme Court of Uganda, Civil App. No. 4 of 2010.

The net effect of the rule is that discussion of matters before court are postponed until the due process of the law has been accomplished, and in that case there will be no danger of prejudicing a fair trial.

7.2.4.2 Comparative analysis with rules in other jurisdictions

We live in an age of globalisation where geographical boundaries have become less significant. There is gradual decline in economic barriers and rapid rise in regional economic communities through integration, all of which impact on the legal profession and the ways advocates work to address the needs of clients. Therefore, it becomes imperative to look at the legal rules in other jurisdictions.

7.2.4.2.1 South Africa

The Uniform Rules on Professional Ethics for Advocates provide that "a member must not issue statements to any news or current affairs media in connection with any matter in which he or she is or has been briefed or instructed".241 Furthermore, the rules on non-legal publications provide that "members of the Bar should not write articles in non-legal publications with regard to pending cases nor cases where the time for appeal has not expired".242 That "it is contrary to professional etiquette for counsel to engage in newspaper correspondence or to issue press statements on the subject of cases in which they are or have been themselves concerned as counsel."243 Also that, "it is undesirable for a member to express an opinion in the press, by letter, article, interview or otherwise on any matter which is still pending in the courts. However, notwithstanding the foregoing, a member may express an opinion in the media, in general terms, on an

[241] Uniform Rules on Professional Ethics of the South African Bar, Rule 4.21.1.
[242] *Ibid*. Rule 4.18.3 (d).
[243] *Ibid*. Rule 4.18.3 (e)

issue which is still pending, provided that the member does not thereby purport to pre-judge the result."[244]

Per the above stated rules, advocates in South Africa are permitted to make media comments on pending matters provided they are not prejudging. In other words they are free to frame the legal issues for the public in a meaningful way. This makes sense as advocates are best equipped to understand and explain such issues.

7.2.4.2.2 England and Wales

Section 709 of the code of conduct of the bar of England and Wales,[245] which sets out the professional conduct rules is on media comment and provides as follows:

> *709.1: A barrister must not in relation to any anticipated or current proceedings in which he is briefed or expects to appear or has appeared as an advocate express a personal opinion to the press or other media or in any other public statement upon the facts or issues arising in the proceedings.*
>
> *709.2: paragraph 709.1 shall not prevent the expression of such an opinion on an issue in an educational or academic context.*

These limitations are far narrower than Uganda's *sub judice* rule as the advocate must have been somewhat involved in the matter. The Bar Standards Board[246] through its standards committee issues guidance on the application of particular provisions of the code. There are guidelines on media comment to the effect that, although barristers are not required to speak to the media, with the consent of the client a barrister can

[244] *Ibid*. Rule 4.18.3 (f)
[245] 8th Edition. Adopted by the Bar Council on 18th September 2004, and became effective on 31st October 2004.
[246] The body responsible for regulating barristers called to the bar in England and Wales.

inform the media about the client's view of the proceedings or what their client is seeking to achieve. Similarly a barrister can inform the media about the facts of a particular case or the issues that will be discussed without giving personal views about the merits of the case or the appropriate outcome.[247]Furthermore, in order not to bring the administration of justice into disrepute, the guidelines are to the effect that barristers should exercise care while commenting on cases in which they have been involved. "It will almost invariably be inappropriate to make allegations about the good faith of a judge or other judicial officer or to use inflammatory language."[248] These guidelines, however, seem to allow comments that from a general reading of that section seem to be prohibited.

Advocates should be permitted to comment on matters of public concern that involve litigation. Advocates owe a duty to the public to offer guidance on matters of the law. Advocates cannot take part in crucial policy discussions if their lips are sealed by rules and regulations.

7.3 Advertising

Advertising is the act of drawing attention to a product, service, or event through the mass media in order to promote its awareness, sale or attendance. Common advertising media includes: billboards, newspapers, directories, magazines, public transport, the Internet, etc. Generally, advertising in almost all jurisdictions has some form of limitation either in content or mode. For example the adverts should not be misleading or against public interest. This limitation is largely

[247]www.barstandardsboard.org.uk/standardsandguidance/codeguidance, accessed on 19/8/2011.
[248]*Ibid*.

intended to protect consumers and maintain the repute of the legal profession.

7.3.1 Limitations on Attorney Advertising in Uganda

The Advocates Act[249] and related regulations limit attorney advertising by prescribing how certain activities are to be carried out such as, the size and content of the name plate or sign board, firm name, publications by advocates.

Sec. 74(f) of the Act states:

> *No advocate shall advertise in relation to his or her professional business, except as may be permitted by regulations made by the Law Council.*

Regulation 25[250] states:

> *(1) An advocate shall not allow his or her name or the fact that he or she is an advocate to be used in any commercial advertisement.*
> *(2) An advocate shall not cause his or her name or the name of his or her firm or the fact that he or she is an advocate to be inserted in heavy or distinctive type, in any directory or guide and, in particular, a telephone directory.*
> *(3) An advocate shall not cause or allow his or her name to be inserted in any classified or trade directory or section of such directory.*

This Regulation and in particular paragraph (2) permits advertising of the advocate's name, firm, or the fact that he or she is an advocate in a general directory or guide provided it is not distinctive so as to attract

[249] Cap 267, Laws of Uganda.
[250] Advocates (Professional Conduct) Regulations, Statutory Instrument (SI) 267-2.

any undue attention. On the other hand, the regulation appears to prevent advocates having their name listed in a special directory. However, what constitutes "heavy" and "distinctive" is not defined, suggesting that this can only be determined on a case-by-case basis. Limited advertising is also permitted by way of the law firm name, nameplate or sign board as discussed below.

The conventional rationale for limiting attorney advertising is the protection of the public and the dignity of the profession. Advertising can be a forum for dubious claims that can mislead potential clients and erode the culture of professionalism among advocates. Advertising can also cheapen and commercialise the profession. On the other hand, legal practice is a business. In Uganda prospective law firms must register the name of the firm under the Business Names Registration Act[251] before operating. Advertising is core to business development. It is an important medium for communicating with the public and informing potential customers of services offered.[252] Limitations on advertising can block new entries in the market place and benefit established firms. This greatly hampers competition in the legal market place, which is unjustified in light of the tangential benefits of such limitations.

Law firms host websites with information ranging from the partners, and other advocates in the firm including their photographs, areas of specialization, reports and descriptions of matters handled by the firm, and insights about other activities and aspects of the firm. Based on the existing law and regulations, much of the self-serving information on these websites is highly suspect and probably in violation of present standards.

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[251] Cap 109, Laws of Uganda.

[252] In *Digitek Advertising Ltd V Corporate Dimensions Ltd HCT (Commercial Division)* MA No. 424 of 2005, Justice Egonda Ntende stated, 'outdoor advertising is a form of speech or expression, a specie of commercial speech which is protected by the right to freedom of speech and expression.'

It is possible to tender arguments that would excuse such websites from ethical gaffes. One might assert the websites are being proffered as information as opposed to advertising. However, any such distinction is dubious given the widely accepted purpose of commercial websites. Others might argue that websites fall outside of the ethical rules because they are not specifically addressed in the Advocate's Act or the Advocates (Professional Conduct) Regulations. However, this argument fails when one considers the ban on all advertising except as permitted by the Law Council. Law Council is yet to provide the advocates with guidelines on online advertising. Given the language of the Regulation, perhaps the most prudent practice for advocates would be to submit their web pages for approval prior to posting.

Other developments portend the need for official guidance in the area of web-based communication. Law firms in Africa, Europe and South Africa have formed working relationships with law firms in Uganda and legal process outsourcing is taking place. There are also publications such as IFLR1000[253], Chambers Global and others that list what they consider reputable law firms internationally, and members of the public consult these publications when seeking legal services. There is need for the profession to grow with the changing professional and business environment if it is to remain relevant, and become competitive locally and internationally[254] by taking advantage of technological and other innovations.

7.3.2 Attorney Advertising in Other Jurisdictions

The prohibitions on legal advertising have come under considerable challenge both locally and internationally. Some are critical of the lack of enforcement or failure to take action where the rules against

[253] This is a guide to the world's leading financial law firms.
[254] For example, in 2010, legal practitioners from commonwealth countries were allowed to practice as solicitors in UK.

advertising have been flouted. Others are critical of the justifications against advertising. A brief look at the approaches and practices in other jurisdictions provides perspective and insight for those engaged in the ongoing policy debate.

7.3.2.1 The Republic of Kenya

The ban on advertising has been the subject of a petition in the High Court of Kenya (Constitutional and Human Rights Division) in the case of *Okenyo Omwansa George & Anor v Attorney General & 2 Ors.*[255]

The petitioners in the *Okenyo* case challenged the constitutionality of the prohibition on attorney advertising as provided in Rule 2 of the *Advocates (practice) Rules* made under the Advocates Act (Chapter 16 of the Laws of Kenya)[256] on the ground that the said Rule imposes unreasonable restrictions that bar advocates from advertising. Rule 2 provides as follows:

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

The petitioners sought a declaration that Rule 2 is in conflict with, inconsistent with and contravenes Arts. 35(1) (b) and 46 of the Constitution of the Republic of Kenya and is therefore null and void. They argued that Rule 2 contravenes the right of access to information because it constrains a consumers right to access information regarding where, when, from whom and how to get the services of an advocate and the advocate's areas of proficiency. They further argued that the denial

[255] Petition No. 126 of 2011.

[256] Sec. 81 of the Advocates Act, Cap 16 Laws of Kenya, empowers the Council of the Law society of Kenya, with the approval of the Chief Justice, to make rules regarding the professional practice, conduct and discipline of Advocates.

of information is a denial of public access to justice, a right guaranteed under Article 48 of the Constitution.

The Council of Legal Education, the 3rd Respondent, opposed the petition on the grounds of guarding against unnecessary competition, preventing the commercialisation of legal practice and preserving the dignity of the legal profession. In its ruling, the court, presided over by Justice D.S. Majanja, noted that "whatever the reasons for the prohibition of advertising, one thing is becoming clear; the prohibition of advertising has come under considerable challenge both locally and internationally." The Court noted that in the Unites States of America advertising on television, newspapers and billboards is allowed and acknowledged other jurisdictions, such as England and Wales, which have lifted ban on advertising subject to rules against false and misleading information.

Regarding Article 46, court held that, "the prohibition of advertising under Rule 2 in essence constrains the consumers of legal services to such information as is necessary for them to make informed choices. Advertising enables the consumers to have information regarding where, when, from whom and how to get legal services of an advocate." Regarding Article 48, court noted that "a consequence of the ban on advertising of legal services is that the consumer is left in the dark about the nature and extent of legal services that can be offered by an advocate thereby undermining the right of access to justice." The Judge further made a reference to the case of *Bates v State Bar of Arizona*[257] where the Supreme Court of the United States noted that "advertising, which is a traditional mechanism in a free market economy for a supplier to inform a potential purchaser of the availability and terms of exchange, may well benefit the administration of justice." The Court concluded that a complete ban on

[257] 433 US 350 (1977).

advertising by advocates as contained in Rule 2 of the Advocates Practice Rules undermined the right of access to justice and is therefore a violation of that right. The court decided that Rule 2, in as far as it constitutes a complete ban on advertising by advocates, was inconsistent with the provisions of Articles 46(1) and 48 of the Constitution.

7.3.2.2 South Africa

The South African legal profession is divided into advocates (barristers) and attorneys (solicitors), and dual practice is not permitted. Clients approach attorneys who in turn instruct advocates. Thus, the advocates' profession is a referral profession.[258] The rules on professional conduct are contained in the Uniform Rules of Professional Ethics,[259] and Rule 4.17 concerns advertising. Advocates are permitted to advertise, and the rule specifically provides that "an advertisement must be factually true and must not be of a kind that is or might reasonably be regarded as: false, misleading or deceptive; in contravention of any legislation; vulgar, sensational or otherwise such as would bring a court, the counsel, another counsel or the legal profession into disrepute or ridicule."[260] Further, "counsel may on the basis of specialised qualification or experience and with the prior approval of his or her Bar Council advertise or hold himself or herself out as being a specialist or as offering specialist services."[261]

7.3.2.3 England and Wales

The code of conduct of the Bar of England and Wales prescribes what is, and isn't acceptable for attorney advertisement. It provides for advertising and publicity in section 710 as follows:

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[258] General Council of the Bar of South Africa, www.sabar.co.za/legal-system.html, visited on 22/8/2011.
[259] *See*www.sabar.co.za/rules-of-ethics.html, accessed on 22/8/2011.
[260] Rule 4.17.2 (1-3).
[261] Rule 4.17.3.

Subject to paragraph 710.2 a barrister may engage in any advertising or promotion in connection with his practice which conforms to the British Codes of Advertising and Sales Promotion and such advertising or promotion may include:

a) photographs or other illustrations of the barrister;
b) statements of rates and methods of charging;
c) statements about the nature and extent of the barrister's services;
d) information about any case in which the barrister has appeared (including the name of any client for whom the barrister acted) where such information has already become publicly available or, where it has not already become publicly available, with the express prior written consent of the lay client.[262]

And paragraph 710.2 states:

Advertising or promotion must not:

a) be inaccurate or likely to mislead;
b) be likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;
c) make direct comparisons in terms of quality with or criticisms of other identifiable persons (whether they be barristers or members of any other profession);
d) include statements about the barrister's success rate;

[262] Lay client is defined in section 1001 to mean the person on whose behalf a practicing barrister (or where appropriate in the case of an employed barrister his employer) is instructed.

e) indicate or imply any willingness to accept instructions or any intention to restrict the persons from whom instructions may be accepted otherwise than in accordance with this Code;

f) be so frequent or obtrusive as to cause annoyance to those to whom it is directed.[263]

The above rules try to achieve a delicate balance between protecting the public, and the administration of justice, while recognizing the need for the advocate to advertise his or her services.

7.3.2.4 United States of America

In some respects, attorney advertising in the United States of America is hardly distinguishable from general commercial advertising. Attorneys can take out television, radio, and billboard adverts among other forms of advertising. The adverts are flashy, eye catching and often very competitive in character and content. However, there are many limitations on attorney advertising in the United States. These limitations differ among the states. In most states, the substantive standards are very similar to those in England and Wales, and there is a requirement to submit all advertising and web content to a review panel for approval.

7.3.2.5 The Ugandan Context

The comparative review discussed above is instructive within the Ugandan context. First, in light of the East African Community (EAC) regional integration process it is possible that the courts in the other EAC countries will follow Kenya's lead in striking down a complete ban on advertising, so as not to disadvantage advocates in any member state and thereby render them uncompetitive.

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[263] Adopted from the bar standards board website, www.barstandardsboard.rroom.net, pp. 7-5 & 7-6, visited 11/08/2011.

In some instances where the rules against advertising have been blatantly breached, the Disciplinary Committee of the Law Council has not taken disciplinary action against the advocates. It can be argued that in those instances, perhaps the adverts have not hurt the profession in any substantial way. The failure to take action may also signal a silent recognition of the change that the profession wishes to see. Due to the increased use of information and communication technologies in recent years, dynamic and massive changes in the business environment, advertising should be allowed within prescribed limits that enhance professional growth. New rules therefore need to be put in place, and the rules in England and Wales are instructive.

If an advocate wishes to advertise himself or herself as an expert in a particular area, clear criteria for expert status should be developed subject to approval. Here much can be learned from the model developed in South Africa.

7.3.3 Touting

Touting is the attraction of business or clients in an unfair manner. Touting can take many forms including: directly approaching clients and seeking instructions from them, instituting a suit without proper instructions, and soliciting clients of other advocates.

Sec. 74 (1) (e) of the Advocates Act states:

> *No advocate shall accept any employment in any legal business through a tout or employ a tout as defined in section 75 of this Act.*

And sec. 75 of the Advocates Act states,:

> *Any person who, on behalf of any advocate, or for his or her own account, acts as a tout commits an offence.*

The section defines a tout as follows:

> *a person who, in consideration of any payment or other advantage to himself or herself, procures the employment in any legal business of any advocate, or proposes to an advocate to procure him or her employment or other advantage.*

Regulation 22 of the Advocates (Professional Conduct) Regulations also prohibits touting and states:

> *No advocate may directly or indirectly apply or seek instructions for professional business, or do or permit in the carrying on of his or her practice any act or thing which can be reasonably regarded as touting or advertising or as calculated to attract business unfairly, and in particular, but not derogating from the generality of this regulation*
>
> *(a) by approaching persons involved in accidents, or the employment of others to approach such persons;*
>
> *(b) by influencing persons, whether by reward or not, who by reason of their employment are in a position to advise persons to consult an advocate; and*
>
> *(c) by accepting work through any person, organization or body that solicits or receives payment or any other benefit for pursuing claims in respect of accidents.*

An advocate who breaches provisions of the Act and the Regulations is subject to disciplinary proceedings for professional misconduct.[264]

Procurement of services, including legal services, by businesses and organizations has changed in recent years. Advertisements appear in the media, especially newspapers and the Internet, calling upon persons or firms to bid for legal services. Does an advocate's response to a bid amount to touting? The Public Procurement and Disposal of Public

[264] S. 79 (2) of the Act, and Regulation 31(1).

Assets Act, 2003[265] and the Regulations require public entities to issue bid notices, unless otherwise exempted, for works, services, supplies or any combination thereof. This means that any public entity requiring legal services must comply with the said laws. Therefore, is the case of *Re A solicitor,*[266] where it was held, "the client may seek him, but he must not seek the client," still appropriate in current circumstances? There is clearly a need to reassess and refine the rules on touting in light of the changes in business environment and the exceptions necessitated by bidding requirements.

7.3.4 Law Firm Name, Nameplates or Signboards

Regulation 24 of the Advocates (Professional Conduct) Regulations, regarding the advocate's nameplate or signboard states:

(1) An advocate may erect a plate or sign board of not more than 36 centimetres by 25.5 centimetres in size containing the word "advocate", indicating his or her name, place of business, professional qualifications, including degrees, and where applicable, the fact that he or she is a notary public or commissioner for oaths.

(2) Notwithstanding, sub regulation (1) of this regulation, a nameplate or signboard shall, in the opinion of the Law Council, be sober in design.

(3) No advocate shall carry on any practice under a firm name consisting solely or partly of the name of a partner who has ceased to practice as an advocate.

(4) An advocate or a firm of advocates affected by sub regulation (3) of this regulation shall be allowed five years from the date of the change in the composition of the firm, in which to effect the required change in the firm name.

(5) Notwithstanding sub regulation (1) of this regulation, no advocate shall include on his or her nameplate, signboard or letterhead any non legal professional qualifications or appointments in any public body whether the appointments are present or past.

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[265] *See* S. 2 on Application of the Act, which is detailed.
[266] [1945] 1 ALL ER 445.

This Regulation prescribes strict limitations on what an advocate can communicate on a sign plate and goes well beyond signage. The Regulation touches on letter head and firm names as well.

Perhaps the most fertile area for future controversy in this Regulation is the standard of "sober design." Although the Law Council has not issued any guidelines as to what a sober design is, this is generally taken to mean that the name plate or sign board should not contain artwork, the size of the letters should be regular, and there should be nothing flamboyant in design. With the advancement in signage made since 1977 perhaps guidance in this area would be helpful.

In addition, this Regulation is noteworthy for what it omits. In 1977 name plates, sign boards and letterhead were the key mediums for law firm branding. Today websites, business cards and flyers are common means of branding. There is a clear need to revise the Advocates (Professional Conduct) Regulations to account for these modern channels of brand development.

7.3.5 Generic Names

In 2006 Uganda adopted regulations to address the use of generic names by law firms.[267] A generic name is a name other than the name of a partner of a law firm. The regulations require that, 1) the generic name includes the word "advocates" at the end of the law firm name, 2) the names of all the partners be conspicuously stated side by side with the name plate, 3) the law firm letterhead should include the partners names and qualifications and if they cannot fit on the letterhead, a reference as to where they can be found should be included on the letterhead. Furthermore, that a generic name shall not: 1) make any reference actual or derived, to any symbolic, cultic, political, religious, sectarian, discriminatory or specialty classification; 2) be offensive; directly or

[267]The Advocates (Use of Generic Names by Law Firms) Regulations, 2006.

indirectly associated with or suggest any connection with any government, parastatal or a non-governmental organisation; 3) or be misleading. Where there is change of a name from a partners name to a generic name, the former name shall be included on the letterhead and name plate for at least three years, and the generic name shall not be used or registered with the Registrar General until approved by the Law Council.[268] The regulations concerning generic names are pragmatic and instructive and thereby stand in stark contrast with many of the other regulations discussed previously in this chapter.

7.4 Marketing

Marketing is a broad concept that entails more than just selling a product or service. It "encompasses all the activities of the business" as seen from the point of view of the customer who gets the final result.[269]In a way, everything that is done in a business is marketing because all of the activities of a business can affect how the customer perceives the business.

Advocates are not above marketing. Advocates must practice law and conduct business in a manner that attracts, impresses and retains clients. However, advocates must appreciate that there are limitations on marketing activities within the legal profession.

Many law partners desire that their firms outlast their own legal careers. In this respect, appropriate marketing strategies will have to be adopted and this will depend on the size of the firm, clients, both current and prospective, available resources etc. It is very important to market oneself with integrity. Below are some of the marketing strategies that could be considered.

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[268]*Ibid*.

[269] P.F. Drucker, *The Practice of Management*, Harper & Brothers, New York, 1954.

7.4.1 Legal Marketing Strategies

7.4.1.1 Publishing

Publishing is not just for academics; it is an excellent marketing tool for advocates. Through publishing an advocate can present himself or herself as being knowledgeable on a subject matter and well equipped to assist clients in that area of the law.

To ensure that publication is an effective marketing strategy, articles should be well written and should cover topics relevant to your desired practice. The articles should also be accessible to the target audience and written at a level that demonstrates expertise while still being clear and comprehensible to the target audience.

Uganda has special rules regarding publications by advocates. Regulation 23 of the Advocates (Professional Conduct) Regulations was addressed earlier in this chapter. Regulation 23 prohibits advocates from publishing articles and their photographs in news media if that publication is likely to publicise the fact that he or she is an advocate. However, the Regulation allows advocates to answer questions and write articles in the media anonymously or with name disclosed with the approval of the Law Council. In addition, the limitations in Regulation 23 do not apply to professional journals or publications of an educational nature. So, by way of example, the contents of this chapter are not restricted by Regulation 23 because this chapter was written for educational purposes.

7.4.1.2 Seminars

Seminars present advocates with the opportunity to demonstrate and share knowledge and expertise. By serving on panels at seminars, advocates can raise their profile among their peers and potential clients. Other advocates can be a good source of referrals especially when they

view you as an expert in an area of the law in which they are not comfortable.

Seminars create access points where potential clients can get to know an advocate. People that are impressed with an advocate's presentation at a seminar are likely to contact that advocate for assistance in the topic area covered in the seminar.[270] Seminars are usually organized around specified topics by organizations with interest in the matters to be discussed. By associating with reputable organizations, your credibility is also enhanced.

7.4.2.3 Assisting the judiciary

Assisting the judiciary presents an opportunity for advocates to gain expertise and raise their profile. Advocates in Uganda have assisted the judiciary by volunteering as court mediators thereby assisting court in helping parties resolve their disputes. For example, some advocates are mediators in the commercial division of the High Court and for CADER. In 2011, the Judiciary also called for interested advocates to be trained and accredited to the Family Division of the High Court as mediators on a voluntary basis. Once trained, the advocates were expected to give a minimum of 6 hours per week of their time to conduct mediation sessions in the Family Division. Although this training was limited to only 20 participants, there could be more opportunities for advocates to assist the judiciary in the future, especially if such initiatives prove to be useful and workable in the resolution of disputes, such that similar initiatives are undertaken in other courts.

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[270] Thomas E. Kane, "*Marketing for Solos and Small Firms*," *The Practical Lawyer*, June 2005, p. 55.

7.4.2.4 Positioning yourself as a specialist or expert

An advocate who undertakes further training and gains practical experience in a particular legal field can position him or herself as an expert. Specialisation usually entails the acquisition of specialist qualifications from academic institutions or specialist institutions coupled with the ability to apply the knowledge practically so as to achieve the desired outcome. Although this gives the advocate the desired edge in that particular area, it does not mean that she or he cannot handle matters outside their area of specialisation. The need to obtain higher qualifications or advanced training may seem a tedious and lengthy process. However, clients are increasingly demanding legal counsel with specialised knowledge. It is therefore a worthwhile undertaking for an advocate's professional growth.

Advocates are required to undertake minimum training-Continuing Legal Education (CLE) each year, and this could serve as a launching point in developing new areas of specialisation. The CLE seminars are usually organized around new legal or business areas, emerging topical issues, and regional and international trends in law or business. As noted, in South Africa, advocates are permitted to advertise as specialists. This certainly presents these advocates with a valuable marketing opportunity.

Legal specialisation is an emergent issue in Uganda. Ugandan advocates must be careful not to engage in improper touting or advertising when establishing themselves as specialists in the eyes of the public. Listing relevant publications, training, and types of cases that you prefer accepting are ways of publicising your area of specialisation without running afoul of the ethical rules.

7.4.2.5 High profile work

Undertaking high profile work, such as serving on a commission of inquiry, being part of a team that will undertake a special task, or carrying out commissioned research, generates publicity and introduces you to potential clients. This is especially true if the work is commissioned by government or a reputable national or international organization. Involvement in important matters is testimony to professional acumen.

7.4.2.6 Pro bono opportunities

It may seem as if *pro bono* work will merely earn you more *pro bono* opportunities. This is undoubtedly true. Many people are very interested in free legal services rather than paying for them. However, *pro bono* work can also establish you as an expert and a capable advocate among those whom you serve and with whom you interact. This can, in turn, attract paying clients. In addition, advocates conducting *pro bono* work sometimes receive media attention and public notoriety that can boost a legal career. *Pro bono* clients may also refer paying clients to their advocate. Finally, providing free legal advice to a charitable or community organisation is qualified *pro bono* work that can connect you to individuals and institutions that might employ you as a paid advocate.

7.4.2.7 Client surveys for feedback

A client survey is aimed at obtaining information about how your clients perceive you, your practice, their legal needs, and whether they are satisfied with the services you offer. Client survey responses give an indication of areas that need to be improved upon, so you have an opportunity to put right a problem before the client leaves for another

firm.[271] The survey also demonstrates your interest in the clients' opinions. Surveys should not be undertaken unless suggestions given will be acted upon. While it is beyond the scope of this work to discuss in detail the methods of conducting client surveys, these include use of questionnaires, personal interviews and telephone surveys.[272] A survey can be undertaken at the conclusion of the matter or on a regular basis.

7.4.2.8 Networking

Networking is an essential marketing strategy. Networking activities include joining social clubs or associations either within your local community, national or international and professional bodies. The goal of networking is to meet people with whom you can work for your mutual benefit or who will refer clients to you. Social clubs or associations are usually formed around commonly held values such as honesty, integrity and accountability amongst the members, which helps to enhance your personal and professional growth. Potential clients could also identify you through your active service to the club.

7.5 Conclusion

Communication is a crucial aspect of legal practice on several levels. Advocates must take all forms of communication seriously. It is important for the advocate to develop proper communication ethics with the client, opposing parties, the court and the public in general. This is especially true in the case of client communications. The advocate-client relationship is fiduciary. This duty requires the advocate to act in the best interests of the client. In performance of his or her duties an advocate must embrace communication and information technology in order to efficiently meet client needs and achieve business growth.

[271] *Ibid*. p. 56.
[272] *Supra* note p. 14.

Advertising and marketing present special communication challenges. Advocates must be knowledgeable about the limitations and restrictions applicable to such communications. Rules on professional conduct are necessary to guide members of the legal profession as they go about their duties. However, the rules should be relevant in time and purpose. The current rules concerning advertising and marketing activities are somewhat dated and out of touch with current practices. It is important to develop ethical strategies for promoting one's practice within the current constrictive framework. It is also important to engage regulatory and administrative bodies in order to adjust the rules to the realities of the current legal marketplace while still protecting the general public and maintaining the regard and esteem for the legal profession.

8

ETHICS IN ALTERNATIVE DISPUTE RESOLUTION IN UGANDA

Sarah Taboswa Chemonges †

Prefatory Note: Alternative Dispute Resolution (ADR) is the name given to methods of resolving disputes outside of the formal courtroom litigation process. As the costs and risks of formal litigation rise, ADR grows in importance. Future advocates must be familiar with the various forms of ADR and the ethical challenges those forms present. This chapter provides you with an introduction to legal ethics within the context of arbitration, mediation, negotiation and collaborative law. In addition, this chapter addresses broader ethical issues entailed within the concept and practice of dispute resolution.

> *"The Courts should not be the places where the resolution of disputes begin; they should be the places where disputes end- after alternative methods of resolving disputes have been considered and tried."*- Sandra Day O'Connor, Retired Justice, United States Supreme Court

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8.1 Alternative Dispute Resolution: General Introduction within the Ugandan Context

8.1.1 Definition and Scope of Alternative Dispute Resolution

The term "alternative dispute resolution'' or "ADR'' describes a wide range of dispute resolution mechanisms that are short of, or alternative to, full–scale court proceedings. The primary forms of ADR are negotiation, mediation and arbitration. Other emergent forms of ADR include collaborative law and conciliation.

8.1.2 Policy and Purpose of Alternative Dispute Resolution

In many instances formal litigation is not the best option for resolving disputes. ADR can provide parties to a dispute with mechanisms for reaching resolutions more quickly, amicably, efficiently, cost-effectively, and less arbitrarily. ADR is considered particularly beneficial where disputing parties have an interest in maintaining an ongoing relationship, where there are shared interests that can be realized with a collaboratively designed outcome, or when the parties do not have the time or resources to pursue formal litigation.

8.1.3 Alternative Dispute Resolution in Uganda

The 1995 Constitution of the Republic of Uganda establishes a general policy framework for the promotion and establishment of alternative dispute resolution. Article 126 (2) (e) provides that in adjudicating cases of a civil and criminal nature, the courts should promote reconciliation.

> Justice Kiryabirwe expounded on this Constitutional mandate in the case of *Buildtrust Construction (U) Ltd vs. Martha Rugasira* HCT-00-CC-CS-288-2005:

> Court has a duty under Article 126(2) (e) of the Constitution of the Republic of Uganda 1995 to see that reconciliation between parties should be promoted. In effect this in my view means that if parties use alternative dispute mechanisms, like in this case a reputable third party expert, to resolve their dispute then court will promote that reconciliation by giving effect to it unless there is good reason not to do so.

In Uganda, formal litigation remains the dominant form of dispute resolution for those who can afford to engage in the process. However, the rising prominence of ADR can be seen in various contexts. The Ugandan Civil Procedure Rules require courts to hold scheduling conferences where the possibility of settlement is explored, and the court may order the parties to participate in a form of alternative dispute resolution under the court's direction.[273] The Commercial Court takes this mandate one step further by requiring litigants to enter into a good faith mediation process as a matter of course prior to proceeding to the trial phase.[274] Principles of reconciliation and dispute resolution are expressly incorporated within the statutory framework establishing and regulating the local council courts, labour disputes and land disputes. The increasing significance and relevance of ADR is exemplified in the high profile arbitration between Heritage Oil and the Ugandan Revenue Authority.

The delivery of formal ADR services in Uganda is administered by the Centre for Arbitration and Dispute Resolution (CADER). CADER is a statutory institution established under the Arbitration and Conciliation Act charged with the responsibility of providing ADR services.[275] The institution makes available to individuals and their legal counsel, at no

[273] Civil Procedure Rules of Uganda, Order XII.
[274] The Judicature (Commercial Court Division) Mediation Rules No. 55/ 2007.
[275] Cap 4 Laws of Uganda.

charge, pre-drafted model arbitration and mediation clauses for inclusion in their contracts.[276] It also has a detailed fee structure for CADER registered mediators or arbitrators. CADER mediators and arbitrators must subscribe to CADER's Code of Conduct and are subject to the Ethics Committee established within CADER's governing body referred to as "The Governing Council."[277]

ADR occurs as a matter of necessity among the larger percentage of Ugandans who are unable to afford access to the formal justice system. Many individuals utilise informal negotiation methods and community based mediation though tribal or religious leaders to resolve disputes.

8.2 Forms and Categories of Alternative Dispute Resolution

As noted above, the primary forms of ADR are negotiation, mediation and arbitration. In addition, new forms of ADR are increasing in use and prominence. These forms include the use of collaborative law and conciliation. Each of these forms of ADR will be introduced and described in more detail below.

8.2.1 Negotiation

Negotiation is communication aimed at reaching an agreement. Negotiation is by far the most common form of ADR. People constantly participate in negotiations. Negotiations can range from a discussion with a friend over what you will watch on television to the ongoing diplomatic dispute over the political status of Palestine. Most negotiations take place without the involvement of lawyers. A large

[276]Kakooza Conrad A., *Arbitration & Conciliation: A Focus on the Ugandan Practical Aspects*, A paper presented to the Post Graduate Bar Course Students at Law Development Centre on 10th January, 2007 at a Training on Alternative Dispute Resolution, organized by the L.D.C Legal Aid Clinic.
[277]*Ibid* at p. 3.

majority of disputes are resolved between the actual parties without the need for legal action or some other form of ADR.

Advocates are often engaged to negotiate matters on their client's behalf. Due to the cost of legal representation, advocates are rarely called upon to negotiate trivial matters. Many clients will assess an advocate based on the advocate's ability to negotiate a favourable result. Therefore, many advocates seek to establish themselves as "hard bargainers" who win their negotiations through posturing, intimidation and threats. Such techniques raise ethical and social concerns.

8.2.2 Mediation

Mediation is the formal process whereby dispute resolution is facilitated by an independent third party known as a mediator. Mediation gives both sides of a dispute the opportunity to communicate their concerns and contentions directly to one another in a civilised format. Parties to mediation are not required to resolve their dispute and the mediator has no power to force the parties to take any action against their will. The mediation process is largely about creating an environment that facilitates dispute resolution.

One defining attribute of the mediation process is the presence and role of the mediator. The mediator's function is to facilitate processes whereby opposing parties communicate substantively, identify common interests, clarify issues of dispute and contention, consider available options, and reach fair and equitable resolutions of disputes.[278] In order to further such objectives, the mediator must garner the confidence of the disputing parties. The parties need to believe that the mediator will treat the parties fairly, discretely, honourably and without bias. Mediators should also be skilled in the art of cutting through the

[278] Hung Hin "*Neutrality and Impartiality in Mediation,*'' *ADR Bulletin* Vol. 5: No. 3, Article 7. (2002) Available at: http//epublications.bond.edu.au/adrvols5/iss3/7

posturing and gamesmanship endemic to litigation. Due to the premium placed on this particular quality, mediators are often retired judges or experienced litigators that are skilled in getting to the heart of disputes.

Another key aspect of most mediation is confidentiality. Information exchanged in the mediation process is normally considered confidential. A confidential setting allows for a freer exchange of ideas and information between the parties.

Mountain Tops and Mediation:
LESSONS LEARNED IN THE
COMMERCIAL COURT OF UGANDA

By John M. Napier, Esq.

My knowledge about mediation in Uganda is informed by experience. As the first court accredited mediator in the Commercial Court of Uganda, I conducted over 100 mediations in all manner of cases ranging from property disputes and tax issues to contract contentions and insurance claims.

During my experience at the Commercial Court, I noted a pattern of challenges that face the Ugandan mediator. I call these challenges the three "mountains" of mediation. Each of the three mountains presents escalating levels of difficulty and, conversely, higher levels of satisfaction with each summit.

The first mountain is helping the parties understand mediation. Mediation, in form, has been present for millennia on the continent of Africa. However, the concept and principles of mediation have been largely lost in the context of formal legal proceedings. Thankfully, recent efforts in Uganda to sensitize the public at large and the legal community about mediation are producing fruit. That said, there is still a lack of understanding about the nature and purpose of mediation that

must be addressed before the mediation process can move forward. The mediator must close this knowledge gap.

The second mountain involves convincing the litigant and their advocate about the benefits of the mediation. The parties must appreciate the potential of achieving win-win through mediation. There was a case—and I will only speak in generalities about specific cases, because the ethics of being a mediator, as well as participating in mediation, means keeping the details and parties strictly confidential—where two parties were disputing the outcome of a shipping contract. The mediated resolution allowed the first party to recover their loss from the situation through increased business from the second party, who was able to get a discount on their shipping from the first party. The parties walked out with increased business, a recovery of losses, and a mended commercial relationship. This is the type of outcome that is possible within mediation. Other benefits include saving time, saving money on court costs, and the relief of stress that comes with a final decision on the dispute. Once the parties understand the advantages of mediation you are ready for the third mountain.

The third mountain is enabling the disputing parties to come to an informed decision about their situation. This is normally the most difficult peak to climb. However, if you have properly sensitized the participants about the purposes and benefits of mediation your chances of climbing this last mountain are greatly increased.

In most circumstances the third mountain is successfully climbed through a mediated resolution of the dispute. This typically comes in the form of a written resolution to the dispute, memorialised in the Commercial Court through a consent judgment. While resolution is a mediator's hope in most circumstances, it is important to remember that a mediator's job is to help the parties reach their own decision. In some instances the best-informed decision may be to litigate the matter in court, specifically when the case turns on a matter of law.

By way of example, there was an insurance dispute that I was handling in the court, where after hours of mediation, and a much better understanding of the dispute by not only me, as the mediator, but the parties themselves, it became clear that this was a case that must go before a judge to settle a matter of law. I considered that a successful mediation, even though the parties still went into court. In my experience, less than five percent (5%) of formal disputes are best resolved in court.

Mediation is ingrained in the fabric of Uganda. Its integration into the formal legal process is not an innovation as much as it is a return to foundational principles of traditional dispute resolution. It is the mediator's job to facilitate the process and not force outcomes while maintaining confidentiality and neutrality. Mediation is a wonderful tool that allows not only the quick and efficient resolution of disputes, but also the opportunity to restore relationships and repair the cloth torn by conflict. Mediators that are able to effectively climb the three mountains perform a great service to the parties of the mediation, the court and society in general.

8.2.3 Arbitration

Parties to arbitration engage an arbitrator, or panel of arbitrators, to serve in the role of a decision-maker to resolve a dispute. An arbitrator's decision can be either binding or non-binding depending on the terms of the arbitration agreement. When the decision is binding it is very difficult to overturn on appeal.

Matters are normally bound over to arbitration based on an agreement between the parties. Arbitration clauses are often found in a commercial agreement entered into before the dispute arises. However, parties can also agree to arbitrate a dispute after it arises.

Party agreement sets the arbitration process in motion, but it does not dictate the outcome. Once the parties entrust the arbitral tribunal with the authority to rule, they relinquish control of the proceedings, the dispute and its resolution to the arbitrators.[279]

Arbitration also enables the parties to engage arbitrators that are specialists in the subject matter of a dispute. Examples include hiring an experienced architect or engineer to arbitrate a construction dispute. The use of expert arbitrators can further streamline the process and helps to generate more equitable and technically accurate results.

Arbitration often resembles a trial in form and content, but is less beholden to procedural rules and technicalities. For example, the Evidence Act does not apply in arbitrations. However, despite the fact that certain legal technicalities do not apply, ethical rules continue to apply. Arbitration is not an excuse for lowering one's standards of professionalism.

Proponents of arbitration contend that the process offers the parties quicker resolutions, especially when court dockets are backed-up. This is true to a point. However, arbitration can move quite slowly.

The Arbitration and Conciliation Act[280] is the primary statutory instrument that regulates ADR method and practice in Uganda. The Act domesticates key international principles on ADR and is instructive on how the process of arbitration starts and ends in a Ugandan context. The Act also provides useful information on the expected behavior of arbitrators in the discharge of their functions.

8.2.4 Collaborative Law

Collaborative law is a structured, voluntary, non-adversarial dispute resolution process where parties and their lawyers sign an agreement to negotiate in good faith giving consideration to the interests of all parties,

[279] T. Carbonneau, *Arbitration in A Nutshell*, Thomson West, USA, 2007, p.10.
[280] Cap 4, Laws of Uganda 2000.

to resolve their dispute without resort to a court imposed resolution, to disclose all relevant information, and to engage neutral experts, as needed, for assistance in resolving issues.[281] The goal of collaborative law is a willing, informed, and mutually acceptable settlement.

Collaborative law has certain distinctive qualities. First, the process seeks to establish and clarify the client's goals and interests. Second, the process promotes the open and efficient exchange of meaningful information relevant to the dispute. Third, the process emphasises the development of options and the joint utilisation of relevant experts. Fourth, the process involves an honest, transparent and meaningful evaluation stage that is not grounded in posturing or positional negotiation. Fifth, the process concludes with principled negotiation that seeks a resolution that is in all of the parties' best interest.

Advocates engaged in collaborative law assume a unique ethical status. They can only remain in the case as long as the collaborative process is viable. If any party opts out of the process, all of the advocates in the case must be replaced by new advocates. Therefore, there is an incentive for the advocates involved in the collaborative process to keep the process moving forward so that they remained engaged as counsel. Advocates must be vigilant to not put their own interest before the client's. If the client would be best served in an adversarial court proceeding, the advocate should advise the client accordingly.

Collaborative legal practice is an emerging modality of ADR that has yet to rise to prominence in Uganda. One of the primary reasons for its slow adoption within Uganda is the absence of "no fault" divorce in Uganda. Because of the obvious need to maintain relationships, divorce is the most common area where collaborative law is utilised elsewhere.

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[281] Sherri R. Abney, *Avoiding Litigation: A Guide to Civil Collaborative Law*, Trafford Publishing, 2006.

However, since parties in Uganda cannot agree to divorce without cause, it makes it difficult for parties to agree to divorce terms in Uganda within a collaborative setting.

8.2.5 Conciliation

Another emergent trend is an emphasis on conciliation for the sake of religious principles, community benefit or pragmatic concerns. The last several decades have seen several examples of dispute resolution efforts grounded in the restoration of relationships through conciliation or reconciliation. Prominent examples include the efforts of the Truth and Reconciliation Commission in South Africa, the Gacaca Courts in Rwanda and the Christian Conciliation movement championed by the Christian Legal Society in the United States.

The common thread behind these movements is an emphasis on restoring relationships as opposed to simply generating a resolution. The conciliation movement recognises the importance of community and deemphasizes strict adherence to justice and fairness in the hope of restoring community in a meaningful way. As a result, conciliation efforts often point towards higher moral directives in order to enable parties to look past what they might deserve in order to salvage and preserve relationships.

8.3 The Practical Benefits of Alternative Dispute Resolution

Ethical and effective advocates must be aware of the benefits presented by ADR. Some advocates might see some of these benefits as counter to their own personal ambitions for pecuniary gain. Ultimately such individuals fail in their ethical duty when they seek to benefit themselves at the expense of their client and community.

The following is a brief, but non-exhaustive treatment of benefits that flow from the proper incorporation and implementation of ADR

methods within a society's legal culture. These benefits include increased efficiency, greater party control, cost reduction, stress reduction, reduced work for the public court system and expedited resolution.

8.3.1 Efficiency

The proper use of ADR results in increased efficiency in case management and litigation. Court proceedings are notoriously slow and labour intensive. Mediation enables many parties to substantially reduce the effort required to get a case to final resolution. Arbitrations can be conducted in ways that streamline litigation and free up client resources. The proper use of mediation and arbitration results in cost saving efficiencies for the parties to the dispute.

8.3.2 Control

In standard court-based litigation, parties often surrender the entire process to the advocates and wait for a final verdict of the judge. Clients often feel left out of the decision-making process and experience a loss of control. Alternative Dispute Resolution can enable parties to maintain a higher level of control over the process and the end result.

8.3.3 Reduction in Cost

One of the most trumpeted benefits of ADR is reduction of costs. One of the best examples of a cost saving measure is a successful mediation conducted prior to trial preparations. However, under certain circumstances ADR can increase expenses. This is especially true when non-binding arbitration and collaborative legal process fail to produce a resolution and the participants are left to effectively re-litigate the dispute.

8.3.4 Reduction in Stress

Conflict is stressful. Parties to a dispute can pay a high emotional price. Properly conducted mediation and principled negotiation can help to facilitate dialogue, restore relationships, resolve disputes, avoid public shame and alleviate other stressors associated with litigation. These non-monetary benefits should not be underestimated.

8.3.5 Earlier Resolutions

The potential for ADR to facilitate earlier resolutions of disputes than purely court-based litigation is obvious. This is particularly true in the Ugandan setting where there can be multiple opportunities to appeal in the courts.

8.3.6 Reduction of Work Load on the Court Systems

ADR mechanisms have the capacity to reduce a court system's workload. This benefit is one key reason why courts all over the world are incorporating procedures to funnel litigants into ADR.

8.4 Ethical Underpinnings of Dispute Resolution

Along with the practical benefits of ADR discussed above, dispute resolution and reconciliation are recognised as beneficial from several ethical perspectives. Here we will discuss how dispute resolution and reconciliation are ethically valued from African, secular and religious perspectives.

8.4.1 African Heritage of Dispute Resolution – Ubuntu

Africans have long placed value on dispute resolution. The guiding principle behind valuing reconciliation is "Ubuntu." "Ubuntu" is the understanding that our personal value is interrelated to how we value others. According to Archbishop Desmond Tutu "a person with Ubuntu

is open and available to others, affirming of others, does not feel threatened that others are able and good, for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed."[282] Moreover Tutu notes that Ubuntu appreciates the connectedness of humanity. If a person values Ubuntu, that person will value the peaceful and mutual resolution of disputes.

Traditional dispute resolution in Africa is a collective enterprise involving the whole community.[283] Resolution techniques and models re-establish social peace and prevent feuds.[284] Peace within groups and peace between the groups are predominant goals.

Broader community well-being is a traditional African value. The emphasis on community has manifested itself into the promotion of mutual settlement of disputes. The concept of Ubuntu provides a solid ethical undergirding for promoting and fostering of dispute resolution in the African context.

8.4.2 Secular Ethical Endorsement of Dispute Resolution

Secular ethical theory also supports the promotion of dispute resolution. From a utilitarian standpoint, dispute resolution can provide the greatest good for the greatest number by restoring relationships and producing non-arbitrary results. From an economic perspective, dispute resolution avoids the "zero-sum" exercise of litigation and frees up human and capital resources to engage in productive activities. From a pro-poor/humanitarian perspective, ADR provides greater access to justice and broadens legal empowerment.

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[282] Desmond Tutu, *No Future Without Forgiveness*, Doubleday, 2000.
[283]Elisabetta Grande, *Alternative Dispute Resolution, Africa & The Structure of Law & Power: The Horn in Context*, Journal of African Law, Vol. 43, No. 1 (1996), p. 64.
[284]*Ibid*.

8.4.3 Religious Ethical Endorsement of Dispute Resolution

Religious ethics also place a value on dispute resolution. Here we will consider Christianity, Islam and African Traditional Religions.

The Christian call to reconciliation is based on clear Biblical instruction.[285] Jesus taught that if someone offends you go and show him his fault; if he refuses to listen, take one or two others along with you. If the person still does not listen, you now have a witness to the conflict and proceed to take him to community or church for a fair hearing. If he still refuses, you have done your best; let him bear the eventual fate of his stubbornness.[286] The Apostle Paul in his first letter to the Corinthians asks that offenders be excommunicated from the community for purposes of evaluation, reflection and repentance that may result in reconciliation.[287] The Christian emphasis on reconciliation is clear and direct.

In Islam, there is a specific emphasis on the importance of reconciliation among Muslims (Musalaha) that is based on the ancient Arab practice of "Sulah" that actually predates Islam. According to Islamic law (sharia), "the purpose of the Sulha is to end conflict and hostility among the Muslims so that they may conduct their relationships in peace and amity."[288]

African Traditional Religions also place a value on conflict resolution. In Uganda we have the striking example of the Acholi practice of "Mato Oput" whereby a party who has wronged another takes part in a ritual that includes the slaughter of a sheep, the drinking

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[285] *Ibid*.
[286] Mathew 18:15-20.
[287] *See* 1 Corinthians 5:4-13.
[288] M. Khadduri, "*Sulh*," in *The Encyclopedia of Islam*, vol. 9, ed. C.E. Bosworth, E. van Donzel, W.P. Heinrichs, and the late G. Lecomte (Holland: Brill. Leiden, 1997), 845-46.

of blood mixed with bitter roots and the casting of omens.[289] This "Mato Oput" ritual is an outward religious practice of reconciliation and forgiveness.

Based on the above, Ugandans whose ethical perspectives are formed by Christianity, Islam and African Traditional Religions should value mechanisms designed to resolve disputes.

8.5 ADR Ethics in Context

Negotiation, mediation and arbitration all present their own ethical challenges and considerations. The following is a discussion of ethical concerns pertinent to advocates within the context of each of those three forms of ADR.

8.5.1 Ethics in Negotiation

Negotiation involves major categories of ethical concerns. The first is how one comports oneself during the negotiation in terms of honesty and truthfulness. The second concerns the broader ethical approach that one adopts with respect to negotiating. Both categories are discussed below.

8.5.1.1 The Problem of Lies and Misrepresentations in Negotiation

Some view negotiation as a game. Pursuant to this game mentality, participants often play fast and loose with the truth, and lawyers are valued for their "cunning, precise calculation and willingness to employ

[289] B. Afako "*Traditional Drink United Ugandans*" from *BBC Focus on Africa Magazine*, 29 February 2006, available at http://news.bbc.co.uk/2/hi/africa/5382816.stm

whatever means justify the end."[290] In fact, some have suggested that a lawyer's effectiveness in negotiations depends in part upon one's willingness to lie.[291] Posturing and puffery in the context of negotiation present special challenges to advocates charged with meeting standards of conduct and professionalism worthy of the legal profession.

The primary purpose of lying in negotiation is to increase the liar's power over the opponent through false or misleading information. Lies function to misinform the opponent regarding the perceived costs and benefits which can impact how opponents perceive their options.[292] In negotiation, lies take several basic different forms including: (1) misrepresentation; (2) bluffing; (3) falsification; and (4) deception.[293]

Lying and misrepresenting facts impair the negotiation process. Once a party detects dishonesty, a climate of distrust ensues. Negotiations are typically unproductive when the parties lack trust in each other. Lying and misrepresentation damage reputations and relationships. If parties believe they have been lied to they may be less willing to participate in subsequent negotiations.

In Uganda there are no provisions that specifically govern the ethics of advocates in the context of negotiations. Nor are there general provisions concerning truthfulness. The provisions within The Advocates Professional Conduct Regulations that concern honesty and truthfulness address witness coaching, false affidavits, and duties to advise the court about untruths to prevent the court from being

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[290]Alvin B. Rubin, "*A Causerie on Lawyers' Ethics in Negotiation*," 35 *Louisiana Law Review* 579, 1975 *quoting* 19th Century Austrian statesmen Klemens von Metternich.

[291]Gerald B. Wetlaufer; "*The Ethics of Lying in Negotiations*" *Iowa University Law Review*, 1990.

[292] Geoffrey M Peters, *The Use of Lies in Negotiation*, 48 *Ohio State Law Journal* 1,11,1987.

[293]*Ibid* at p. 9.

misled.[294] An advocate could fairly construe the current Regulations as being largely inapplicable to the negotiation table.

Other jurisdictions have ethical provisions that address an attorney's obligation for truthfulness more broadly. Rule 4.1 of the American Bar Association's Model Rules of Professional Conduct prohibits lawyers from making false statements of material fact or law and further prohibits lawyers from failing to disclose material facts to another person when the disclosure is necessary to avoid assisting a criminal or a fraudulent act by a client. This materiality standard suggests that advocates may play by slightly different rules in the context of negotiation. This ABA standard provides advocates with some wiggle room to practice some degree of puffery and non-disclosure.[295]

Professor Ruth Fleet Thurman takes a strong stand against lying in negotiations. According to Thurman "(l)ying in negotiations should not be countenanced, much less expressly authorized."[296] For Thurman the materiality requirement in ABA Rule 4.1 should be repealed in order to maintain the presumption of honest behaviour and to prohibit exceptions to the broad application of the ethical requirement of honesty.

Some state jurisdictions within the U.S. have gone further and enacted rules of professional conduct that expressly address truthfulness in the context of negotiation. The Preamble to South Carolina's Rules of Professional Conduct provides "(a)s negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others."

In Uganda, it not uncommon to hear people refer to lawyers as "liars." The public perception is that lawyers obtain favourable results

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[294] The Advocates (Professional Conduct) Regulations, Statutory Instrument 267-2, Regulations 15, 16 and 18.

[295] Ruth Fleet Thurman, "*Chipping Away at Lawyer Veracity: The ABA's Turn Toward Situation Ethics in Negotiations*," 1990 *Journal of Dispute Resolution* 103, 1990.

[296] *Ibid*.

for their clients by practising deception and misrepresentation. If Ugandan advocates want to improve their standing in the community perhaps they should endorse the adoption of more expansive and stringent limitations on dishonesty that will apply even in the context of negotiations. In addition, they should strive to act in an honest manner that is above reproach in all contexts.

8.5.1.2 Principled Negotiation: Ethical and Effective Advocacy

Ethical negotiations go beyond honesty and cordiality. Ethical negotiation encompasses the purpose behind the negotiation. For example, are you negotiating to get the most money you possibly can for your client? Or are you negotiating for a fair and sustainable result that can restore and grow relationships?

Ethics are not limited to the assessment of individual actions on a case-by-case basis. An informed ethical perspective entails broader societal impacts. In the context of negotiation, principled negotiation promotes the common good and improves society's perception of the legal profession.

The default negotiation style for many is "positional negotiation."[297] This is the negotiation style that resembles a game of tug-of-war with each side simply trying to move the final agreement one way or the other. Positional negotiations break down as win-or-lose exercises where any gains for one party result in a loss for the other party. In positional bargaining, each side stakes out its position and simultaneously attacks the other's position. Positional negotiation is competitive and often damages relationships.

[297] For a discussion of the detriments of positional negotiation as well as the benefits of principled negotiation, see R. Fisher and W. Ury, *Getting to Yes, Negotiating Agreement Without Giving In*, Penguin Books, USA, 1981.

There are instances where positional negotiation is really the only form available. (E.g. when the only thing in dispute is the amount of money someone is going to pay for an object in a one time encounter between buyer and seller.) However, in most instances there are factors that make the negotiation more complex. In these situations a party can adopt "principled negotiation."

There are certain key attributes to principled negotiation. First, principled negotiators avoid threats and manipulative tactics. Threats and manipulation damage relationships and destroy trust.

A second key attribute of principled negotiation is separating the people from the problem.[298] In a principled negotiation, the parties focus on the issue to be resolved. Achieving revenge and inflicting pain and shame are not legitimate objectives when you separate the people from the problem.

A related attribute to separating people from the problem is an emphasis on objective facts. When a negotiator's positions are based on facts they become principled. By focusing on the facts, parties shift from blame and positional techniques. Instead they look to build a factual basis that supports the principled position they take. This approach has the added benefit of enabling parties to better prepare for trial in case negotiation fails.

Principled negotiation decisions are based on legitimate reasons as opposed to mere emotional pressure and manipulation. Sometimes concessions are made simply out of frustration, weariness, pressure, fear or desire to please the opponent. The resulting agreements may fail to hold up over time and can result in feelings of remorse and regret. When parties negotiate based on principle instead of emotion they avoid consenting to agreements for the wrong reasons.

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[298] Ibid.

Principled negotiations tend to create just results. In terms of ethics, advocates must not simply pursue the best result they can for the client. There comes a point when an advocate can achieve an unfair result. As Professor Alvin Rubin wrote "(t)he lawyer should not be free to negotiate an unconscionable result, however pleasing to his client merely because it is possible, any more than he is free to do other reprobated acts."[299] Per Rubin there is no substantial moral distinction between conduct that is illegal verses conduct that is unconscionably unfair. Rubin posits that a "duty of fairness is one owed to the profession and to society" and that duty "must supersede any duty owed to the client."[300] If advocates adopt a principled negotiation style, they are better aligned to generate fair results.

There are other positive benefits that flow from principled negotiation. These include building trust between parties, building and restoring relationships, reduced emotional stress and better overall outcomes. Adopting a negotiation style that engenders such results has positive ethical implications.

8.5.2 Ethics in Mediation

There are two basic categories of professional actors in the mediation process. First, there is the mediator. Second, there are advocates that may be representing the parties to the mediation.

The ethical obligations in the context of mediation are largely addressed in the previous section. However, there are some additional concerns. In particular, mediations are often confidential proceedings. Therefore, advocates must be careful to respect the requirements of confidentiality and make sure their clients understand them as well.

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[299]Alvin B. Rubin, "'A Causerie on Lawyers' Ethics in Negotiation," 35 *Louisiana Law Review* 579, 1975.
[300]*Ibid*.

As for the mediator, there are no uniform rules that govern the conduct of mediators in Uganda. Even so, we can glean guidance on the proper conduct of mediators from certain statutory authority in Uganda as well the standards established by CADER.

The Arbitration and Conciliation Act, Cap 4, Section 53 defines the role of a conciliator/mediator as one who assists parties in an independent and impartial manner in their attempt to reach an amicable settlement. It further sets forth the guiding principles for conciliators in Uganda. These include: objectivity, fairness, just consideration of applicable legal principles and contextual awareness.

CADER, the primary implementer of formal ADR activity in Uganda, maintains a Code of Conduct. This Code of Conduct applies to all mediators appointed by CADER and mediators otherwise directed to mediate in accordance with CADER's procedures. These principles provide sound ethical guidance for all mediators operating within Uganda.

The official objectives of CADER's Code of Conduct for Mediators include providing protection for the public and promoting confidence in the mediation process for resolving disputes.[301] Certain ethical principles are emphasised in the Code of Conduct. Key principles include: 1) the principle of self-determination; 2) impartiality; and 3) confidentiality.

8.5.2.1 Self-Determination

The principle of self-determination is based on the premise that mediations merely promote voluntary resolutions. Mediators do not have the power to force the parties to agree to anything. The CADER Code of Conduct for Mediators underscores the relevance of self-determination in many respects. The Code requires mediators to advise the parties that

[301] Centre for Arbitration & Dispute Resolution (CADER) Code of Conduct for Mediators. Available at CADER.

the mediator has no power to force the parties to take any action or enter any agreement. Moreover, the Code restricts mediators from giving any legal advice to the parties.

8.5.2.2 Impartiality

A second principle expounded in CADER's Code of Conduct for Mediators is impartiality. The Code provides that a potential mediator should only accept to mediate matters where impartiality can be maintained. The Code does not elaborate or define what is meant by impartiality of a mediator. Mediator impartiality instils trust, enables parties to collaborate and share information with the mediator and other parties, protects mediation agreements from subsequent challenges and promotes public confidence in the process.

According to the Mediation UK's Practice Standards, the concept of non-partisan fairness is equivalent to "impartiality," which is defined as "attending equally to the needs and interests of all parties with equal respect, without discrimination and without taking sides."[302] A joint undertaking by the American Arbitration Association (AAA), the American Bar Association (ABA) and the Society of Professionals in Dispute Resolution (SPIDR) produced the *Model Standards of Conduct for Mediators*, which defines "impartiality" as even-handedness and lack of "prejudice based on the parties' personal characteristics, background or performance at the mediation."[303] Impartiality can be observed in the way the mediator relates with the parties in dispute and even in the way the mediator addresses the issues in controversy. The behaviour from the mediator must be equal and balanced.

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[302] C. Morris, "The Trusted Mediator: Ethics and Interaction in Mediation" from J. Macfarlane, *Rethinking Disputes: The Mediation Alternative*, Cavendish, London, 1997 at p. 320.
[303] *Ibid* at p. 321.

8.5.2.3 Confidentiality

Another key tenant of mediator ethics is confidentiality. Assurances of confidentiality can help to open up dialogue and foster meaningful discussions between the parties. Given the central role that confidentiality plays in the process, it is crucial that mediators honour their obligations of confidentiality and that they instil reverence and respect for confidentiality among the participants to the mediation.

Rule VI of CADER's Code of Conduct provides for confidentiality of mediation proceedings and places an obligation on mediators to inform parties before them of the confidential nature of mediation. In addition to informing parties, mediators are barred from disclosing to anyone who is not party to the mediation any information, or documents exchanged for or during the mediation process. The exceptional circumstances which justify disclosure in the code is limited to where the parties have consented, court has ordered the disclosure of information, when the information discloses danger to human life and where the identity of information is disguised for use in research, statistical, accreditation or educational purposes.

LEGAL ETHICS IN PRACTICE

Land Wrangles in Uganda: Challenges and Opportunities for ADR

By Jeremy Akin

Land disputes pose unique challenges for Uganda's legal systems today. They also, however, provide ample opportunity for those seeking to employ alternative approaches to justice where it is needed most.

To begin with, land wrangles are rife in Uganda. Data from the Ministry of Justice reveals that land disputes rank the highest among

reported conflicts countrywide—experienced by 34.9% of households (Rugadya et al, 2009). A recent study estimates that in Acholi sub-region alone, over 12,000 land cases are brought before Local Council (LC) 2 Courts each year—and this does not include the volume of cases reported at the clan level, the venue most locals reportedly prefer (Burke and Egaru, 2011; Uganda Land Alliance, 2010). Since these numbers are expected to increase as remaining Internally Displaced Persons (IDPs) return, oil companies expand operations, and population growth trends continue, the need for critically- and creatively-thinking justice practitioners is greater than ever before.

Second, the complex and personal nature of these disputes means that these cases rarely concern a mere plot of ground. Instead, they often feature family tensions, inter-group grievances, greed for material gains, actual or perceived witchcraft, tenure insecurity, and fears over resource scarcity. Knowing how to identify and address these extrajudicial dynamics is therefore critical to the effective resolution of these cases.

Third, customary lands account for about 80% of Uganda's territory and the vast majority of all land-related court cases reported nationally (Rugadya, 2009). Both Uganda's 1995 Constitution (Article 237.3) and Land Act, Cap. 227 (Section 3.1.a) officially recognize the customary tenure system, insofar as custom aligns with the Constitutional guarantees against discrimination. Understanding the distinct principles, practices, rights, and responsibilities for land under customary tenure in each ethnic context is thus essential for the creation of workable legal solutions for the parties involved.

Lastly, both the clan and court systems share jurisdiction over customary land disputes. This environment of legal pluralism enables "forum shopping," whereby parties can select where to report their case in order to obtain their desired outcome. Some actors choose to exploit this ambiguity to their benefit, leveraging loopholes or contradictions in the law to argue for or against the application of custom in the case at

hand (Adoko and Levine, 2004). While such tactics may win cases, they also erode public confidence in the legal system and may lead aggrieved parties to take matters into their own hands. A great need exists, therefore, for ethical lawyers, mediators, and community peacemakers who recognize the value of harmonizing law and custom and use their influence to ensure sustainable justice for both parties.

Alternative dispute resolution (ADR) strategies have proven somewhat successful in mitigating land conflicts in Uganda (see Akin and Katono, 2011."Examining the ADRtistry of Land Dispute Mediators in Northern Uganda."). Instead of positioning family or clan members at odds like in litigation, processes such as mediation and conciliation preserve relationships and encourage joint problem-solving rather than ad hominem attacks. Moreover, ADR also creates space to investigate deeper interests and invent remedies that go beyond what a judge may traditionally order.

For instance, mediators are able to look beyond the case at hand and address the relational dynamics at play. Konsantino of Nambieso Sub County had been issuing death threats to the inheritor of his brother's widow when they sat down to mediate. He explains how the mediator tactfully addressed the grievances of both sides:

"Bringing us together at that time was a difficult task—I admit, I didn't even greet her in those days. At first, [the mediator] called just a small meeting between my sister-in-law, the mediator, and me, where he gave us counseling for our personal relationship. He started with giving us a chance to vent and be heard… He cooled us down by addressing our anger and taught us in such a way that we realized for ourselves that we were wrong. He never told us that directly or judged us, but recognized our free will to make choices for ourselves. A short time later, the mediator came to our village and met with us before the clan, where we talked about the land issues. Neither of us understood until [the mediator] taught us how the property of the deceased remains with

the widow and the orphans... and that clan leaders are the ones who approve land sales. We realized we were both in the wrong, and finally settled the dispute. My sister-in-law was being misguided to sell the family land for drinking money and go and leave with her boyfriend, but I was also misguided to think that we should chase her away."

When tempers flare, other mediators in Apac Sub County use jokes or hilarious stories to redirect parties' minds, and a parish priest in Amuru district independently counsels hostile and stubborn parties at their homes in-between joint mediation sessions. Moreover, when parties reach an agreement, some mediators take this opportunity to sketch a new map of the formerly disputed area and plant trees along the boundary, thus preventing future conflicts. These alternative approaches, which help parties confront the source of their misunderstandings, are often not possible in formal court settings. Yet many challenges exist for ADR in this context. Community mediators need better capacity to manage growing caseloads, local abuses of custom are often touted as the norm, donor-funded organisations tend to focus more on "settlement" rates rather than follow-up and lasting resolution, and mediation agreements remain non-binding. Perhaps most notably, the wholesale lack of reliable enforcement for land-related court judgments is a serious problem in situations of land grabbing—instances in which party A is deliberately seeking to exploit some perceived weakness in B in order to claim B's land. Although the criminal element in land grabbing makes such cases inappropriate for mediation (which relies upon parties' good faith), mediators nevertheless find themselves working with these cases, since they are nearly impossible to discern from genuine disputes until closely investigated.

Moving forward, ADR needs a strong enabling environment in order to be fully effective. At the policy level, this means that the Justice, Law, and Order Sector must clarify enforcement mechanisms to identify and address land-related crimes like land grabbing and explore legal

backing for mediated agreements. It must also specify a hierarchy for land case reporting, starting at the clan level and moving to the formal courts, to eliminate opportunities for forum shopping. On the ground, mediators must focus on the real resolution—and not simply the settlement—of land wrangles by preempting future conflicts, shifting from adversarial to more collaborative approaches, and following up on previous cases. Continued exchange of mediators' best practices and insights is also essential for cultivating a climate of legal creativity among those who seek to resolve these intractable, but not impossible, cases.

8.5.3 Ethics in Arbitration

The role of an arbitrator is similar to the role of a judge. Given that parties in nominating or appointing an arbitrator confer on the arbitrator so much power to ultimately decide their dispute, arbitrators are expected to conduct themselves according to high standards of professional conduct like judges who pronounce judgements on disputes before them.[304] Judges are held to higher standards of integrity and ethical conduct than attorneys or other persons not invested with the public trust.[305] Arbitrators are expected to exhibit and adhere to similar standards of integrity while occupying such office or even after ceasing to act as arbitrator.

8.5.3.1 Legal Guidance in Uganda on Ethical Standards in Arbitration

The most prominent legislation concerning arbitration in Uganda is the Arbitration & Conciliation Act. However, as is the case with ethical standards for mediators, the ACA is somewhat limited in terms of

[304] James J. Alfini, et al. *Judicial Conduct and Ethics*, Michie, 1995.
[305] *Ibid*.

specific ethical guidance. Therefore, we can once again turn to standards adopted by CADER for instructive ethical guidance.[306]

CADER's purpose in establishing ethical guidelines for arbitrators is to contribute to the maintenance of high standards and continued confidence in the process of arbitration.[307] CADER further recognises that various aspects of the conduct of arbitrators may be governed by agreements of the parties, by arbitration rules to which parties have subscribed or by applicable law.[308]

8.5.3.2 Key Ethical Principles for Arbitrators

There are certain key ethical principles that apply across the board to all arbitrators operating under CADER's mandate or standards. Among these principles are: a) integrity, fairness & impartiality; b) timeliness; c) the duty to disclose interests; d) independence; e) faithfulness; and (f) confidentiality.

8.5.3.2.1 Integrity, Fairness & Impartiality

The first ethical safeguard under CADER's Code of Ethics for Arbitrators in Commercial Disputes is a requirement for the arbitrator to uphold the integrity and fairness of the arbitration process. In furtherance of this ethical expectation, the Code prohibits arbitrators from soliciting appointment for themselves, although a general indication of willingness and availability to serve as arbitrator is appropriate.[309] After accepting appointment and while serving as an arbitrator, an arbitrator is required by the Code to ensure that he/she does not engage in any financial, business, professional, family or social

[306]The Code of Ethics for Arbitrators in Commercial Disputes – CADER FORM No.10.
[307]*Ibid*.
[308]*Ibid*.
[309]Uganda's Center for Arbitration and Alternative Dispute Resolution Code of Conduct for Arbitrators, Cannon 1.

relationship which can possibly affect the arbitrator expectation of being impartial or raise any suspicion or appearance of bias.[310] Furthermore, the CADER Code emphasises the need for arbitrators to make objective decisions and not be swayed by public pressure, clamour, and fear of criticism or by self-interest.

8.5.3.2.2 Timeliness

The CADER Code also reminds arbitrators to stem delaying tactics, harassment of parties or any other form of abuse of the arbitral process. Time management is of the essence in arbitration. To this end, Section 31(1) of the Arbitration and Conciliation Act requires the arbitrator to make the award within two months of entering on the reference. Parties are free to impose whatever time limits the parties think appropriate for the completion of the arbitration proceedings and the making of an award.[311] Arbitrators that fail to perform their functions in a timely manner may be terminated.[312]

The arbitrator may only enlarge time for making the award on reasonable grounds. Therefore, an arbitrator who accepts to serve in a matter is presumed to be available for the duties expected of him as arbitrator, to devote enough and adequate time for such duties and to work within the time permitted by the rules.

8.5.3.2.3 Duty to Disclose Interests

Canon II of CADER's Arbitral Code requires arbitrators to disclose the existence of any direct or indirect financial or personal interest in the outcome of the arbitration, as well as any relationship they personally

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[310] Ibid.

[311] Section 8.49.1 Arbitration Law, Lloyd's Commercial Law Library, Service Issue No.38:2, August 2004.

[312] *Roko Construction Ltd vs. Aya Bakery (U) LTD*, Misc. Application No, 12 of 2008, Arising out of CAD/ARB/NO.10 of 2007..

have with any party or its lawyer, or with any individual whom they have been told will be a witness.

Arbitrators are obligated to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. Disclosure is a continuing duty and should be made to all parties including fellow arbitrators. If the parties are concerned about an arbitrator's capacity for independence after a disclosure of interests, it is advisable for the arbitrator to withdraw from the dispute.

8.5.3.2.4 Independence

The arbitrator's independence is crucial in reaching a just decision. Independence calls on arbitrators to decide disputes brought before them according to the facts of the case and law without interference from the public or the parties in a dispute. An independent arbitrator is better positioned to keep an open mind and deliver an impartial award.

8.5.3.2.5 Faithfulness

The CADER Model Code Canon VI addresses the concept of faithfulness to the relationship of trust and confidentiality inherent in the arbitrator's office. It reminds us that arbitrators occupy the position of trust and should not use confidential information acquired during the arbitration process to gain any advantage.

8.5.3.2.6 Confidentiality

Depending on the terms of the arbitration, deliberations may be subject to confidentiality. When confidentiality applies, the arbitrator must honour this duty. Moreover, even when a proceeding is not confidential, the arbitrator should be as discrete as possible in terms of how he disseminates information concerning the arbitration.[313]

[313]CADER Model Rules, Canon VI.

8.5.3.3 Consequences and Accountability of Arbitrators

There are consequences when arbitrators fail to comply with ethical standards. In Uganda, the Arbitration & Conciliation Act provides formal checks on both arbitrators and mediators. Most significantly, the Act provides for the setting aside of an arbitration award under certain circumstances.

The Arbitration & Conciliation Act section 34 (2) empowers a court to set aside an award if an application is made to it under the following circumstances:

(i) incapacity of one of the parties to the arbitration agreement,
(ii) the arbitration agreement is invalid under the law,
(iii) lack of proper notice of appointment of arbitrator and arbitral proceedings,
(iv) the award relates to issues outside the terms of reference,
(v) the composition of arbitral tribunal contrary to agreement of parties,
(vi) the award was procured by corruption, fraud or undue means or procured with evident partiality by the arbitrator(s), or
(vii) the award is not in accordance with the ACA.

An arbitrator whose conduct does not correspond to commitment to ethical principles can be removed by the parties.[314] An award influenced, affected or procured by corruption or fraud on the part of the arbitrator or with evident partiality by the arbitrator can also be subjected to setting aside proceedings in the ACA. If the award is set aside on grounds of corruption, fraud or partiality this will have far-reaching negative consequences on the reputation of the arbitrator.

[314]*See e.g. Telkom Kenya Limited and Another v Kamconsult Limited Nairobi* (Mulimani) High Court Civil case numbers 262 and 267 of 2001 reported in [2001] 2 EA 574.

8.6 Challenges and Barriers facing Alternative Dispute Resolution in Uganda

In Uganda, there are structural and societal barriers that inhibit the wider use, adoption and integration of ADR methods. Here we will address the impact of the current rule regarding the award of attorney's fees and a bias for formal litigation among the Ugandan bar.

8.6.1 Attorney's Fee Rule

In Uganda, the losing party in court judgement is typically ordered to pay the costs of the winner's litigation. This creates an incentive for parties who believe they will win their cases to litigate their case all the way to a court judgment. The expectation of an attorney's fee award can make the use of ADR less appealing to clients. Parties who believe that they are on the right side of a case are less willing to resolve a matter through mediation when they believe they can get an award of attorney's fees if their matter is resolved in court.

8.6.2 Current Bias for Litigation among the Ugandan Bar

Despite calls for "client-centred" approaches, advocates have a great deal of influence over how matters are litigated. Advocates in Uganda tend to favour litigation for many reasons, including economic incentives, personal competency and familiarity. This bias on the part of Ugandan advocates inhibits the use, utilisation and development of ADR in Uganda.

8.6.2.1 Perceived Economic Incentives among Ugandan Advocates

Lawyers, especially those paid hourly, are in position to extract substantial fees from prolonged conflict, and may have an incentive to shape disputes in such a way as to maximize personal economic

benefits.[315] Many lawyers in Uganda fear that the spread and development of ADR is bad for business.

8.6.2.2 The Adversarial Tradition in Uganda

The Ugandan legal system is built on an adversarial model inherited from the British. This adversarial style is characterised by aggressive techniques involving long and endless court battles. Advocates in an adversarial system tend to view themselves as champions of the client's interests who are out to gain victory over the opposition. Advocates groomed in an adversarial system tend to be sceptical of systems geared toward reconciliation.

8.6.2.3 Structural Sources of Bias against ADR in Uganda

Ugandan advocates are accustomed to this adversarial system. Due to their training and experience, many Ugandan advocates are more comfortable with formal litigation and view ADR with suspicion and scepticism.

Uganda's legal education curriculum fosters a bias towards court-based litigation. Lawyers go through rigorous training focusing on the virtues of legal analysis and argumentation, of "thinking like a lawyer.''[316] At the Law Development Centre, future advocates are trained to argue cases in court and draft court pleadings.

The bias established within the educational system is reinforced through practice. The courtroom is the dominant forum for dispute resolution. As a result, Ugandan advocates are heavy on court-based experience.

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[315] R. Scott; S Edward & P Scott; *Negotiation*, Thomson West, New York, 2006, p.56

[316] *Ibid* at p. 57.

The result of this educational bias is a tendency to choose formal litigation over ADR. It should come as no surprise that advocates are going to favour environments and situations for which they have been trained and garnered experience.

8.6.3 The Way Forward

ADR will continue to rise in importance in the coming years. When formal legal sectors are unable to produce timely, efficient, cost-effective and non-arbitrary results, the parties to disputes will look elsewhere. When courts are unable to adequately manage their documents, they force matters into ADR. Therefore, future Ugandan advocates must be trained to perform professionally and ethically in ADR settings.

8.7 Conclusion

There is a steady global shift away from formal litigation to other forms of dispute resolution. ADR's momentum is building in Uganda. The Law Council and Judiciary have launched many programs and workshops to encourage the use of ADR. There have been calls to law schools to integrate ADR into the syllabus with a view of reorienting our legal training to focus on peaceful settlement of disputes. With fresh groups of law students filtering through there is hope for change and a shift away from only litigation. The Commercial Court's initiatives to promote and implement ADR have caught the attention and imagination of many.

This rise of ADR in Uganda has ethical implications. Advocates must appreciate their ethical duties and obligations in ADR settings. Moreover, advocates have a duty to promote and recommend ADR when it can serve the best interest of clients, the judicial system and society.

9

ACCESS TO JUSTICE AND PRO BONO LEGAL SERVICES IN UGANDA

By Anthony Conrad K. Kakooza †

9.1 Introduction

Uganda's 1995 Constitution makes several proclamations regarding equal access to justice.[317] Article 21(a) states that "(a)ll persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law." Article 28(1) states that "in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law." Article 126(2) (a) provides that in the adjudication of civil and criminal cases, the courts shall administer justice to all "irrespective of their social and economic status."

Uganda is also a party to several international conventions that establish rights to access to justice. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) provides for equal treatment under the law and provides that those that cannot afford to engage counsel have the right to have counsel appointed in matters

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[317] The 1995 Constitution of Uganda, Articles 21, 28 and 126.

"where the interests of justice" so requires.[318] The African Charter on Human and People's Rights has provisions regarding rights to access to justice that are similar to those found in the ICCPR.[319]

Are the preceding provisions and declarations mere platitudes or do those constitutional articles and convention provisions establish tangible rights? Can Uganda have a judicial system where the social and economic status of its litigants has no bearing on the justice those litigants receive? Can there be effective administration of justice to all in Uganda when the vast majority of people are too poor to afford legal representation?

The proclaimed standards in Ugandan Constitution and the ICCPR are quite lofty, particularly in the Ugandan context. True universal access to justice is a very difficult goal for any nation to meet. Access to justice must be the product of continuous, collective and concerted effort. It is a challenge to a broad commitment to public service and the extensive use and effective implementation of human capital and other resources. This chapter concerns access to justice and the tools and policies that are designed to increase access to justice.

Access to justice is an ethical issue. The members of society have the right to access justice. Advocates are the best-positioned actors in terms of knowledge, access and ability to make sure that access to justice is promoted and realized. It is an ethical obligation that advocates must work to achieve in the context of the economic and time demands of legal practice. It is an ethical dilemma that is particularly challenging in Uganda due to the high number of citizens with limited financial means and limited knowledge of their laws and the legal system.

This chapter begins with a background briefing on the problem posed by the inability of the poor to access justice in Uganda. This is

[318]International Covenant on Civil and Political Rights, UN Doc.A/6316 (1966) 999 U.N.T.S. 171, quoting from Article 14(3) (d).
[319]African Charter on Human and People's Rights, 21 I.L.M. 58 (1982).

followed by an introduction of the legal framework in Uganda concerning access to justice and a discussion of government efforts to improve access to justice. The chapter then explores the concept and objectives of *pro bono* services in detail. This includes a review of the regulatory directive concerning pro bono services in Uganda and an exploration of the benefits and challenges of pro bono work in Uganda. The chapter provides recommendations to strengthen the delivery and implementation of pro bono services in Uganda. It also includes an Appendix that provides short descriptions of some of the most prominent legal aid service providers in Uganda along with a non-exhaustive list of others.

9.2 Increasing Access to Justice in Uganda

According to a report prepared by the Commission on the Legal Empowerment of the Poor titled *Making the Law Work for Everyone*[320], one of the four pillars of legal empowerment of the poor is the provision of "access to justice and the rule of law." Pro bono legal services address this key pillar by empowering the poor and enabling the indigent to access justice.

In Uganda, the challenge of access to justice is quite formidable. This is largely due to the high levels of poverty, especially with respect to the practice of income generating activities. Only a small percentage of Ugandans can actually afford to pay for the services of an advocate. In fact, for many Ugandans the cost of court fees presents a serious financial challenge.

In addition to resources, there are other challenges. Many Ugandans do not understand the justice system. It is difficult to access justice if you have a limited understanding. For other Ugandans, there is a

[320] Commission on Legal Empowerment of the Poor: *Making the Law Work for Everyone*, Vol. 1, 2008, at p. 18.

problem of distrust. Many Ugandans view the justice system as corrupt. Ugandans with such views will not seek to access justice through the judicial system.

Legal Empowerment Snapshot

International Justice Mission's Activities in Uganda

By Jess Rudy, Field Office Director, International Justice Mission

International Justice Mission (IJM) is an international non-governmental human rights agency that secures justice for victims of slavery, sexual exploitation, property grabbing and other forms of violent oppression. IJM's lawyers and investigators document cases of ongoing abuse and intervene on behalf of those who are suffering to bring relief to victims and hold perpetrators accountable under local laws.

Since 2008 IJM's Uganda Field Office's primary focus has been addressing property grabbing in Mukono County, leveraging the power of the law to return over 800 victims of property grabbing to their homes and land. Since early 2012, IJM's Uganda Field Office has complemented its individual pro bono casework with a comprehensive structural transformation program designed to reduce the prevalence of property grabbing by improving service delivery of the public justice system in the areas of estate administration and criminal prosecution.

IJM looks at the law in much the same way that a doctor looks at a vaccine. Vaccines can only save lives if you have the needles necessary to get them into a patient's bloodstream. In the same way, laws designed to protect the property rights of the poor and vulnerable only serve their purpose if the poor and vulnerable can access their power through an effective public justice system. Uganda has numerous civil and criminal laws that have the power to

protect widows and orphans from property grabbing. Unfortunately, the public justice system has failed to bring the power of these laws to the people they were designed to protect. As a result, IJM has found that 55% of widows in Mukono are subject to attempted property grabbing and 30% ultimately lose their homes to property grabbers. Much like a patient dying of disease without a needle in a warehouse full of vaccines, the poor and vulnerable in Uganda suffer and sometimes die from the effects of property grabbing in a country with a legal system full of laws to protect them.

*For millions of poor people, their greatest and most hopeful source of wealth and well-being comes from the little plot of land they have acquired for housing and for cultivation. With a patch of land, they can provide a shelter for their family, grow a bit of food, and even operate a small enterprise. Take away their land and you have stolen their means of survival. (*Gary Haugen, President and CEO of International Justice Mission)

IJM engages in individual pro bono casework because it provides the poor with access to justice to which they would not otherwise have. We have seen our clients empowered, emboldened and strengthened by the realization that the authority of the public justice system can be leveraged to protect them from their oppressors. We have seen women who were on death's doorstep, ravaged by malnutrition and disease, transformed into vibrant and powerful home and business owners all because the power of the law trumped the power of brute force that had been holding them down. Access to justice literally has provided these individuals with a roof over their heads, food on their tables and futures for their children.

IJM complements its casework with structural transformation because the public justice system is intended to help all Ugandans, whether they are represented by IJM or not. Learning lessons from

our casework, we partner with Local Council Leaders, the Police, and the Administrator General to unblock the pipelines of justice in Uganda's public justice system. Only when these pipelines are cleared and the rule of law for all becomes a fact of life will the poor truly be empowered. Only when widows and orphans can live in their homes and cultivate their lands without fear that their work will be taken from them will they truly thrive and prosper.

9.2.1 The Legislative Framework in Uganda

A number of statutory and regulatory provisions in Uganda pertain to access to justice and the wider provision of legal services. The following is a descriptive listing of some of the most important provisions that address these issues:

The Poor Persons Defence Act, Cap. 20

This is an Act "to make provision for the defence of poor persons committed for trial before the High Court." Section 2 thereof provides:

> *Where it appears for any reason that it is desirable, in the interests of justice, that a prisoner should have legal aid in the preparation and conduct of his or her defence at his or her trial and that the means of the prisoner are insufficient to enable him or her to obtain such aid—*
>
> *(a) a certifying officer, upon the committal of the prisoner for trial; or*
>
> *(b) a certifying officer at any time after reading the summary of the case submitted at the committal proceedings, may certify that the prisoner ought to have the legal aid, and if an indictment is filed against the prisoner and it is possible to procure an advocate, the prisoner shall be entitled to have an advocate assigned to him or her.*

This Act is regulated by the Poor Persons Defence Rules, S.I No. 20-1.

The Advocates Act, Cap. 267.[321]

Section 3(e) stipulates that the Law Council shall "*…exercise general supervision and control over the provision of legal aid and advice to indigent persons."*

Section15A of the amendment to the same Act[322] provides:

(1) That every Advocate shall provide services when required by the Law Council or pay a fee prescribed by the Law Council in lieu of such services;

(2) That where any Advocate does not comply with sub section(1), the Law Council shall refuse to issue or renew a practicing certificate to that Advocate under sub section 11 of this Act.

The Advocates Act, as amended, is supplemented by other laws and regulations such as those below:

The Advocates (Legal Aid to Indigent Persons) Regulations, S.I No. 12 of 2007

These regulations are made pursuant to section 77(1) (g) of the Advocates Act. Regulation 3(1) stipulates that the regulations apply to persons, organisations or institutions providing legal aid to indigent persons in Uganda.

The Law Development Centre Act, Cap. 132

Section 3 (l) of this Act provides that the Law Development Centre shall have the function of "*assisting in the provision of legal aid and advice to indigent litigants and accused persons in accordance with any law for the time being in force.*"

(e) The Advocates (Student Practice) Regulations, S.I 70 of 2004

[321] Laws of Uganda, 2000 ed.
[322] Act No. 27 of 2002, Laws of Uganda.

These regulations are made pursuant to Section 11(6) of the Advocates Act concerning the right to practice. Regulation 7 is to the effect that no payment of any kind shall be given to a student for his or her services under these regulations. Thus the regulations enable students to provide pro bono legal services. Student services must be offered under the supervision of an advocate and the supervising advocate retains the right to bill for the advocate's services.

This regulatory framework is incomplete because it does not include the Advocates (Pro-Bono Services to Indigent Persons) Regulations, S.I No. 39 of 2009. Those regulations are presented in detail in the section on pro bono services.

A missing piece in this framework is the pending Legal Aid Bill.[323] If the Legal Aid Bill is passed, it will substantially add to the existing framework on legal aid. Included in the Bill are provisions for the establishment of a Legal Aid Commission that will be charged with "coordinating legal aid services in the country."[324] Critics note that the Legal Aid Bill is notable for the absence of funding to support the provision of legal services.[325] Instead the Bill appears to be more geared towards addressing the management of services provided through the mandatory assessment of pro bono services by advocates and civil society organisations.

9.2.2 Government Efforts to Increase Access to Justice

Uganda is home to several government strategies and initiatives to improve access to justice. Efforts range from establishing community sensitization programs to forcefully directing advocates to offer free legal services. What follows is an overview of some of the most

[323]Long Title, Draft Legal Aid Act 2011.
[324] Dan Ngabirano, *A Baseline Survey of Uganda's Legal Aid Providers*, Makerere, March 2012, p. 6 *citing* Section 3 and 13 of the Draft Legal Aid Act, 2011.
[325]*Ibid*, at p. 6.

significant initiatives and policies intended to increase access to justice. I begin with descriptions of some broad-based efforts that concern coordination and strategic development. Next, I will address more specific service-based efforts. I conclude this treatment with a description of government efforts to engage and enable non-governmental actors to improve access to justice.

There are certain wide-ranging efforts that seek to improve access to justice in Uganda. From 2007 through 2011, the Ugandan Judiciary has implemented administrative, legal and judicial reforms under the Judiciary Strategic Investment Plan II, better known as JSIP II. JSIP II seeks to enhance access to justice, improve human rights observance and strengthen the rule of law in Uganda. JSIP II is the first Plan to specifically list speedy and affordable access to justice for the poor and marginalized as one of the Judiciary's four primary strategic outcomes. The Judiciary is cognizant of the need to minimize financial hurdles and other bottlenecks hampering access to justice for vulnerable persons as well as enable physical access to JLOS institutions and services, improve the quality of justice delivered and reduce the technicalities that hamper access to justice.

A second broad-based initiative was the establishment of the Legal Aid Service Providers Network (LASPNET) in 2004. This network has provided a platform for collaboration and solution-directed initiatives within the wide array of actors that seek to promote access to justice. This effort has been further bolstered and coordinated through the existence of the Legal Aid Basket Fund.

A third broad-based approach concerns the efforts of the Justice, Law and Order Sector (JLOS) and Law Council. JLOS provides guidance and direction for non-governmental organisations seeking to increase access to justice for the poor and marginalized and to eliminate legal service gaps. JLOS's responsibility springs from a mandate issued by the Government of Uganda in 2000 for administration of justice and

maintenance of law and order. JLOS is committed to supporting the development of a national legal aid and pro bono policy. The Law Council is charged with devising the Terms of Reference for this initiative and has made some progress in this regard. This includes setting up a pro bono scheme supported by a legal and regulatory framework to ensure that pro bono and legal aid service provision is done in a well-coordinated manner.

One of the best-known government-based access to justice initiatives in Uganda is the State Brief System. Under State Briefs, the Ministry of Justice sends out invitations to practicing Advocates requiring them to represent indigent criminals at a modest fee provided by the State. This practice is in conformity with the Constitutional provision under Article 28 that requires that a person accused of a capital offence shall be entitled to legal representation at the expense of the State.[326] Most persons charged with capital offences cannot afford legal representation and yet the gravity of the offence requires that they be represented. As such, the State is constitutionally mandated to provide them with legal representation.

The advocates who are engaged to work in the State Briefs System typically receive less pay than the fees that are paid in private practice. Therefore, the State Brief System relies on the willingness of Ugandan advocates to deliver their services at lower than normal rates. The unfortunate consequence is that in some cases advocates compensate for their lower pay by providing services in a manner that could be described as less dedicated or less professional than the standard level of practice.

Some attribute the lack of interest in State Briefs to the meager fees paid out to advocates who take up the briefs. Excuses aside, the practice of advocates accepting payment for a State Brief and then giving it

[326]Article 28(3) (e) of the 1995 Constitution of the Republic of Uganda.

lackluster attention raises concern about the integrity and professionalism within the legal fraternity.

There are many critics of the State Brief System. Some condemn the level of service provided in the system. Many complain that lawyers assigned to handle matters on State Brief fail to exercise adequate diligence in research and preparation.[327] Some critique the low rate of pay provided to the advocates. Others assert that the State Brief System does not go far enough to meet the Ugandan Government's obligations under the Constitution and binding international human rights instruments such as the ICCPR due to the limited scope of criminal defendants who receive free representation.

Another prominent government-funded measure addressing access to justice is the Justice Centres Uganda initiative. Per its own materials "Justice Centres are a one-stop-shop legal aid service delivery model that seeks to bridge the gap between the supply and demand sides of justice by providing legal aid services across civil and criminal areas of justice to indigent and vulnerable persons, while at the same time empowering individuals and communities to claim their rights and demand for policy and social change."[328] Justice Centres offer a variety of core services to the "most indigent persons of Uganda" including: 1) legal advice; 2) legal representation; 3) alternative dispute resolution; 4) counseling; 5) legal awareness; 6) referrals; and 7) a toll-free help line.[329] The Justice Centre initiative is intended to "address the dilemma of availability, accessibility, and quality of essential legal and human rights based support to (the) indigent population of Uganda."[330] There

[327] Unstructured Interview conducted on May 26th 2011 with Mr Besigye Aaron, Head: Legal Aid & Pro-bono services, Legal Aid Project, Uganda Law Society.
[328] This description is taken from the home page of Justice Centres Uganda: http://www.justicecentres.go.ug/ as accessed on 21 January 2013.
[329] This list of activities is taken from http://justicecentres.go.ug/about as accessed on 21 January 2013.
[330] Justice Centre Uganda, *Legal Aid Service Provision Mapping Report* (No Other Publication Information Provided in Report), p. 4.

are many Justice Centres throughout Uganda including ones in: Amolatar, Apac, Bududu, Bugiri, Bukwa, Butaleja, Busia, Dokolo, Iganga, Kaberamaido, Kitgum, Kotido, Lira, Manafwa, Namutumba, Oyam, Pader, Pallisa and Tororo.[331]

In addition to these key government initiatives, the Government seeks to promote the provision of legal services to the poor and disenfranchised through private legal practitioners and non-governmental organisations. The Government support for such efforts ranges from the establishment of regulations requiring all practicing advocates to perform pro bono services (or pay a fee in lieu of providing such services) to openness towards cooperation with non-governmental organisations (NGO's). I will address pro bono and pro bono policy issues subsequently in this chapter. Here I will conclude this section with a brief discussion of the Government's interaction with NGO's operating in the justice sector.

The Government does not give NGOs *carte blanche* authority to do whatever the NGOs want to do. The activities of NGO legal service providers are vetted and supervised by the Legal Aid Sub-Committee of the Law Council under the Ministry of Justice and Constitutional Affairs. In addition, certain NGOs have incurred the displeasure and public criticism of the Government for falling short of fulfilling the Constitutional objectives of legal aid service provision. That said, the Government of Uganda is quite open to extensive partnerships and collaborations with NGOs in the context of justice delivery. Perhaps the best testimony to Uganda's openness toward NGOs in the justice sector is the large number of NGO actors involved in a wide range of activities and initiatives concerning access to justice. Short reports on many of these actors and their activities are included in an Appendix to this chapter.

[331] Id. p. 4

9.2.3 Pro Bono Legal Services

The word '*Pro bono'* is of Latin origin and carries the meaning of designated legal work undertaken without charge for someone on a low income.[332] This phrase is an abridgement of the term '*Pro bono publico'* which means "for the public good."[333] Drawing from this understanding, pro bono work is essentially legal aid work to vulnerable or underprivileged persons, carried out at either a low professional cost or no charge at all. Pro bono is regarded as central in providing access to justice by ensuring equality before the law, the right to counsel, and the right to a fair trial.

The goal of the Pro bono Scheme, from a Ugandan perspective[334], is to ensure indigent, vulnerable and marginalized persons access to justice and the objectives are to –

(a) Promote equality in access to justice and improve delivery and standard of legal services through pro bono,

(b) Interest advocates in appreciating the provision of pro bono services,

(c) Strengthen institutional linkages with other legal aid service providers,

(d) Promote and emphasize the use of Alternative Dispute Resolution (ADR),

(e) Promote networking and collaboration with stakeholders at local and international levels to improve the administration of justice.

When a lawyer works on a pro bono basis, that lawyer is said to be working for the public good. In Uganda the Advocates (Pro-bono Services to indigent Persons) Regulations set the parameters for work

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[332] Shorter Oxford English Dictionary 5th Ed. Vol. 1, Oxford University Press.
[333] New Oxford American Dictionary, 2012 ed.
[334] *The Pro-Bono Handbook: A legal practitioner's guide*, Uganda Law Society, (with support from the Legal Aid Basket Fund) 2011; at p. 1.

that qualifies for pro bono status based on the type of work and the beneficiaries of the work.

Most jurisdictions consider it necessary to provide some level of legal services to persons otherwise unable to afford meaningful access to justice. However, true equality within a judicial system goes beyond mere access to court or legal counsel. Litigants with superior resources are able to hire advocates that warrant higher fees based on their superior skills and reputations.

Worldwide, major imbalances in civic and economic opportunities exist. Imbalances in accessibility to the attainment of justice must be effectively addressed through the provision of legal aid. Failure to adequately address imbalances constitutes a violation of the principles of equality before the law and due process under the rule of law.

There are several delivery models for provision of pro bono legal services:

- The 'Staff Attorney' model – Lawyers and law firms are employed on a salary basis, solely to provide legal assistance to qualifying low-income clients, similar to staff doctors in a public hospital. Examples include the Legal Aid Clinic of the Law Development Centre, Kampala, the Uganda Christian Lawyers' Fraternity and the Legal Aid Project at the Uganda Law Society Secretariat, Kampala.
- The 'Judicare' model – Private lawyers and law firms are paid to handle cases from eligible indigent clients. At times such programs are optional, and in other instances the provision of such services at some level is a requisite for court membership. The Ugandan example of the judicare model is the State's Brief system for capital offenders mentioned above.
- The 'Community legal clinic' – Comprises non-profit clinics serving a particular community or group setting through a broad

range of legal services such as legal representation, sensitization on fundamental topics, and so on. This is similar to community health clinics.

- The Bar Society model – Law Societies/Bars require every member to handle a certain number of pro bono cases each year as a prerequisite for renewal of a member's practicing certificate annually. An example of such mandatory provision of pro bono services is found in Uganda as illustrated below.

Prior to the passing of mandatory pro bono service requirements, advocates assisted in the provision of pro bono legal services on their own volition as a matter of professionalism and public duty. Mandatory pro bono service requirements first began to appear prominently in global legal systems about thirty years ago. This trend was first evident in the United States.

In 1983, the American Bar Association House of Delegates adopted a rule that all lawyers should "render public interest legal service." Pressure from the American Bar Association and subsequent revisions that clarified the terminology ignited widespread interest and engagement. Subsequently, in 1993, the Law Firm Pro Bono Project put forth a challenge to the legal community to contribute three to five percent of billable hours to pro bono legal services. By 2007, the number of legal pro bono organisations in the U.S had drastically increased from approximately 80 organized programs in 1980 to almost 800 by the close of 2010.[335]

In Uganda a mandate-based pro bono policy has its genesis in the Advocates Act in 2002. Subsequent formal pro bono policy measures have sprung from this seedbed including The Advocates (Pro-bono Services to Indigent Persons) Regulations, 2009. These Regulations are

[335] *See* www.nationalserviceresources.org/probonofaq - as accessed on February 21, 2011.

the major landmark in pro bono service policy in Uganda. What follows is an abridged version of the Regulations:

The Advocates (Pro-bono Services to indigent Persons) Regulations, S.I No. 39 of 2009

These Regulations are made pursuant to sections 15A and 77(1)(a) of the Advocates Act. As stipulated in Regulation 3, these rules make the provision of pro-bono services mandatory by every Advocate. Advocates are required to offer forty (40) hours of pro-bono services to an indigent person every year.[336]

According to Regulations 3(2) and (3), the pro bono services to be offered include:

(a) Giving advice or providing representation to indigent persons;
(b) Involvement in free community legal education;
(c) Involvement in giving free legal advice or representation to a charitable or community organisation or to a client of such an organisation.

They may also include professional services relating to—

(a) Administrative law;
(b) Business law, in relation to a non-profit making organisation;
(c) Child care and protection;
(d) Criminal law;
(e) Debt and credit;
(f) Discrimination;
(g) Employment and industrial law;
(h) Family and succession law;
(i) Wills and estates;
(j) Human rights;
(k) Land rights;

[336] Reg. 3(1), The Advocates (Pro-bono Services to indigent Persons) Regulations, S.I No. 39 of 2009,

(l) Tenancies;
(m) Women's rights;
(n) Environment and health; and
(o) any other matter approved by the Law Council or a body delegated by the Law Council for that purpose.

Under Regulation 4 an advocate who is unable to provide pro bono services is required to pay the equivalent of one currency point to the Law Council for each two professional service hours that the advocate has not provided. A currency point is equivalent to twenty thousand shillings.[337]

These Regulations are largely self-explanatory. They establish the minimum threshold of pro bono services that must be provided. They provide for payments that can be made in lieu of the provision of pro bono services. They establish the categories of legal work that is eligible for pro bono credit and the possible identities of the beneficiaries of pro bono services.

Pro Bono services offer benefits to the providers as well. Generally speaking, fresh law graduates share an ambition to make money in their first years of practice. As such, many of them shun working with Civil Society Organisations (CSOs) or other pro bono service providers, due to the perception that there is limited potential financial remuneration. The idea of rendering pro bono services is also shunned by many lawyers since offering free services is the opposite of 'making money.' This part of the chapter illustrates that there are a variety of benefits associated with doing pro bono work for both law students and lawyers alike.

- **Pro bono services enhance career opportunities for law students.**

[337] *Ibid*. Reg. 2

Following the operation of the *Advocates (Student Practice) Regulations, S.I 70 of 2004,* Bar Course students that engage in pro bono legal practice have a twofold opportunity of not only gaining exposure to legal practice at an earlier stage, but also the opportunity to garner an impressive network that ultimately catches the eye of a potential employer. Pro bono engagements for Bar Course students are an excellent opportunity for establishing professional networks with established lawyers.

A law student that gets involved in pro bono work displays honesty and commitment in helping vulnerable people access justice. Any person recruiting would thus desire to have such a law graduate on his or her team of employees.

- **Pro bono services develop vital skills necessary in the legal profession.**

  Pro bono work provides practical learning experiences. Law student exposure to pro bono services helps develop personal organisation and time management skills. Legal aid clinic work builds skills in witness interviewing, counseling, alternative dispute resolution mechanisms, legal writing and drafting, and legal research.

  Engaging in pro bono work also builds teamwork and interpersonal skills. Pro bono work is not so much about ensuring that a case is won through hook or crook for the sake of making a name for the lawyer handling the case – which is characteristic of private legal practice. In the alternative, the core principles that provide a basis for the work of pro bono organisations, nurture team work and commitment among the members of staff in ensuring that they live up to those principles.

  Accountability is also a core activity since most legal aid service providers operate under the Legal Aid Basket Fund. As such,

accountability and working with integrity become part and parcel of their day-to-day legal practice.

- **Pro bono services can boost a student's academic performance and curriculum vitae.**
  Participation in live-client or other pro bono work boosts students' academic performance. Clinical Legal Education programs are presently conducted at the School of Law, Makerere University, the Faculty of Law, Uganda Christian University, and other law schools in Uganda. Such programs enable student participants to see the law in context and to understand what it means to practice law at a deeper level. Similar programs for Bar Course students at the Law Development Centre enable them to acquire hands-on training. Students prepare client files for trials (acquiring file management skills) and conduct legal research. Clinical experiences enable the students to understand the law from the perspective of a lawyer already in the field.

9.2.4 Challenges to the Provision of Legal Aid and Access to Justice in Uganda

As noted previously, there are policies and regulatory efforts in place in Uganda designed to increase access to justice. However, there are still a number of substantial challenges to the effective provision of legal aid and access to justice in Uganda:

9.2.4.1 Advocate backlash

The provision of pro bono services (or the payment of a fine in the alternative) became mandatory with the adoption of the Advocates (Pro-bono Services to indigent Persons) Regulations. Much as this Regulation helps to elicit and extract free legal services from advocates, it should be noted that compulsion towards rendering legal aid has its criticism as well. Colin Cohen, a partner at *Boase, Cohen & Collins*, a law firm in Hong Kong, asserts[338]:

> *I don't believe in compulsion because I don't believe compulsion works, but I would be in favour of a central scheme putting together a list of lawyers who are prepared to deal with pro bono cases, so that people who really need help can get it. I think the Law Society and the Bar should set up a pro bono unit.*

Requiring advocates to provide pro bono services might cause them to look at their duty to the wider public as a regulatory burden as opposed to a professional responsibility. Instead of working to provide a valuable service to the poor and excluded, advocates might look for a way around the requirement. In many instances this will result in advocates simply choosing to pay the alternative fee in lieu of providing legal services. Advocates who choose to pay the fee might convince themselves that they have met their obligation to society through their small payment. Unfortunately, the funds received from advocates in exchange for opting out of pro bono work do not begin to handle the huge needs on the grounds that they are dependent on the provision of quality legal work. In any case, payment of a fee in lieu of legal aid

[338] *Practice Management: The Hong Kong Lawyer*, May 1997: *Why Pro Bono pays; see* http:/www.sunzi.lib.hk/hkjo/view/15/1501148.pdf – as accessed on February 21, 2011.

service hours does not reduce the huge number of underprivileged persons that are in need of access to justice.

The Motivation behind Pro Bono Legal Services Impacts the Quality and Spirit of the Service Provided.

By Eunice Nabafu, Advocate of the High Court and Project Director Uganda Christian Lawyers Fraternity

The concept of free legal assistance for the poor was promoted by the publication in 1919 of Reginald Heber Smith's *Justice and the Poor*. Smith challenged the legal profession to consider it an obligation to see that access to justice was available to all, without regard to ability to pay. "Without equal access to the law," he wrote, "the system not only robs the poor of their only protection, but it places in the hands of their oppressors the most powerful and ruthless weapon ever invented."

In framing the debate on how the motivation behind *pro bono* legal services impacts the quality and spirit of the service provided, it is important to examine the different motivations behind *pro bono* work. Some of the voluntary motivations include the legal practitioners' view of legal assistance as a form of charity. If this is the motivation clients deemed not to be among the "deserving poor" are turned away. For some lawyers their *pro bono* service is said to come from a sense of moral commitment to a particular set of issues or objectives. To the others, it is about the spiritual drive. An example of such a motivation applies to Uganda Christian Lawyers Fraternity (UCLF) whose mission statement is "speak up and judge fairly, defend the rights of the poor and needy" (Proverbs 31:9).Under this spirit, UCLF encourages its members to use their legal skills for the sake of the Kingdom of God. Meanwhile, the new regulatory framework in Uganda creates an external motivation grounded in a mandatory requirement.

> In my opinion, the source of the motivation impacts the quality and spirit of the pro bono services provided. There is a difference between performing a task because one wants to verses performing a task when one has to. There is also a difference in the way you treat the people you are serving in such circumstances.
>
> That said, it should be noted that devising means for providing effective legal services to the indigent and poor is major problem. In Uganda we have decided to sacrifice a bit of the quality and spirit of the pro bono services provided in order to force broader participation in pro bono service delivery among the Bar.

9.2.4.2 Overdependence on donor funding

A number of Legal Aid and pro bono service providers rely heavily on donor funding and are accountable to the Legal Aid Basket Fund. Reliance on outside funding generates operational uncertainty. For instance, the Legal Aid Project (LAP) of the Uganda Law Society has, since its inception, been funded by the Norwegian Agency for Development Cooperation (NORAD) through the Norwegian Bar Association. A large percentage of their activities and administrative budgets remain dependent on donor funds. Although various members of the Uganda Law Society have made financial contributions towards the running of the Legal Aid project, transition into financial self-sustainability for such legal aid providers remains a challenge. Furthermore, operational and administrative costs for many pro bono service providers take up over 50% of the overall budgets. These include costs for salaries, office space and other related costs, as compared to the actual spending costs on specific legal aid programs and activities.[339]

[339]Report of the Baseline and needs analysis survey on Legal Aid provision in Uganda, May 2004.

9.2.4.3 Lack of Government Policy

There is currently no Government policy on Legal Aid Services to guide the effective and efficient provision of legal aid in Uganda. Nonetheless, a draft policy, spearheaded by the Judiciary under the Strategic Investment Plan, is presently in the offing. In the absence of a national legal aid scheme, effective legal representation for the poor and access to justice remain elusive.

A large portion of legal aid service provision is furnished by CSO's with support from various donor agencies. While the activities of such legal aid providers are vetted and supervised by the Legal Aid Sub Committee of the Law Council under the Ministry of Justice and Constitutional Affairs and the Legal Aid Project of the Uganda Law Society under its Legal Aid Service Scheme, the supervisory role of the Law Council must be strengthened in order to ensure that the legal community in Uganda interfaces effectively with civil society's service providers.

9.2.4.4 Economic, Social and Logistical Challenges

As noted earlier, Uganda is home to a number of economic, socio-cultural and logistical challenges. In terms of economics, Uganda has a large number of poor citizens that depend on subsistence farming for survival. Moreover, many Ugandans who are able to live a decent quality of life are not able to access the cash needed to pay for legal services.

Uganda is also home to many ethnic groups. This creates challenges in the translation, dissemination and implementation of the written law. Moreover, many Ugandans distrust the court system based on the costs, fear of corruption and beliefs that the formal law conflicts with widely held cultural beliefs. All of these factors present serious challenges to justice delivery and access.

Finally, and related to the above, is the issue of logistics. In Uganda, access to justice remains elusive for many people residing in rural areas. While the majority of advocates and civil society organisations are based in Kampala, many of the people who need the most help live far from Kampala. As such, many peasants in need of legal assistance are either unable to reach the legal aid providers or do not know where to access legal aid and legal service providers. This problem is compounded further by general challenges faced in organizing community outreach programs. Related challenges include a dysfunctional transport infrastructure and communication barriers.

9.3 Recommendations

The following is a list of eleven recommendations for improving the management and delivery of pro bono services in Uganda:

(1) Reforming the law on paper is not enough to change the reality on the ground. Poor people also need a legal and judicial system that they can access – one that ensures that their legal entitlements are practical, enforceable and meaningful. Therefore, efforts to legally empower the poor should focus on the underlying incentive structures as well as the capacity of the judiciary and state institutions necessary to make the law work for the poor.[340]

(2) The current scheme on legal aid provision orchestrated by civil society often focuses on the resolution of discrete legal problems instead of equipping people to handle their own legal challenges. More emphasis should be placed on community outreach programs that build awareness on basic legal rights such

[340] Government of Uganda (2002): *Participatory Poverty Assessment on Safety, Security and Access to Justice: Voices of the poor in Uganda*, Ministry of Justice and Constitutional Affairs, Justice Law and Order Sector (JLOS).

as land ownership and inheritance. More legal and human rights awareness programs should be introduced in schools especially in the rural areas. In the same vein, measures to improve access to justice should focus on developing low-cost justice delivery models, taking into account (1) the cost of legal services and remedies; (2) the capacity and willingness of the poor to pay for such services; (3) the congestion in the court system; (4) the incentives of the judiciary and law enforcement agencies; and (5) the efficacy of informal and alternative dispute resolution mechanisms.

(3) When structuring a national pro bono scheme, considerations should be made with the existing Law Council pro bono scheme as a foundation. Other factors to consider include physical barriers to accessing justice, timing and capacity to improve access to justice as well as the existence of formal and informal institutions that poorer citizens approach for judicial and quasi-judicial intervention, and the weakness of existing institutional arrangements.

(4) The importance of access to justice, legal aid and pro bono services should be emphasized at the law school level. This exposure should include field activities in order to ground future advocates in the importance and rewards of public service.

(5) Consideration should be given to providing legal aid desks at Police Stations and police posts. These would be vital contact points for persons reporting cases on any form of human rights infringement, especially for victims that are unaware of how to proceed in following up their cases or seeing to it that justice is done.

(6) Legal aid service providers should rigorously undertake more training of paralegals at the sub-county and parish levels so as to make it easier for persons in far-to-reach areas to know how to

access justice through members of their own local communities. This will also help to alleviate the communication barriers.

(7) It has also been suggested[341] that lawyers with a reluctance towards pro bono practice should be encouraged to take on law school interns or Bar Course students to handle pro bono cases, and in return, the advocate supervising the student would be awarded professional contact hours for pro bono service provisions under the Pro Bono Scheme and the Advocates (Pro bono Services to Indigent Persons) regulations, 2009. In this way, the student benefits from professional exposure and training while the lawyer acquires the contact hours needed to satisfy pro bono service requirements without necessarily directly rendering such service.

(8) Colin Cohen, a partner in the law firm of Boase, Cohen & Collins (Hong Kong) is critical of making it mandatory for private attorneys to provide pro bono services. Cohen suggests that the law society and the Bar should set up a unit comprising a list of lawyers who are prepared to deal with pro bono cases, so that people who really need help can get it from such a unit. These units would also guarantee commitment and exercise of due diligence from the lawyers involved hence rendering effective service. After all, as has already been emphasized, the most fundamental motivation for lawyers engaged in pro bono work should be the desire to see that justice is done.

(9) Some of the prevalent cases that keep recurring, especially upcountry, involve domestic disputes. The victims of domestic abuse are normally resigned to fate because of ignorance or poor access to justice. As such, more interventions should be designed

[341] Unstructured Interview with Dr. Pamela Tibihikirra-Kalyegira, Dean, Faculty of Law, Uganda Christian University, conducted on June 8th 2011.

and implemented in the areas of wife and child protection, capacity building and resource mobilization.

(10) Areas that are difficult to access such as the regions of West Nile, Karamoja, and the Islands of Lake Victoria should be the focus of special efforts in terms of capacity building and the provision of legal aid.

(11) CSO's require support in building their capacity to manage programs in both organisational and institutional development. Different regions in the country should develop systems and mechanisms for integrating programs into sub-county plans and budgets.

9.4 Conclusion

The provision of legal aid and pro bono services in Uganda stands at important crossroads. The needs of the public are massive and growing. The Legal Aid Bill is yet to be enacted. New policies are being launched to increase the delivery of legal services to the poor. Meanwhile, government funding remains limited to the provision of certain services and projects and the broader coordination of individual actions, while existent on paper, is limited on the ground.

Presently the Roll of Advocates and CSO's feel the weight of the challenges of access to justice in Uganda. It is crucial that the pressure these two groups experience does not undermine the mission to improve access to justice. Advocates must not resent the duty of pro bono service that is an obligation within the legal profession. Instead, advocates must recognize their duty to the public and take up the mantle of service with enthusiasm and drive.

Meanwhile, CSO's must continue to meet the challenges of capacity building and service delivery that are not met by other actors. This can

be particularly daunting given reductions in funding and the difficulty in demonstrating that such efforts are generating results.

At the end of the day, both the people of Uganda and the government of Uganda must embrace a larger role. For the people it comes back to capacity building and legal empowerment on the citizen level. For the government it comes down to prioritizing legal aid provision by increasing funding levels in a manner that treats access to justice as a human right. It will not be an easy road for any of these key players. However, it is a road we must take so that Uganda can realize her full potential.

9.5 ADDENDA: Table of Legal Aid Providers in Uganda

The following is a list of active legal aid providers in Uganda. This list is not meant to be exhaustive[342].

(a) Legal Aid Project of the Uganda Law Society

The Legal Aid Project (LAP) was established by the Uganda Law Society in 1992, with assistance from the Norwegian Bar Association, to provide legal assistance to indigent and vulnerable people in Uganda. The Project was born out of the realization that apart from the State Brief system that handles only capital offences and the huge back-log of cases, there is no statutory free legal service provision in Uganda despite the fact that a large part of Uganda's population lives below the poverty line, and without means of accessing justice. LAP has branches in Kabarole, Kabale, Masindi, Jinja, Gulu and Luzira, with its head office in Kampala. To date, the project has helped and continues to help thousands of

[342] Dan Ngabirano's *A Baseline Survey of Uganda's Legal Aid Service Providers* (*See supra* note 9)was a helpful resource in supplementing the content in this list.

indigent men, women and children in advocating for their human rights.

(b) Legal Aid Clinic of the Law Development Centre (LAC)

This clinic was founded in 1998 with assistance from the Ford Foundation and the United States Agency for International Development (USAID). It offers free legal assistance to indigent petty criminals and juvenile offenders as well as children in need of care and protection. It engages students at the Law Development Centre.

(c) Public Defender Association of Uganda (PDAU)

The PDAU is a Nonprofit Human Rights organisation that offers criminal legal aid and pro bono services to the poor. It was conceived in 1997 as one of the new models for improved administration of justice in Uganda. It complements the Criminal Justice Reform Program which is one of the JLOS' initial key areas for reform. PDAU offers pro bono and legal aid services to indigent persons and places particular emphasis on those charged with criminal offences. The organisation works with courts, prisons, police and other pro bono and legal aid service providers. PDAU offers legal services to poor people in order to promote the right to liberty and fair hearing, alleviating poverty and ensuring professional, cost effective, complete and quality services.

(d) The Uganda Christian Lawyers' Fraternity (UCLF)

UCLF was born out of a law student Christian fellowship at Makerere University. UCLF operates a community outreach and legal aid program. UCLF is a registered as an NGO but also acquired law firm status. A major portion of UCLF's pro bono clientele are indigent prisoners and detainees in the adult and juvenile system. UCLF also provides legal services to Christian NGOs. The Organization uses both "in house" advocates and volunteer

advocates from the wider Christian legal community that seek to represent the indigent community of Uganda out of a Christian call to service. UCLF presently operates branch offices in Kasese and Gulu with the head office based in Wandegeya, Kampala.

(e) Refugee Law Project – School of Law, Makerere University

The Refugee Law Project was established in November 1999 under the then Faculty of Law at Makerere University. The Refugee Law Project runs a Legal Aid and Counseling department that offers free information and advice as well as legal services to asylum seekers, refugees and internally displaced persons.

(f) FIDA Uganda, Legal Aid Clinic

A group of female lawyers established FIDA Uganda in 1974. In 1988, FIDA Uganda established its first Legal Aid Clinic in Kampala with the objective of providing legal services to indigent women to enable them access to justice.[343] FIDA also participates in strategic litigation and advocacy training.

(g) International Justice Mission (IJM)

Similar to the Uganda Christian Lawyers Fraternity, IJM is a Christian NGO led by Human Rights professionals, which helps people suffering from injustices and oppression, who have not been able to obtain justice through local authorities. IJM investigates and documents cases of abuse and provides pro bono legal representation to vulnerable individuals. IJM has established itself in pro bono practice in the area of land law and normally works in partnership with local police and public justice officials with a view of increasing the capacity of the Ugandan justice system in handling

[343]FIDA Uganda Website, http://www.fidauganda.org/our-origins, Accessed on 27 January, 2013.

such cases. IJM operates in certain specified sub counties and town councils within Mukono, Gulu and Amuru Districts.

(h) Foundation for Human Rights Initiative (FHRI)

FHRI is an NGO that promotes citizen awareness of basic fundamental human rights and obligations guaranteed in the Ugandan Constitution and international conventions. FHRI places an emphasis on good governance, respect for the rule of law, democracy and legal protection of human rights. In attempts to meet its mandate, FHRI provides free legal representation to the vulnerable and indigent in rights-based matters including criminal legal defense. In addition, FHI participates in public interest litigation.[344]

(i) Justice For Children - Uganda

This is a non-profit, child-advocacy group that provides legal and social services to abused children and their protective parents. Justice For Children - Uganda intervenes to offer assistance on behalf of abused and neglected children to prevent their re-abuse. The Organization ensures that abused children receive legal representation that is diligent, free of conflicts of interest and meets the highest standards of care. Justice For Children - Uganda helps the child and the protective parent navigate a complicated administrative judicial process. Justice for Children is actively involved in advocating for reforms in the legal aid provision system and laws to improve on the protection of children, the prosecution of their abusers, and recognition of children's rights in court.

(j) Platform for Labour Action (PLA)

PLA is a Ugandan NGO that promotes and protects the rights of vulnerable and marginalized workers.[345] PLA operates a Legal Aid

[344] D. Ngabirano, *supra* note 9, p. 13.
[345] http://ulaug.org/about-us/

Clinic and has been providing legal aid services since 2003. Its target population includes children in exploitative forms of work, children at risk of exploitation, informal sector workers infected and affected by HIV/AIDS, women, youth and workers earning below the threshold of 150,000 Uganda Shillings per month. Its target population is vulnerable, marginalized and undocumented workers. PLA has its head office in Kampala and operates branch offices in Lira, Dokolo and Amolatar districts.

(k) Uganda Land Alliance (ULA)[346]

ULA "is a membership consortium of national, regional and international civil society organizations and individuals, lobbying and advocating for fair land laws and policies that address the land rights of the poor, disadvantaged and vulnerable groups and individuals in Uganda." ULA's mission statement is "(t)o enhance access, control, and ownership of land by the poor and marginalized women, men, and children through the promotion of fair laws and policies aimed at protecting their land rights."[347] ULA facilitates and performs various pro bono activities related to its vision and mission statement including strategic litigation, free legal services to indigent persons, promotion of alternative dispute resolution, and advocacy for structural change.

(l) Legal Action for Persons with Disabilities (LAPD)

LAPD is an organisation dedicated to "promoting and defending the rights of persons with disabilities."[348] LAPD offers pro bono legal services to indigent persons with disabilities in cases where LAPD

[346] This description of Uganda Land Alliance is partially based on a description found in D. Ngabirano, *A Baseline Survey of Uganda's Legal Aid Service Providers*, supra note 9.
[347] *Ibid*.
[348] *Supra* note 9, p. 9.

believes the rights of such persons have been violated. LAPD also participates in strategic litigation aimed at causing structural change.

Partial Supplemental List of Legal Aid Service Providers:

The profiling of organisations that provide pro bono services in Uganda is a task that is difficult to exhaust. There are a great number of organisations that participate in legal aid activities. Some of these organisations are more concerned with policy matters, actor coordination and strategic litigation than the representation of poor, vulnerable and marginalized people on an individual basis. Below you will find a list of other legal aid organisations of note in Uganda. This list is not exhaustive and it should be noted that the names and presence of different players in this field in Uganda is in constant flux.[349]

a) Advocates Coalition on Development and Environment (ACODE)
b) Avocats Sans Frontieres (ASF)
c) Alliance for Integrated Development and Empowerment (AIDE)
d) Centre for Health Human Rights and Development (CEHURD)
e) Civil Society Coalition on Human Rights and Constitutional Law
f) Defence for Children International (DCI)
g) Greenwatch Uganda
h) Human Rights Network – Uganda (HUINET-U)
i) Inter-Religious Council of Uganda (IRCU)
j) Justice and Rights Associates (JURIA)
k) Mifumi Human Rights Defenders' Network (MHRDN)
l) Uganda Gender Resource Centre (UGRC)
m) Uganda Land Alliance (ULA)

[349] This list was compiled in part by reference to Uganda Law Society, (with support from the Legal Aid Basket Fund) *The Pro-Bono Handbook: A legal practitioner's guide*, 2011; at p. 2 and Ngabirano, *supra* note 9.

n) Uganda Network on Law, Ethics and HIV/AIDS (UGANET).
o) Uganda Youth Development Link (UYDEL)
p) Youth Justice Support-Uganda (YJSU).

10

JUDICIAL ETHICS: THEORY AND PRACTICE

Mike J. Chibita†

> *"Hate evil, love good; maintain justice in the courts."*
> Amos 5:15(a)

10.1 Introduction

It is my privilege to write this chapter on Judicial Ethics. I first encountered this subject as a student at the Law Development Centre during a short course called "Judicial Conduct." The course was taught by the then Director of the Centre, now Justice of the Supreme Court of Uganda, Amos Twinomujuni.

We found the course quite humourous because of the various tales of corruption attributed to the magistrates. A common form of corruption, we were told, was for litigants or potential litigants to find creative ways of presenting goats to the judicial officers. One judicial officer found a goat tethered in his compound without explanation. As a result we came to refer to corruption as 'eating a goat.'

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In 2009 I was tasked with teaching a course on Ethics and Integrity to students at Kampala Evangelical School of Theology. One of the fundamental challenges I encountered concerned the utility of teaching ethics. Why should we teach ethics when there are laws in place to direct, constrain and punish human behaviour? Another line of inquiry concerned the relationship between law and ethics? Could one enforce morality though legal means? Finally, if one is a practicing Christian, Muslim or other committed religious adherent is there any need to indoctrinate such individuals to ethical theory through study? These conundrums left me and many of my students questioning the utility of ethical studies.

There are additional challenges to the worthiness of judicial ethics in terms of relevance and practicality. In Uganda, the process of selecting and appointing judges is comprehensive. Efforts are made to ensure that judges are morally upright before they ever take the bench. Similar high standards are maintained through stringent threshold requirements and extensive background checks in other jurisdictions. For one to become a judge it is assumed that they will have gone through a rigorous vetting and selection system. Thus, only people with high integrity and ethical standards should qualify for judicial appointment. One could reasonably argue that there is no need for an emphasis on judicial ethics when those charged with practicing and maintaining judicial ethics are vetted to be ethical in the first place.

These arguments (and others) aside, it is my firm and respectful contention that judicial ethics is a worthy ground for inquiry, study and consideration. First of all, judicial ethics entails more than avoiding wrongdoing and public reprobation. Judicial ethics provides judges with the principles and precepts they need to navigate challenging scenarios in a manner commensurate with their office and societal obligations. Moreover, the tenets of judicial ethics must be known and agreed upon so that judges can be held accountable for their actions by the legal

community and civil society. Finally, knowledge about the ethical standards applicable to judges empowers the general public to hold judges accountable.

10.2 The Basics of Judicial Ethics

In this next section I will cover the basics of judicial ethics. This includes a brief definition of judicial ethics, a discussion about the tension between rule-based and principle-based approaches to judicial ethics, a concise description of the Ugandan framework concerning judicial ethics and an introduction to the Bangalore Principles. The Bangalore Principles will serve as the ordering structure for the balance of this chapter following this section.

10.2.1 Definition of Judicial Ethics

For the purpose of this chapter, I will define ethics as a system of moral principles that direct and inform people's actions and decisions to refrain from acting. It follows that judicial ethics is the system of moral principles that govern judicial officers.

10.2.2 Rules v. Principle

Judicial ethics brings out the tension between a rule-based approach to ethics verses a principle-based approach. Rule-based approaches to ethics are largely about "shalt nots." They are less helpful when it comes to affirmative responsibilities and complex settings. The ethical role of a judge is less about what a judge should not do and more about how a judge should go about meeting the judge's responsibilities to litigants and the wider community. Moreover, the ethical role of the judge is often played out in complex settings where duties and obligations must be balanced and broader moral standards must be upheld. These aspects

and rigours of judicial practice leave rule-based ethical codes largely wanting in the judicial setting.

Judges should operate on a higher order level of morality and social responsibility than the average citizen. Sound moral character is a prerequisite for the job. As such judges should be better suited to a principle-based approach to ethics as opposed to a rules-based approach.

The need and capacity for judges to operate above the mere letter of the law is a well-trodden subject. In the 13th Century Thomas Aquinas wrote that "(n)obody is so wise as to be able to forecast every individual case, and accordingly he cannot put into words all of the factors that fit the end he has in view."[350] It follows that human magistrates should be given the power to rise above the letter of the law. English theologian and political theorist William Perkins made this point when he wrote that "(i)n the laws of commonwealths two things are to be considered … (1) the extremity of the law and (2) the mitigation of the law. Both these are put in the hand of the magistrate by God himself, to be ordered according to his discretion and as the circumstance requireth."[351] Modern jurisprudential scholar Ronald Dworkin famously describes his prototypical judge 'Hercules' who is empowered to do the right and principled thing in "hard cases" where the written law is unclear or silent.[352] If judges are to operate as rational, human agents with the power to do what is right it follows that they be governed with principles rather than rules in the knotty world of judicial ethics.

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[350] Thomas Aquinas, "On Kingship" page 350, Par 3 in Oliver O'Donovan and Joan Lockwood O'Donovan eds, *Irenaeus to Grotius a Sourcebook in Christian Political Thought*, Eerdmans, Grand Rapids, 1999, p. 350.

[351] William Perkins "*A Treatise of Christian Equitie and Moderation*" in Oliver O'Donovan and Joan Lockwood O'Donovan eds, Irenaeus to Grotius a Sourcebook in Christian Political Thought, Eerdmans, Grand Rapids, 1999, p. 773.

[352] *See generally* Ronald Dworkin, *A Matter of Principle*, Harvard Press, 1985.

10.2.3 The Ugandan Ethical Framework for Judicial Officers

The first formal guidance on judicial conduct in Uganda was *The Code of Conduct for Judges, Magistrates and Other Judicial Officers 1989 – Uganda*. According to its Preamble, the 1989 Code was issued in response to concerns about judicial character and conduct. The 1989 Code consisted of fourteen rules ranging from Rule 1's mandate to uphold the laws of Uganda to Rule 14's restriction on accepting gifts from parties that might appear before a judge. The 1989 Code consisted mostly of "shall nots" with the exception of Rule 1, Rule 2 (requiring the disinterested application of the law), Rule 3 (pronouncing a duty to report unprofessional conduct by other judicial officers), and Rule 7's (requiring judges to self disqualify from cases where their impartiality is cast into doubt). All of the Rules in the 1989 Code appear in the following footnote.[353]

[353] RULE 1: A Judge or Magistrate should respect and uphold the laws of the land and his personal conduct should at all times be beyond reproach. He should, in keeping with his Judicial oath, perform his duties without fear or favour.
RULE 2: The function of a Judge or magistrate is the disinterested application of the law. The social service which he renders to the community is the removal of a sense of injustice. It is, therefore, incumbent on him to work towards the establishment, maintenance and enforcement of high standards of conduct by the members of the Bar and other Officers of the Court, both inside and outside Court.
RULE 3: A Judge or Magistrate should report to the appropriate authority any unprofessional conduct by a judicial officer of which the Judge or Magistrate becomes aware.
RULE 4: A Judge or Magistrate should not be a member of any organization or body that practices discrimination on grounds of race, tribe, sex, religion, economic or political affiliation.
RULE 5: A Judge or Magistrate must not engage in active political activities or hold any office in a political organization. He should not solicit funds for or make a contribution to a political organization or candidate and should not, whenever possible, attend political gatherings.
RULE 6: A Judge should not, except in case of part heard cases, assign work to himself. He should handle only work that has been referred to him by the relevant Registrar or Deputy Registrar. He must avoid dealing directly with the parties or their advocates in the absence of a Court Clerk or Registrar.

The Uganda Code of Judicial Conduct replaced the 1989 Code in June of 2003. The 2003 Code was the product of the Judicial Integrity Committee. This Code's guiding principle is "integrity is the bedrock of

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RULE 7: A Judge or Magistrate should disqualify himself in a matter or proceeding in which his impartiality might reasonably be questioned. Examples are cases where he or a member of his family or close relative has a fiduciary interest; where he has a personal bias or prejudice against one of the parties; where he has personal knowledge of the contested or disputed matters or where the matter at hand was handled by a firm in which he was working before he became a Judge or Magistrate; or where a member of his family or a close relative is a party to the action.

RULE 8: A Judge or Magistrate should dispose promptly of the business of the Court. However, in so doing he must ensure that justice is not only sure - but just. Protracted trials of a case must be avoided whenever possible. Where a judgement is reserved to be delivered on notice it should be delivered within the next 60 days, unless for good reason this is not possible.

RULE 9: A Judge or Magistrate should strictly adhere to the sub judice rule. He should not discuss in public matters that are pending in any court and should discourage other persons from doing so.

RULE 10: A Judge or Magistrate should not allow unnecessary broadcasting, televising, recording or photographing in courtrooms and areas adjacent thereto during court session. He should enjoin members of the press present in court to correctly report the proceedings if they must report them.

RULE 11: A Judge or Magistrate should under no circumstances practice law during the currency of his tenure.

RULE 12: A Judge or Magistrate may take part in civil and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his work. A Judge or Magistrate should not solicit funds for any other purpose although he may attend fundraising functions.

RULE 13: (1) A Judge or magistrate should refrain and discourage his or her spouse from entering into financial and business dealings that tend to reflect adversely on his or her image or impartiality, interfere with the proper performance of his or her judicial duties, exploit his or her judicial position, or involve him or her in frequent transactions with lawyers or persons who are likely to come before him or her in court.

(2) A Judge or Magistrate may own and manage property; he may also be a dormant partner in a firm or a shareholder in a company or corporation, but should not serve as an officer, manager or employee of any business concern.

RULE 14: A Judge or Magistrate or a member of his or her family residing in his or her household should not accept a gift, bequest, favour, loan or social hospitality if the donor is a party or other person whose interests have come or are likely to come before the Judge or, Magistrate. In the case of loans, banks, and other financial institutions shall be excepted.

the administration of justice." This Code appears in full at the conclusion of this chapter at Appendix "B" to this book.

The 2003 Code reflects a shift from rules to principles. The 2003 Code is based on the same six principles espoused in the Bangalore Principles that were issued one year earlier in 2002. These six principles are 1) Independence; 2) Impartiality; 3) Integrity; 4) Propriety; 5) Equality; and 6) Competence and Diligence.

After each principle there is practical guidance on how the principle is to be promoted and upheld. In the Bangalore Principles this guidance appears under the heading "application." In the 2003 Code they appear directly after the principles without a qualifying reference. A review of the statements of guidance reflects an effort to state the means of promoting principles of integrity in positive terms. When possible "shalt nots" and "do nots" are avoided. Thus integrity becomes something to strive toward as opposed to a default mode that is only lost in instances of moral failure.

The Judicial Service Commission and the Executive have the teeth to enforce judicial standards in Uganda. For details on the process of judicial discipline please refer to *chapter eleven* on "Discipline and Whistle-blowing in Uganda".

10.2.4 The Establishment of the Bangalore Principles

In April of 2000 several judges from around the world met in Vienna at the invitation of the United Nations Centre for International Crime Prevention. Chief Justice Benjamin Odoki was among the delegates at this meeting.[354] These judges identified the need "for a code against

[354] Other judicial officers in attendance included Chief Justice Latifur Rahman of Bangladesh, Chief
Justice Bhaskar Rao of Karnataka State in India, Justice Govind Bahadur Shrestha of Nepal,
Chief Justice Uwais of Nigeria, Vice-President Pius Nkonzo Langa of the Constitutional Court of

which the conduct of judicial officers may be measured."[355] This recognition ultimately led to the efforts that culminated in the establishment of the Bangalore Principles.

A second meeting of international judicial delegates was held in February of 2001 in Bangalore, India. Here the delegates "identified the core values, formulated the relevant principles, and agreed on the Bangalore Draft Code of Judicial Conduct."[356] The Draft Code emerged as a result of a comparative and multi-jurisdictional approach. At least 32 state, provincial, national and international codes, commentaries and frameworks were expressly reviewed and considered during the process of developing the Bangalore Principles.[357] The Draft Code was shared widely for review and comment and was ultimately revised and adopted in final form after a November 2002 meeting held in the Peace Palace of The Hague.[358]

10.3 A Tour of the Bangalore Principles of Judicial Conduct

What follows is an exploratory tour of the Bangalore Principles.

10.3.1 The Preamble to the Bangalore Principles

Prior to beginning our review of the six ethical principles, it is important to notice some aspects of the Preamble. First, it is worth noting that the Bangalore Principles are grounded in policies and

South Africa, Chief Justice Nyalali of Tanzania. These judges met under the chairmanship of Judge Christopher Weeramantry, Vice-President of the International Court of Justice, with Justice Michael Kirby of the High Court of Australia as rapporteur, and with the participation of Dato' Param Cumaraswamy, UN Special Rapporteur on the Independence of Judges and Lawyers. See Explanatory Note 1 of the Bangalore Principles.

[355] *Ibid*.

[356] *Ibid*.

[357] *Ibid*. at Explanatory Note 2.

[358] *Ibid*.

principles set forth in the *Universal Declaration of Human Rights*, the *International Covenant of Civil and Political Rights*, the *United Nations Basic Principles on the Independence of the Judiciary* as well as other regional and international human rights instruments. The Preamble proclaims the importance of the judicial system in promoting constitutionalism, the rule of law and democracy.

The Preamble places the Bangalore Principles in context. The Preamble notes that the intended beneficiaries of the Principles are both the judges and the wider public that can use the Principles to assess and evaluate judicial conduct. The Preamble notes that the Principles are meant to serve as a supplement to any existing rules and laws of conduct that bind judges.

10.3.2 The Principle of Judicial Independence

The Bangalore Principles provide that "(j)udicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects."

Particular applications of the principle appear in the Bangalore Principles. They are fully quoted in the footnote following this sentence.[359] The applications of the five other Bangalore Principles will

[359] 1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.
1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.
1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.
1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

similarly appear in footnotes in each of the applicable sub-sections below.

In order to maintain independence, judges must exercise the judicial function free from any extraneous influences, inducements, pressures, threats or interference. Judicial independence entails both outward appearances and internal disposition. The judiciary should maintain independence from society and social pressures, the parties to the dispute, and other branches of government.

10.3.2.1 Outward Appearances of Independence v. Internal Independence

Independence encompasses both outward appearances and inward motivations. The appearance of independence concerns the public eye. Judges that seek to maintain the outward appearance are careful to avoid being seen with litigants and advocates. Hence many judicial officers will avoid public gatherings where potential litigants and advocates are likely to be. Weddings, funerals and fundraisers are examples of such gatherings.

Whether or not this is an effective way of guaranteeing judicial independence is debatable. One thing is for sure, the more people one interacts with the higher the likelihood of meeting a litigant or potential litigant.

However, there are events that cannot and should not be avoided. I attended a funeral service when I was a Resident Judge in Fort Portal. Inevitably I met and greeted many people. One of the last people to greet me was a lady who told me that we would meet during the week.

1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.
1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

When I asked why and where we would meet she informed me that we would meet in court since she had a matter before me. Was that *ex parte* meeting enough to impair my independence? If the other party had seen me talking to their opponent would they trust my judgment especially if it was not in their favour? If I had not gone for that funeral service I would not have met her and would not have to ask myself the question. Yet I do not regret attending the service and think it was the right thing to do regardless of that unfortunate encounter. I contend as much largely because I know that my interaction with the woman did not impact my handling of the case. This brings us to the weightier aspect of substantive independence.

In my view, true substantive independence is more crucial than the mere appearance of independence. Inward independence is the principle that truly impacts the cases before a judge. Of course the judge is the only one who knows whether he or she is truly independent. Thus outsiders are forced to focus on appearances rather than trying to read the minds of judges.

Thus independence is more about substance than form. An independent mind is more to be treasured than a form of independence without the accompanying substance. Yet judges must appreciate that appearances do matter and that they have an obligation to maintain the appearance of independence as well as the inward disposition of judicial independence.

10.3.2.2 Independence from Society

A friend asked me whether it would have been possible for a judge to acquit the accused in the infamous *Kajubi* child sacrifice case[360] given the amount of public interest in a conviction. The answer is that an acquittal could have occurred had the State not adduced sufficient

[360] *Uganda v. Godfrey Kato Kajubi*, High Court of Uganda, at Masaka, Session Case No. 28/2012.

evidence to warrant a conviction. Indeed there had been an acquittal before the State appealed and revised its strategy by calling the accused person's co-accused as their principal witness. Had a judge found the defendant guilty simply to appease the public the judge would have failed to uphold the principle of independence.

10.3.2.3 Independence from the Parties

Independence from the parties is an essential aspect of judicial ethics. Judges cannot owe any special allegiance or affinity to a party before them. Certainly independence from the parties is one of the reasons that judges must reject any offer of a bribe, gift or favour by an individual who has a reasonable likelihood of appearing before them in court.

10.3.2.4 Independence from the Other Arms of the Government

Many Ugandans, for whatever reason, are quick to believe in conspiracy theories. Many citizens think that judicial officers receive phones calls from State House telling them how cases should be handled. I suppose such occurrences are possible, but I never experienced anything like this during my time as a judge.

Political pressure on judicial officers is more likely to be applied through other means. One particularly effective way of applying political pressure concerns the power of the purse. In Uganda the funding of the judiciary is determined and conducted by the other two arms of government.

If it is true that he who pays the piper calls the tune, then power is a prime avenue for compromising judicial independence. It is my understanding that the judiciary, one of the three arms of government, is allocated less than 2% of the national budget. Every time the judiciary requires funds it has to run to the executive and legislature. Yet these

two arms are among the most prominent litigants in courts of law. I have no evidence that the executive and legislature have exploited this position to influence judicial decisions, but it is a situation that needs remedying before it is abused. The Constitution of Uganda provides official protection of the judiciary from political financial pressure by way of Article 128. This Article, entitled "Independence of the Judiciary," provides that administrative expenses of the judiciary shall be charged to the Consolidated Fund and that the salaries, allowances and benefits owing to judicial officers shall not be varied to their disadvantage. Nonetheless, funding decisions are not always made without irregularities.

Pressure on the judiciary can also be applied in shocking and nefarious ways. One such incident is the infamous "rape of the court" by the so-called Black Mambas[361]. Another example is the tragic disappearance and death of Chief Justice Benjamin Kiwanuka during the Amin era. Thus extreme political pressure on the judiciary can be a powerful threat to judicial independence. Adhering to this principle can require vast reserves of character and bravery.

10.3.3 The Principle of Judicial Impartiality

The Bangalore Principles describe impartiality as "essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made."

Impartiality and independence are similar judicial virtues. The distinction seems to be that independence is a broader principle while impartiality concerns specific cases and the parties to those cases. This

[361] Armed security forces stormed the High Court in Kampala on November 16, 2005 to re-arrest five men who had been released on bond. On March 1, 2007, for the second time, armed state security personnel stormed the High Court to re-arrest the same men who had now been bailed after 15 months of detention. This action elicited a poem from the then Principal Judge, James Munange Ogoola, in which he described this incident as a "rape of the court"

is reflected in the applications of the principle that address matters such judicial disqualification from a case and the prohibition on commenting on the judge's expectations regarding the likely outcome of a case.[362]

Hence impartiality refers to performing judicial duties without favour, bias or prejudice. As with independence, outward appearances are important. The principle of impartiality requires a judge conduct himself or herself in a manner that maintains and enhances the confidence of the public, the legal profession and the litigants in the impartiality of the judge.

Instances of partiality stem from the judge having actual bias or prejudice in the matter at hand. Impartiality can be compromised where the judge has personal knowledge of the facts of the case, previously

[362] 2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.
2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.
2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.
2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.
2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where
2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;
2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or
2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:
Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

served as lawyer or material witness to one of the parties, where the judge or the judge's family has an economic interest in the outcome of the case. Where such situations arise, the judge should disqualify himself or herself from hearing such a case. Otherwise even if the judge were to disregard all the enumerated instances of bias and judge objectively, justice will not be seen to have been done.

Instances of partiality are not unethical in themselves. Judges must have some freedom to live their lives in society. Their relations and interests outside the courtroom have the potential of creating an interest in a particular case. The key ethical tenet is not on the absolute prevention of partiality; instead it is the ability to recognise partiality and the willingness to step aside (i.e. recuse oneself) when prudent.

Having worked as a member of the Executive of Uganda Revenue Authority prior to my appointment as a judge, it always behooved me to inform the parties and their lawyers of this fact whenever handling a case involving Uganda Revenue Authority. In all instances the lawyers agreed that I proceed with the hearing because I had not been personally involved in the facts of the case at hand and secondly they trusted my fairness. In one case however, I had to disqualify myself without giving the lawyers a chance because I knew the facts very well and had been involved in taking the decision that gave rise to the suit.

The Ugandan judiciary has a well-established system of recusal for presiding judges. If a judge detects a conflict in a case allocated to him the judge should write a minute recusing himself or herself giving reasons for the recusal. The judge should take the initiative to remove himself or herself from the case where there is a tangible threat of impartiality. The judge should not force a party to push for recusal where recusal is warranted.

When the judge does not self-recuse the parties have the power to move for recusal for cause. If the parties believe that the judge is or will be impartial for some reason then the advocate representing such a party

can make an application asking the judge to excuse himself or herself from the case. The judge is supposed to make a ruling on the application. A judge's failure to recuse for cause is a legitimate ground of appeal.

Most times a judge will excuse himself or herself if the application is made in good faith and is well founded. The problem arises where the application is made in bad faith or in an attempt to defeat justice. Such instances are where one party wants to use such an application as a delaying tactic. Or, it may be where the judge is perceived as leaning towards one side. The other side then chooses to pre-empt a ruling by short-circuiting the trial.

In most cases however, judges honour good faith applications for recusal. There are usually hundreds of cases to handle and there is little reason for a judge to insist on handling a particular case amid protests.

10.3.4 The Principle of Integrity

According to the Bangalore principles, "(i)ntegrity is essential to the proper discharge of the judicial office." No definition or description of integrity is provided in the principle itself.

The Bangalore Principles' application notes for integrity are largely outward looking.[363] They call for judges to act in a manner that will be above reproach to outward observers and that will reaffirm the people's faith in the judiciary. The Bangalore Principles assert the mantra that "justice must not merely be done but must also be seen to be done." The reputation of the judiciary is a key element in building and maintaining public trust in the legal system.

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[363] 3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.
3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

The principle of integrity has the shortest explanation following it among all the Bangalore principles. This could be because of either of two reasons: Either it is self-explanatory and therefore needs no further elaboration. Or it may be that integrity is such an intrinsic value that no amount of words can do it justice. It is better seen in practice than read in prose.

The truth might be a bit of both. Integrity is an inward quality that ultimately manifests itself in outward actions. Whereas it may be possible and easy to point out acts of integrity or lack of it, to point a finger at what it is or what gives rise to it is not as easy.

In my view, integrity is the bedrock of all the other principles. Without integrity it will be next to impossible to act independently, impartially or diligently. Put another way, it is easier to act with inequality, partially and contrary to all the other principles if one lacks integrity.

It is often said that the true test of integrity is whether you do the right thing when nobody is looking. Integrity is not something a judge can put on and off. It is either with you all the time or it is not. It is practised and developed over time and eventually becomes a reputation.

10.3.5 The Principle of Propriety

According to the Bangalore Principles "(p)ropriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge." The Bangalore Principles provide extensive particularized guidance for the principle of propriety in the application notes. These appear in the footnote referenced here.[364]

[364] 4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.
4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

4.3. A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.
4.4 A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.
4.5 A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.
4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.
4.7 A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.
4.8 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.
4.9 A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.
4.10 Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.
4.11 Subject to the proper performance of judicial duties, a judge may:
4.11.1 write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;
4.11.2 appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;
4.11.3 serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; or
4.11.4 engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.
4.12 A judge shall not practise law whilst the holder of judicial office.
4.13 A judge may form or join associations of judges or participate in other organizations representing the interests of judges.
4.14 A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.

Most of the applications of the principle of propriety are "do nots" (e.g. avoiding certain situations and not disclosing confidential information). However, many of the applications are "mays." Application 4.6 makes it clear that the judge retains the personal freedoms of expression, belief, association and assembly. Subsections under application 4.11 provide that judges may write, teach, appear at public hearings and serve on official bodies. Thus the choice to enter judicial service does not necessarily require a life of social solitude and complete political disengagement. Judges remain citizens. However, they must be vigilant to perform their public activities in a way that will not compromise their judicial offices and the public's view of the legal system.

One story that brings out the importance of propriety involves Justice Antonin Scalia of the United States Supreme Court. In 2004 Justice Scalia chose to attend a hunting trip with then US Vice President Dick Cheney. When the public learned that Scalia and Cheney were on the trip together they questioned the propriety of such interaction. This was especially true in light of the controversial decision in Bush v. Gore, 531 U.S. 98 (2000) where Scalia has been a critical player in the ending of the recount in Florida and securing the electoral victory for President George W. Bush. The fact that the executive branch was a party to other important cases coming before the Supreme Court also raised eyebrows. The teaching point here is that judge must appreciate that certain actions can damage the public's perception of the judiciary and call their

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4.15 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

4.16 Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

partiality into question. Judges should err on the side of avoiding such sagas.

10.3.6 The Principle of Equality

The Bangalore Principles proclaim that "(e)nsuring equality of treatment to all before the courts is essential to the due performance of the judicial office." The applications appearing in the Bangalore Principles place a special emphasis on judges having awareness of the existence and impact of discrimination and prejudice in society.[365]

The principle of equality requires the judge to act without discrimination of any litigants or practitioners based on gender, race, colour, ethnicity, age, marital status, disability or any other like causes.[366] This equality of persons has to be extended to all court users

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[365] 5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").
5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.
5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.
5.4 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.
5.5 A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

[366] The principle of equality is the greatest point of departure between the Ugandan Code of Judicial Conduct and the Bangalore Principles. Whereas the Uganda Code expressly lists all the groups who are entitled to equality, the Bangalore Principles do not. This is not without accident as the Uganda Code does not include "sexual orientation" among its list of protected groups while the Bangalore Principles list "sexual orientation" as a group that should be treated with equality in Application 5.1.

including parties, lawyers, witnesses, court officials like assessors, clerks, orderlies and even accused persons.

The law is usually accused of favouring the rich to the disadvantage of the poor. A judge must therefore make every effort to treat all people in his courtroom equally. Special emphasis must be made to treat litigants equally regardless of social class.

It can be a challenge for judges to truly appreciate what it means to be a minority or a member of a marginalised group. Speaking of her own background, US Supreme Court Justice Sonya Sotomayor said that "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."[367] Yes, judges are a product of their identity, experience and backgrounds. Male judges must make a concerted effort to appreciate what the court process is like for women. Judges that can speak English must be mindful of what the court process is like for non-English speakers.

Therefore, judges must work diligently to create an even playing field among all of the litigants before the court. One of the practices I always discouraged in my court was referring to litigants as Dr. Pastor, Sheikh, Professor, Honourable, Reverend, King or any other title. It was my view that before the temple of justice litigants should come with only their names and not titles. As it were, even without mentioning titles some litigants already, through their reputation or status in society, appear to have an upper hand.

The other instance where I found that I had to proactively practice equality was where one party was represented by Counsel while the other was unrepresented. Ordinarily a party with legal representation presents more coherent and organised pleadings and submissions.

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[367] Charlie Savage, *"A Judge's View of Judging is on the Record,"* New York Times, 14 May 2009

However, it should be the duty of the court under this principle to ensure that the unrepresented litigant is not unduly disadvantaged.

10.3.7 The Principles of Competence and Diligence

The Bangalore Principles affirm the centrality of competence and diligence in judicial practice. They proclaim that "(c)ompetence and diligence are prerequisites to the due performance of judicial office. The notes concerning the application of these principles require judges to prioritize their career, stay abreast of the law and perform their duties.[368]

Judicial dedication to such principles can generate tangible results. One of the key deliverables of a judge is the timely delivery of well-researched and reasoned judgments. Indeed this principle requires the delivery of reserved decisions with efficiency, fairness and reasonable promptness.

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[368] 6.1 The judicial duties of a judge take precedence over all other activities.
6.2 A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.
6.3 A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.
6.4 A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.
6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.
6.6 A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.
6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

The judge is also required to conduct the proceedings before him with the requisite order and decorum. He is also to exercise patience with all those that appear before him in court.

The other Bangalore principles are largely qualitative in nature. Conversely, the principle of competence and diligence is the principle that lends itself to quantitative analysis. A judge's adherence to this two-pronged principle can be measured more effectively and objectively than under any other principle.

I am keenly aware of the landmines that lay strewn all over the path of judicial performance appraisal. The Uganda Code of Judicial Ethics provides a maximum period of sixty days within which judgments should have been delivered. This standard puts heavy emphasis on speed and efficiency. This standard does address the quality of the judgments.

This begs the question: does quality matter? If it does, how is quality assessed? Does it depend on length, weight or style? Is quality best reflected based on whether judgments stand up on appeal?

Certainly there are many factors that can impact a judge's ability to issue timely judgments. For example, criminal matters and civil matters have different life cycles. Some cases are more complex than others. Some cases have multiple parties. Some cases require judges to take special steps such as visiting the locus in quo in certain land cases.

In addition, not all judicial dockets are created equally. Some courts are busier than others. Consider one judge handles one case in a whole year and delivers that one judgment within the expected sixty days. Consider another judge who handles twenty cases a year and manages to deliver ten of the twenty judgments within the set time. The other ten judgments remain pending beyond the set time. Does the first judge score 100% while the second one scores 50%? Is that a fair and objective appraisal system? In other words should the appraisal of diligence and competence of a judge be based on number of cases commenced, handled, concluded?

It seems to me that it is easier to assess the competence and diligence of a candidate for judge, i.e. before appointment than afterwards. However, quality control is important and efforts need to be made to ensure that judges meet their responsibilities. Appearing in court on time, conducting court sessions as scheduled and logging sufficient office hours are other possible measures of diligence. Also, there must be some method by which the quality of judicial workmanship and knowledge is assessed that goes beyond a percentage-based assessment of a court's judgments on appeal. The assessment methodology must be equal to the task of assessing competency and diligence in order to ensure the judicial quality that the people of Uganda deserve. This requires a considerable commitment of energy, time and resources.

10.4 Conclusion

Judicial ethics is a vibrant and important subject for study and contemplation. The ethical and proper performance of the courts is a crucial element in a functioning society. Moreover, public trust in the justice system hinges on the public's perception of judges and their character.

Judicial ethics is complex and cannot be managed through prohibitive rules and simplified performance standards. The Bangalore Principles are an excellent set of guiding principles that different jurisdictions can build on and customize to suit their local needs. While it can be argued that judicial ethics and principles should be the same all over the world there are always some subtle differences between the different jurisdictions.

When I was first appointed judge I found that there were many theories about how judges should conduct themselves. Not many people however could tell me what the source of such theories was. It is

comforting to have the Bangalore Principles as a reliable source of judicial ethical conduct.

In Uganda we have formally adopted the Bangalore Principles through the *Uganda Code of Judicial Conduct*. Hopefully our judiciary will offer a positive example to the world on how these Principles are implemented and realized in practice.

11

DISCIPLINE AND WHISTLE-BLOWING IN UGANDA

Tibaijuka Kyozaire Ateenyi[†]

11.1 Introduction

Advocates and judicial officers operate within the confines of the legal profession with established standards governing their conduct. The public that should benefit from their services has an interest in their work and the manner in which it is done. Advocates and judicial officers must maintain scrupulous regard to what the public, as well as their peers, expect of them. The very nature of their work calls for discipline on their part, and any lapse in this calls for redress through disciplinary action.

Both formal and informal mechanisms help to check professional conduct in legal matters. Formal mechanisms entail the establishment of certain bodies specifically mandated to handle complaints and to take necessary disciplinary action in appropriate cases. For advocates, the relevant body is the Law Council, whose role is set forth in Section II

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below. Judicial officers, on the other hand, are disciplined by the Judicial Service Commission, as discussed in Section 3 below.

Informal disciplinary mechanisms are broad in scope. They range from the role played by civil society to peer pressure, continuing legal education and administrative intervention. Sections II (E) and III (F) canvass the various sources of informal checks on the conduct of advocates and judicial officers.

Finally, this chapter addresses mechanisms for disclosure and the policy implications and concerns of those mechanisms. We will discuss the publication of judicial disciplinary proceedings in Section III (D) and The Whistleblowers Protection Act of 2010 in Section IV.

11.2 The Disciplince Of Advocates In Uganda

11.2.1 The Law Council Disciplinary Committee

11.2.1.1 Functions and jurisdiction

The Law Council is a statutory body financed through levies and public funds. Its functions are: (a) to exercise through the medium of the Committee on Legal Education and Training, general supervision and control over professional legal education in Uganda, including continuing legal education for persons qualified to practise law in Uganda; (b) to advise and make recommendations to the Government on matters relating to the profession of advocates; (c) to exercise, through the medium of the Disciplinary Committee, disciplinary control over advocates and their clerks; (d) to exercise general supervision and control over the provision of legal aid and advice to indigent persons; and (e) to exercise any power or perform any duty authorised or required by the Advocates Act or any other written law.[369]

[369] Advocates Act (Cap. 267), ss. 2, 3, 3A & 5(2), as amended by the Advocates (Amendment) Act (Act 27 of 2002), s. 4.

Generally, every advocate is subject to the jurisdiction of the Disciplinary Committee, which enjoys concurrent jurisdiction with ordinary courts in trying offences under the Advocates Act.[370] At the conclusion of a hearing, the Disciplinary Committee may order that the complaint be dismissed or make an appropriate order against the advocate, as discussed in Section B below.

11.2.1.2 Subject Offences and Violations

Violations under the Advocates Act (as amended) constitute offences that can result in criminal sanctions and fine.[371] In addition, under the Advocates Act an advocate can be found liable for "professional misconduct," which is defined to include disgraceful or dishonourable conduct not befitting an advocate.[372] On the other hand, contravention of the Advocates (Professional Conduct) Regulations constitutes "unprofessional conduct"[373], which is not statutorily defined. The Disciplinary Committee does not make a distinction between the two in proceedings before it.

11.2.1.3 Composition

The Law Council has a membership of ten, which includes representatives of the Uganda Law Society.[374] In disciplinary proceedings the Council operates through its Disciplinary Committee

[370] *Ibid*, ss. 16, 78 & 79(2).
[371] Cap. 267
[372] *Ibid*. s. 1(k).
[373] Ibid s. 77(5), read with sub-s (1) (a) thereof. In Uganda there is no tenable distinction between *unprofessional conduct* and *professional misconduct*: see Bwengye, *Legal Practice in Uganda,* pp. 124–125.
[374] *Ibid*. s. 2(1) (as amended).All representatives of ULS on the Council are required to be elected by ULS in General Meeting: *Uganda Law Society Act* (Cap. 276), s. 14.

composed of[375]: (a) the Solicitor-General or his or her representative not below the rank of Principal State Attorney; (b) the Director of the Law Development Centre; (c) the President of the Uganda Law Society; and (d) any other two members appointed by the Law Council from among its members. The compositional design of the disciplinary committee is balanced to represent the interests of the different stakeholders.

11.2.1.4 Procedure

Disciplinary proceedings against an advocate are commenced by a signed written complaint, which must contain certain particulars. It is sent to the Secretary of the Committee for onward transmission to the Committee. Once received by the Secretary, the complaint cannot be withdrawn without the consent of the Committee.[376]

Meetings of the Committee are presided over by a Chairperson. The Law Council Secretary serves as secretary of the Committee and also provides prosecuting counsel to the Committee. A quorum of three is required. The Committee makes decisions by majority votes. The decisions must be issued in writing. All hearings of complaints and pronouncements of Committee decisions may be in private or in public or partly in private and partly in public, as the Committee may direct.[377] In practice, however, hearings are rarely conducted in private.

Both the complainant and the advocate are served with a hearing notice and entitled to be heard. Only deliberate failure to appear on the hearing date may result in the complaint being heard and determined in

[375] *Ibid.* s. 18(1) (as amended). Committee members hold office for so long as they are members of the Law Council, but are eligible for reappointment: s. 18(2).
[376] *Ibid.* s. 20(2) (as amended); *Advocates (Disciplinary Committee) (Procedure) Regulations* (S.I. No. 267–6), Regs.3 & 21.A defect in lodging a complaint is not fatal: Reg. 4.
[377] Advocates Acts. 18(3) (4) (5) (7) (8) & 5(1); Regulations in *supra* note 5, Regs. 14(3) & 17.

absentia. However, the Committee, after hearing from the complainant, may dismiss the complaint without requiring the advocate to answer the allegations made against them if, in its opinion, the complaint does not disclose any prima facie case of professional misconduct.[378]

The parties are entitled to be legally represented. The complainant is heard first, followed by the advocate (where necessary) and then the complainant in reply. The Committee has power to administer oaths or affirmations and may take evidence and receive documents or interview and correspond with such persons as it deems fit. Witnesses give evidence on oath and may be cross-examined and re-examined.[379]Although the Evidence Act[380] does not apply to proceedings before the Committee, witnesses are entitled to all rights and privileges to which witnesses are entitled under that Act.[381]

11.2.1.5 Appeals

A party aggrieved by any decision of the Disciplinary Committee may appeal to the High Court. The parties to the appeal and the Law Council are entitled to a hearing notice and to representation by an advocate. A quorum of three Judges is required, and they determine the

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[378] *Ibid*. s. 20(2) (3) (3) (a) & (4) (as amended); Regulations in *supra* note 5, Reg. 10. See *Judge of High Court & Anor v. Ng'uni* [2007] 2 E.A. 201 (CA–T)– –*Held*: The Respondent advocate not having been given a right to be heard, his suspension violated the principle of *audial terampartem* and the Constitution.

[379] *Ibid*. s. 19(1)–(3) and Regulations in *supra* note 5, Regs. 19 & 20, respectively. In practice the Disciplinary Committee also applies the *Civil Procedure Rules* (S.I. No. 71–1) and has since adopted the court practice of Alternative Dispute Resolution (ADR): *see Kawenja Othieno & Co. Advocates v. Zaver & Sons Ltd.*, H/C Misc. Applic. No. 109 of 2003 (Ntabgoba, PJ—as he then was).

[380] Cap. 6.

[381] Advocates Act s. 19(7); *Kaweja Othieno supra* note 12.

appeal by majority decision.[382] After hearing the appeal, the High Court has two options. The first is to refer the matter back to the Committee, with directions for its finding on any specified point. The other is to confirm, set aside or vary any order made by the Committee, or substitute for it such order as it deems fit.[383] Every decision or order of the High Court on appeal is final and conclusive and is not subject to appeal to any other court.[384]

11.2.2 Means of Discipline

While disciplinary proceedings are pending, the Committee may order the advocate concerned to deposit a client's property or money with the Committee for safe custody pending the disposal of the matter. This protects the interests of the client by ensuring that the property or money is not wasted or disposed of before conclusion of the matter. Such order does not prejudice the advocate in any way.[385]

Where a case of professional misconduct has been made out, the Committee may make any one of the following orders, or a combination of them[386]: (a) that the advocate be admonished; (b) that the advocate be suspended from practice for a specified period not exceeding two years; (c) that the name of the advocate be struck off the Roll; (d) that the advocate do pay a fine not exceeding two hundred and fifty currency points; (e) that the advocate do pay to any person who has suffered loss as a result of the misconduct of the advocate such sum as in the opinion

[382] Advocates Act ss. 22(1) (2), 24 (as amended) & 26(1) (2). It is deplorable to try to circumvent the appeal process by bringing other proceedings, such as judicial review—see *Kaweja Othieno's supra* note 12.
[383] *Ibid*. s. 25 (as amended).
[384] *Ibid*. s. 26(3).
[385] *Kaweja Othieno supra* note 12.
[386] Advocates Act s. 20(4) (4a) (as amended). One currency point is equivalent to twenty thousand shillings: see Schedule 2A.

of the Committee is just, having regard to the loss suffered by the aggrieved party.

When a sole practitioner is suspended from practice or struck off the Roll, Law Council may order the closure of the practitioner's chambers; and if it does so, it must appoint a trustee to take care of the interests of the practitioner's clients and the pending matters of the practitioner.[387] The practitioner is henceforth not entitled to practice, even if there is a pending appeal against the decision of the Committee.[388] In addition, an advocate who is suspended from practice is deemed to have had their membership of the Uganda Law Society suspended; and if their name is struck off the Roll of Advocates, they are deemed expelled from the Society.[389]

The Committee may also make an order for payment of costs, witness expenses and Committee expenses in connection with hearing the complaint. It may also make a restoration order in relation to any property in the possession of the advocate, in favour of any person appearing to be entitled to it.[390] Any order made by the Committee relating to the payment of a fine, compensation, costs or expenses, or to the restoration of property, is executable as if it were a decree of the High Court; and a warrant may be issued for recovery of the sums ordered by distress and sale of the advocate's property.[391]

An advocate may also be disciplined by refusing to issue or renew their Practising Certificate, or by cancelling or suspending the same. If

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[387] *Ibid*. s. 20(4c) (as amended).

[388] *Ibid*. s. 22(3). The only exception is where a period of suspension lapses before the hearing of the appeal.

[389] Uganda Law Society Act, Cap. 276 s. 8(1).

[390] *Advocates Act*, s. 20(5) (7).

[391] *Ibid*. s. 20(4b) (6) (8) (as amended).*See Ntege Mayambala v. Christopher Mwanje* [1993] 1 KALR 97 (HC–U)—*Held*: A stay of execution would be granted on condition that the Applicant deposited with the High Court all the money which the Disciplinary Committee had ordered him to pay.

thereafter the advocate practises without any Certificate, an offence is committed for which a prosecution may ensue.[392]

Courts always have jurisdiction to deal with misconduct or offences committed by an advocate during or in the course of or in relation to court proceedings.[393] This occurs where the conduct of the advocate, an officer of court, is dishonourable. This power is intended to ensure that advocates conduct themselves in a professional manner.[394] Where the misconduct is not so serious as to justify striking off the advocate's name from the Roll or suspending them, court may make a punitive order calling upon the advocate to pay the costs of either or both parties.[395]

The fact that an advocate is facing disciplinary action does not preclude a concurrent civil action or criminal proceeding or any other remedy arising from the same facts.[396] Therefore, a client whose money has been misappropriated by an advocate is at liberty to report the advocate

To the Police for prosecution in a criminal court and to Law Council for disciplinary action, while at the same time pursuing a remedy against the advocate in a civil suit. In order to enhance accountability and integrity among advocates, it is advisable for Law Council to always point out all these options, and their concurrent nature, to clients aggrieved by their advocates' conduct.

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[392] Advocates Act ss. 12, 14 & 15(1) (as amended).*See also* the *Advocates (Accountant's Certificate) Regulations* (S.I. No. 267–3), Reg. 6.

[393] Advocates Act s. 17; *Kohli v. Popatlal* [1964] E.A. 219 (CA), at 222D–223B; *Lobo & Anor v. Saleh S. Dhiyebi & Ors* [1961] E.A. 223 (CA). This is in addition to Court's appellate jurisdiction, considered above.

[394] *Equip Agencies Ltd v. Credit Bank Ltd* [2008] 2 E.A. 115 (HC–K); *Patel v. Kairu* [1999] 2 E.A. 297 (CA–K), at 301c–e.

[395] But the advocate must first be given a hearing: *Kohli* supra note 22, at 222D; *Kamurasi v. Accord Properties Ltd.* [2000] 1 E.A. 90 (SCU), at 96d–97b.

[396] Advocates Act ss. 37 & 79(2).

11.2.3 Case Study

Kituuma Magala & Co. Advocates v. Celtel Uganda Ltd.[397]

In *Kituuma* a debt collection agreement drawn by the respondent company enjoined the appellant firm of advocates from using any means to collect the company's debts in exchange for a quarterly payment and a specified commission. The agreement was not notarised as required by s. 51 of the Advocates Act (Cap. 267). The advocates subsequently filed three summary suits against the company's debtors and the company paid them under the said agreement. Meanwhile the agreement had been terminated by the company. The advocates applied to court for leave to tax a "bill of costs" against the company, arguing that the agreement was illegal and that in any case payment for contentious matters could only be made under the Advocates (Remuneration and Taxation of Costs)(Amendment) Rules. Their application and the ensuing reference to a Judge having been dismissed, the advocates appealed to the Court of Appeal.

Held—(1) The debt collection agreement contravened s. 51 of the Advocates Act and was therefore illegal and unenforceable; (2) S. 51 was enacted to protect clients and it did not matter that an agreement that turned out to be illegal was prepared by a client: the advocate could not wriggle out of it and get a benefit via the said Rules; (3) the advocates were supposed to know the law and had no excuse to enter into an illegal contract; and (4) Court could not help the advocates because of their so-called special status as a special category of

[397]Civil Appeal No. 39 of 2003 (CAU). The Rules referred to in the case are now the Advocates (Remuneration and Taxation of Costs) Regulations (S.I. No. 267–4). *Note*: (1) The report of the case in [2001–2005] 3 HCB 72 (CA) is inaccurate; (2)The advocates' subsequent appeal to the Sup. Ct. was dismissed with costs—see *Kituuma Magala & Co. Advocates v. Celtel Uganda Ltd*., SCCA No. 9 of 2010.

professionals, and moreover the two parties to the agreement were in *pari delicto*.

11.2.4 Criminal Sanctions

Criminal proceedings may also be brought against an advocate for offences under the Advocates Act.[398] The principle of double jeopardy does not prevent an advocate from being subjected to both a criminal proceeding and a disciplinary proceeding for the alleged violation of a single provision of the Advocates Act.[399] The negative publicity inevitably arising from criminal proceedings, and the prospect of imprisonment, are strong deterrents to any advocate intending to steal their client's money.

11.2.5 The role of the Uganda Bar in Self-Monitoring and Discipline

The objects of the Uganda Law Society (ULS) include: maintaining and improving the standards of conduct of the legal profession; facilitating the acquisition of legal knowledge by members of the legal profession and others; protecting and assisting the public in all matters relating to the law; and assisting the Government and the courts in all matters affecting the administration and practice of law in Uganda.[400] In order to achieve these noble objects the ULS must be engaged in the active monitoring and discipline of unethical conduct by advocates. In practice, however, ULS concentrates its efforts and resources on constitutional and other political matters, particularly those relating to

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[398] Advocates Act ss. 78 & 79(1).

[399] *Ibid*. s. 37; *Oging v. Attorney General* [2010] 1 E.A. 309 (Const. Ct–U) (causing bodily harm). See also *Uganda v. Mushraf Akhtar* [1964] E.A. 89 (HC–U) (theft of client's money).

[400] Uganda Law Society Act (Cap. 276), s. 3(a) (b) (d) (e). With necessary modification, the account given in Section III (F) below on informal checks on misconduct is also applicable to advocates.

human rights and civic duties. In those exceptional circumstances where ULS has endeavoured to handle ethical complaints against advocates, there has been little cooperation from the latter as advocates have ignored ULS "summons". In the end, ULS has had to refer such matters to Law Council.

This author hopes that the ULS will embrace its mandate to monitor and improve the professional conduct of advocates in the future. The ULS can make real strides by visiting advocates' chambers and making professional conduct a regular topic for discussion at its General Meetings. Such efforts would equip ULS with useful feedback and recommendations to make to Law Council with regard to professional conduct.

At the individual level, every advocate is at all times required to uphold the dignity of the legal profession and to refrain from conduct that is unbecoming of an advocate, even outside their professional practice.[401] If a particular advocate has fallen short of this standard and another advocate has noticed it, the latter could advise any aggrieved person to report the matter to the Uganda Law Society or to the Law Council. In many cases, however, advocates have simply sat back as their colleagues continue to literally terrorise their clients.[402]

It is important for advocates to recognise that they are largely self-policed. It is up to advocates to make sure that their fellow colleagues are upholding the established standards of conduct. If advocates continue to turn a blind eye to the offences of their colleagues they will surely lose the current professional autonomy they enjoy. It might be

[401] Advocates (Professional Conduct) Regulations (S.I. No. 267–2), Regs.30 & 31(2).

[402] In this author's opinion, such efforts will be seriously undermined if the concept of limited liability partnerships is extended to law firms, as is already the case in some firms of solicitors in the United Kingdom. Limited liability partners are by law divorced from management of the firm and shielded from personal liability for all the firm's debts beyond their capital contribution.

burdensome and socially difficult, but Ugandan advocates must be diligent in this regard. If the advocates fail to take an active interest in ensuring that professional standards are met and corruption within legal practice is limited, we are sure to continue on a downward spiral. Ultimately legal practice in Uganda and the advocates themselves will suffer the consequences.

11.3 The Discipline of Judges in Uganda

11.3.1 The Judicial Service Commission

11.3.1.1 Functions and jurisdiction

The Judicial Service Commission (JSC) is a public body established under the Constitution. Its members are required to be persons of high moral character and proven integrity. The Commission's Chairperson and Deputy Chairperson must be persons who qualify to be appointed Justices of the Supreme Court. In the performance of its functions, JSC acts independently and is not subject to the direction or control of any person or authority. This is so, in spite of the fact that its members are appointed by the President with the approval of Parliament, with the Attorney General as an ex officio member.[403]

Judges of all ranks, the Chief Registrar and Registrars are appointed by the President. Other judicial officers, mostly magistrates of various grades, are appointed by the JSC. In either case, the respective appointing authority also confirms, disciplines and removes the said

[403]Constitution, Arts.146(1) (2) (3) (5) & 147(2); Judicial Service Act (Cap. 14), s. 2. In spite of the Commission's independence, written or oral communications between the Commission or any of its members or officers and any public officer are absolutely privileged: Cap. 14, s. 16(a). A judicial officer appearing before the Commission cannot therefore insist on such communication being availed to them.

officers. But in all cases the President is advised by the JSC, which has power to review and make recommendations on judicial officers' terms and conditions of service.[404]

The JSC prepares and implements programmes about law and the administration of justice for judicial officers and the public. It receives and processes people's recommendations and complaints concerning the judiciary and the administration of justice, and generally acts as a link between the people and the judiciary. This is in addition to advising the Government on improving the administration of justice, and performing any other function prescribed by the Constitution or by Parliament.[405]

The Judicial Service Commission Regulations, 2005[406]establish the disciplinary offenses pertinent to the conduct of judicial officers. These include conduct that is prejudicial to the good image, honour, dignity and reputation of the service; practising favouritism, nepotism, corruption or discrimination; habitual late coming or absenting oneself or absconding from duty without reasonable excuse; insubordination, laziness and untrustworthiness or lack of integrity in public or private transactions; engaging in private interests at the expense of official duties; divulging official information to unauthorised persons; acting in contravention of the Code of Judicial Conduct[407], the Judicial Oath or any other oath taken by the judicial officer; being convicted of a criminal offence by a court of law; abuse of judicial authority; etc.

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[404] Constitution, Arts 147(1) (3), 148 & 151(c); Judicial Service Act (Cap. 14), ss. 5 & 26.

[405]*Ibid*. For examples of other functions under various laws, *see Law and Administration of Justice in Uganda: Citizen's Handbook*, 2nd ed. (2007), Judicial Service Commission, pp. 14–15.

[406] S.I. No. 87 of 2005, Reg. 23.

[407] Since contravention of the Uganda Code of Judicial Conduct (2003) is an offence under the above Regulations, the Code is by reference incorporated into the Regulations. It therefore has force of law and need not be separately enacted as a statutory instrument.

A complaint may be submitted to the JSC against: a Judge; the Chief Registrar or a Registrar of a court; a Magistrate; a Chairperson or member of a Land Tribunal established under the Land Act; the Chairperson or member of the Communications Tribunal established under the Uganda Communications Act; the Chairperson or member of the Electricity Disputes Tribunal established under the Electricity Act; and such other person holding any office connected with a court or a tribunal as may be prescribed by law. The JSC is required to handle such complaints in the best interest of the public and of the Judiciary.[408]

11.3.1.2 Composition

The JSC is composed of the following persons appointed by the President with the approval of Parliament[409]: a Chairperson; a Deputy Chairperson; one person nominated by the Public Service Commission; two advocates of not less than fifteen years' standing nominated by the Uganda Law Society; one Justice of the Supreme Court nominated by the President in consultation with the Judges of the Supreme Court, the Justices of Appeal and Judges of the High Court; two members of the public, who are not lawyers, nominated by the President; and the Attorney General, as an ex officio member.

To buttress the JSC's independence, undue influence from the Judiciary, politicians and private legal practitioners is proscribed by law, and even criminalised. Thus, the Chief Justice, Deputy Chief Justice and the Principal Judge are expressly excluded from the composition of the JSC; a member of Parliament, a local government council or executive of a political party or political organisation must relinquish such office on appointment as a member of the JSC; and the JSC Chairperson is prohibited from engaging in private legal practice while holding that

[408] Judicial Service (Complaints and Disciplinary Proceedings) Regulations, *2005* (S.I. No. 88 of 2005), Regs.4 & 19(2).
[409] Constitution, Art. 146(2) (3); Judicial Service Act, s. 2.

office.[410] These limits on outside influence help to ensure the autonomy and integrity of the JSC and thereby preserve the JSC's moral authority to monitor, police and judge the judiciary.

11.3.1.3 Procedure

Disciplinary proceedings may be commenced by the lodging of a complaint by an aggrieved party or on the JSC's own action.[411] Complaints must contain specified particulars, and must be written in simple English without insults directed at the person or institution complained about. A copy thereof must be served on the respondent. The JSC has power to delegate its functions to its Disciplinary Committee, whose quorum is constituted by a Chairperson and two other members nominated by the JSC.[412]

A complaint may be grounded on improper conduct, corruption and abuse of office, neglect of duty or mal-administration of justice. The officer concerned may be interdicted to pave the way for investigations, which must be expeditiously conducted. After considering a complaint, if the JSC decides that a *prima facie* case has been established, it must fix a date for hearing the complaint and serve a hearing notice on each party to the proceedings. The complaint should be rejected if it is unrelated to the administration of justice or operations of the courts,

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[410] Judicial Service Act, ss. 3 & 21(1); *Constitution*, Arts 146(4) (6) (7) (b) & 147(2). Before 1995, the Commission was chaired by the Chief Justice and had as one of its members the Chief Judge of the High Court (now Principal Judge)––see Uganda (Constitution) Order in Council, 1962; Constitution of the Republic of Uganda, 1967, Art. 90(1), as amended by the Judicature Act (Amendment) Decree, *1977* (Decree 20 of 1977), s. 2(e).

[411] Judicial Service Commission Regulations, *2005* (S.I. No. 87/2005), Reg. 35(1).

[412] S.I. No. 88/2005, Regs. 3, 8, 10(1), 13(2) & 14(1) (2). An oral complaint must be reduced into writing, dated and signed by the complainant. The Disciplinary Committee is part and parcel of the Commission, as held in *His Worship Aggrey Bwire v. Attorney General and JSC*, Civil Appeal No. 9 of 2009 (CAU) (unrep.); Civil Appeal No. 8 of 2010 (SCU) (unrep.).

does not deal with the conduct of a judicial officer or any other persons performing judicial functions, or is manifestly frivolous, vexatious, unwarranted or unfounded in law.[413]

Proceedings before the Disciplinary Committee are conducted in camera but are guided by the rules of natural justice and governed by general principles of law applicable in Uganda. Both parties are heard and their evidence is recorded in written form. They are then notified of the date and time when the Committee's decision is to be pronounced.[414]

11.3.1.4 Appeals

A judicial officer who is dissatisfied with the decision of the Commission may appeal within thirty days after the decision has been made to a panel of three judges of the High Court. The appeal should state the reasons for which he or she is not satisfied.[415]

11.3.2 Means of Discipline

For a judicial officer other than a Judge, the JSC may direct that they be interdicted—a discretionary preliminary step in the disciplinary process before the actual trial. But after hearing the complaint, the JSC may impose one or more disciplinary penalties against the errant officer. These include dismissal, suspension, reduction in rank and others. The JSC also has power to retire such judicial officer in the public interest without going through the trial procedure described above.[416]

Judges enjoy special protections under the 1995 Constitution. A Judge can only be removed from office by the President for inability to

[413] *Ibid*, Regs.5(3), 10(2), 11(1) & 12(1);*Bwire* supra note 45.
[414] Judicial Service Act, ss. 11 & 12; S.I. No. 88/2005, Regs.10(14), 15, 16(1) & 19(1). For any case not otherwise provided for, the Commission determines the procedure to be adopted: S.I. No. 87 of 2005, Reg. 41.
[415] S.I. No. 88 of 2005, Reg. 18. As shown by the decision in *Bwire* supra note 45, in an appropriate case judicial review may be available to a person dissatisfied with a decision of the Commission.
[416] S.I. No. 87/2005, Regs. 25(2), 31(1) (2) (3) (a) & 34; *Bwire supra* note 45.

perform the functions of his or her office arising from infirmity of body or mind, misbehaviour or misconduct, or incompetence. The process starts with the JSC or the Cabinet referring to the President the question whether the removal of a Judge should be investigated, with advice that the President should appoint a tribunal for that purpose. The President only effects the removal on the recommendation of the tribunal. While the matter is pending before the tribunal, the President is required to suspend the Judge from performing the functions of his or her office. The suspension only ceases to have effect if the tribunal advises the President that the Judge should not be removed.[417] The near-absolute security of tenure enjoyed by Judges makes them virtually irremovable.[418]

11.3.3 Case Study

His Worship Aggrey Bwire v. Attorney General and JSC[419]

The Appellant, a Magistrate Grade I, was charged before the JSC (the 2nd Respondent) with the following counts under the Judicial Service (Complaints and Disciplinary Proceedings) Regulations, 2005— Count I: being untrustworthy and lacking integrity in private and public transactions, contrary to Reg. 23(g); Count II: Abuse of judicial authority, contrary to Reg. 23(m); and Count III: Conducting himself in a manner prejudicial to the good image, honour, dignity and reputation of the service, contrary to Reg. 23(a). He was interdicted by the Chief Registrar on the directive of the 2nd Respondent's Disciplinary

[417] Constitution, Art. 144(2)–(7).
[418] Kasule, Remmy, *The Role of the Supreme Court and the Court of Appeal* (2002), a Paper presented to the Justices of the Supreme Court and Court of Appeal during their Retreat held at Imperial Botanical Beach Hotel, Entebbe, Uganda, from 8–11 August 2002, p. 2. *See also* Nevada Legislative Counsel Bureau Research Division *Background Paper 81–8: Judicial Discipline*, p. 1.
[419] *Supra* note 44. By the time the matter came to the Sup. Ct. the Appellant had already been dismissed from service by JSC.

Committee. He applied to the High Court for judicial review and unsuccessfully complained in an ensuing appeal to the Court of Appeal that the trial Judge had failed to consider his plea of judicial immunity and judicial independence. His subsequent appeal to the Supreme Court was also dismissed.

Held—(1) (CAU) By his own conduct the Appellant had disqualified himself from the protection afforded by the principles of judicial independence and immunity; (2) (SCU) There were very many complaints against the Appellant which necessitated his interdiction in the public interest pending the disposal of those complaints.

11.3.4 Publicity Regarding Disciplinary Actions

11.3.4.1 Uganda

Complaints before the Commission are heard in camera unless otherwise decided by the Commission or due to public interest. Any final order made may be published in at least one of the newspapers circulating in Uganda, or announced on a radio station of the Commission's choice. And copies of the decision may be sent to certain specified persons, organisations or institutions.[420]

In its own publication, the Commission states: "The Commission's proceedings are not open to the public. However, for the benefit of the public, it is the Commission's policy that its decisions are made known to the public."[421] This secrecy of JSC proceedings is further entrenched by other provisions that prohibit, and even criminalise, unauthorised publication or disclosure of the JSC's documents, communications or information—even in legal proceedings![422]

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[420] S.I. No. 88 of 2005, Reg. 10(14) (18) (19).
[421] *Law and Administration of Justice in Uganda: Citizen's Handbook supra* note 38, p. 18.
[422] Judicial Service Act, ss. 16 & 22, read with ss. 23 and 24(2) (a) thereof.

If the JSC is to transparently display its independence, there is no need for its correspondences or communications with public officials to be kept secret from persons thereby affected. Under the 1995 Constitution, which enjoys supremacy over all other laws, only private correspondences and communications are protected. Official correspondences or communications between public officials are not protected, save where their disclosure is likely to prejudice the security or sovereignty of the Sate.[423] A weighty Constitutional challenge to these secrecy provisions is likely to be forthcoming if the provisions are not altered to comply with the Constitutional requirements for transparency and open records.

11.3.4.2 Comparative Analysis

Uganda is not alone in maintaining a shroud of secrecy over proceedings of its judicial disciplinary organs. The United Kingdom also restricts the right to disclose information regarding disciplinary proceedings against judicial officers. There, the Lord Chancellor and the Lord Chief Justice determine whether a particular disclosure ought to be made, guided by the need to maintain public confidence in the judiciary.[424] Similarly, in most states in the United States of America, activities of the judicial disciplinary commissions and their staff are confidential.[425] However, California and several other states have opened the judicial disciplinary proceedings to the public[426]. It should also be noted that in the United Kingdom and the United States there is

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[423] Arts.27(2) & 41(1).*Cf.* provisions of the Official Secrets Act (Cap. 302), particularly ss. 2 & 4.

[424] Constitutional Reform Act 2005 (c. 4), s. 139; Judicial Discipline (Prescribed Procedures) Regulations 2006, Regs.40, 25(7) (c), 34(5) (c) & 35(1) (d) (e).

[425] *Discipline–State Court Judges,* in http://www.judicialaccountability .org/judicialaccountability3.htm (accessed on 4th Feb 2011)

[426] Nevada Legislative Counsel Bureau Research Division *Background Paper 81–8: Judicial Discipline*, p. 7.

no Constitutional mandate for keeping such proceedings open as there is in Uganda.

11.3.5 Special Concerns Regarding Publicity Of Disciplinary Actions Concerning Judges, Including Policy Discussion

Proponents of confidentiality in judicial proceedings argue that confidentiality preserves judicial independence and protects the judiciary from frivolous, vexatious, unsubstantiated or unfounded accusations.[427] They also argue that it protects the anonymity of a complainant, especially an attorney.[428]

The poor reputation of individual judges impacts the reputation of the judiciary as a whole. A judiciary with a besmirched reputation cannot administer justice that is acceptable to the people; and a country with such a judiciary is a country without honour or justice.[429] Therefore there are grounds for protecting the reputation of Judges as a matter of policy. However these grounds must be balanced with the need for judicial accountability.

On the other hand, those who advocate public hearing before the Disciplinary Committee argue that "judges hold a public trust and should be held accountable for their actions. If a judge violates that trust, the public has the right to know what disciplinary actions were taken and the reasons for them. The core purpose is to maintain public confidence in the judiciary. The most stringent set of ethical standards is of little value unless the public is convinced that the standards are uniformly and vigorously enforced."[430] Open hearings would also

[427] *Ibid*, pp. 6–7; 32 *The Colorado Lawyer* (June 2003, No. 6), p. 27; and the enforcement provisions of the Uganda Code of Judicial Conduct, p. 13. See also Kanyeihamba, G.W., *Judicial Activism and the Quest for Human Rights in Uganda*, in [2002] MLJ 1–9, at 1, 7.
[428] *See supra* note 58, at 6–7.
[429] Kanyeihamba, G.W., *supra* note 60, at 1.
[430] *Supra* note 60, pp. 6–7.

enable the public to evaluate and assess the performance of the Commission.[431]

It is also possible to adopt a hybrid procedure that would provide some protection for judicial officers while still keeping the judiciary under the watchful eye of the public thus enabling the public to check the judiciary. Under one hybrid approach, hearings could become public after an initial finding of a prima facie case against the judicial officer. This approach would prevent the public besmirching of the judiciary through frivolous accusations. Finding ways that strike the balance of protecting the judiciary while subjecting the judiciary to public censure is important. As judicial power is derived from the people[432], it is right and proper for judicial officers to be subjected to public scrutiny.

11.3.6 Informal Checks on Misconduct

11.3.6.1 Peer Influence and Pressure

The "Promotion and Enforcement" section of the Uganda Code of Judicial Conduct provides that the Judicial Integrity Committee, Peer Committees and the Judiciary as a whole "shall encourage all Judicial Officers" to comply with the principles and rules set out in the Code. This is intended to serve as a self-monitoring mechanism within the judiciary itself. But since compliance with provisions of the Code is an obligation and not a mere voluntary act, judicial officers require more than mere "encouragement". Disciplinary measures should be brought to bear on them, given that a breach of the Code is a disciplinary offence.[433]

11.3.6.2 The Role of Civil Society

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[431] *Ibid*, p. 7.
[432] Constitution, Art. 126(1).
[433] S.I. No. 87 of 2005, Regs 23(j) & (n).

Civil society organisations also have a role to play in curbing misconduct. This may be done by educating the masses, which ultimately prepares them to identify and seek redress for any misconduct. It may also be done by helping victims of such misconduct to articulate their grievances before relevant authorities. Where possible, financial assistance could be extended to victims to facilitate their travel to the relevant offices to make and pursue their complaint.

11.3.6.3 The importance of professional ethics training

One of the causes of unethical behaviour among advocates and judicial officers is a lack of knowledge. A large number of errant professionals facing disciplinary charges genuinely believe they have not done anything wrong.[434] Continuing legal education can address this knowledge gap through seminars and training workshops that place an emphasis on ethics standards and professionalism. Key players and participants in the monitoring and disciplinary process should actively participate in such proceedings and care should be taken so that the event itself is conducted in a manner beyond reproach.

11.3.6.4 Capacity building within the general public

One of the most important checks on judicial and professional misconduct is the public at large. However, this important "watchdog" is unable to make an impact without a working knowledge of the professional standards that should be met. Therefore, the general public must be educated about what is expected of the legal professionals and the remedies available against them. Effectively educating the masses requires something more than mere radio and television programmes. The Law Council and the Judicial Integrity Committee could put in

[434] The position was the same several decades ago—*see* Mugerwa, *The Legal Profession and Legal Education in Uganda*, in Harvey, W.B., *An Introduction to the Legal System in East Africa*, E.A.L.B. (1975), pp. 105–111, at 110.

place an outreach programme, which may in turn conveniently take advantage of the existing regional structures of the Legal Aid Project of the Uganda Law Society.

11.4 The Whistleblowers Protection Act, 2010 and its implications for Lawyers

11.4.1 Background and Overview of the Act

For over four decades, various anti-corruption laws have made provision for the protection of informers.[435] By the end of the 1980s, however, many corrupt law enforcement agencies had turned against the informers. This necessitated a law to protect the confidentiality, identity and safety of informers in order to encourage reporting about corruption in government without the suffocating fear of reprisal.[436] This need eventually led to the passage of the Whistleblowers Protection Act, 2010.[437]

The Whistleblowers Act enables and protects individuals who, in the public interest, disclose information relating to irregular, illegal or corrupt practices. It is immaterial that the impropriety may have occurred in or outside the Republic of Uganda, or that the law applicable to it is Ugandan or foreign law. Disclosures of impropriety may be made internally to an employer of the whistleblower or externally to the

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[435] *See, e.g.*, the repealed (1970)Prevention of Corruption Act (Cap. 121), s. 23; the repealed (1988) Inspector-General of Government Act (Cap. 167); the Inspector-General of Government Act, 2002 (Act 5 of 2002), s. 34; the current Anti-Corruption Act, 2009 (Act 6 of 2009), s. 44.

[436] "Corruption in the Public Service: An Assessment, in Ruzindana," A et al (eds), *Fighting Corruption in Uganda: The Process of Building a National Integrity System*, Fountain Publishers (1998), at 24, 34; Jeremy Pope, "Elements of a Successful Anti-Corruption Strategy", in ibid, p. 12.

[437] Act 6 of 2010.

Inspectorate of Government, the Directorate of Public Prosecutions, the Uganda Human Rights Commission, the Directorate for Ethics and Integrity, the office of the Resident District Commissioner, the Parliament of Uganda, the National Environment Management Authority or the Uganda Police Force. External disclosures may be made where the complaint does not pertain to the whistleblower's employment or where an employee whistleblower reasonably believes that he or she will be subjected to occupational detriment, or that evidence relating to impropriety will be concealed or destroyed, or where the complaint has already been made and no action has been taken, or the whistleblower reasonably believes or fears that the employer will take no action.[438] A complaint arising from a disclosure may be rejected or dismissed for not revealing actionable impropriety or for lack of merit; but a deliberately false disclosure is an offence punishable by imprisonment or a fine, or both.[439]

Perhaps the most powerful and ominous aspect of the Act is what it sets in motion in conjunction with other law. When disclosures are made to the IGG and the DPP, the receiving officer is bound to expeditiously investigate the matter [Whistleblowers Act, s. 8(1)(2)]. If the disclosure relates to corruption, then the powers under Part IV of the Anti-Corruption Act, 2009 may be invoked. These entail forceful extraction of documents or information from whomever is in possession of the same.

11.4.2 Protection and Reward to Whistleblowers

Whistleblowers who maintain the confidentiality of their identity and of the information contained in the disclosure are protected, so long as the disclosure is reasonably believed to be substantially true and made in

[438] *Ibid*. s. 4(1)–(3).
[439] *Ibid*. ss. 5(3)–(7) & 17. A disclosure is not actionable if it relates to trivial, frivolous or vexatious matters or where it is not made in good faith: s. 5(4) (a).

good faith to an authorised officer. They are protected against victimisation or discrimination whether from their employer, a fellow employee or any other person. This protection extends to instances of actual or threatened dismissal, suspension, denial of promotion, demotion, redundancy, intimidation or harassment. Non-employee whistleblowers are similarly protected. However, where there is a right in law to take the action complained of, or where such action is demonstrably unrelated to the disclosure made, no victimisation arises.[440]

A victimised whistleblower may make a complaint to either the Inspectorate of Government or the Uganda Human Rights Commission for redress. Alternatively, he or she may seek redress by bringing a civil action in a court of law.[441] A whistleblower is also protected from civil or criminal proceedings in respect of a disclosure that contravenes any duty of confidentiality or official secrecy law, provided that the disclosure was made in good faith. This is bolstered by the availability of state protection, where necessary.[442]

Whistleblowers may also be entitled to a reward for their services. The reward is pegged to the recovery of money based on a particular disclosure; so that where no recovery is made, no reward can be paid.[443] Since the reward payable is a percentage of the sum recovered, a high-value transaction is likely to arouse the interest of potential whistleblowers.

11.4.3 Implications of the Act for Lawyers

The Whistleblower Act presents a stark conflict of duties for advocates. Admittedly, the conflict between an advocate's allegiance to

[440] *Ibid*. ss. 2(2) (3) & 9(1) (2) (a) (b) (6).
[441] *Ibid*. s. 9(3) (4).
[442] *Ibid*. ss. 10 & 11(1).
[443] *Ibid*. s. 19. The section attests to the fact that the actual target of the Act is financial impropriety.

a client and the advocate's duty as a citizen is nothing new. In Uganda there is a general conflict between the advocate's duty to clients and the broad Constitutional objectives and mandates to promote the general welfare of Uganda by combating corruption and public waste.[444] However, the Whistleblower Act provides a specific context for a conflict between duties. The Act pits the advocate's duty of client loyalty and client confidentiality against the incentives and immunities of the Whistleblower Act for reporting irregular, illegal or corrupt practices.

Advocates are barred by the Advocates (Professional Conduct) Regulations and Section 125 of the Evidence Act from disclosing their client's information without authority from the client, unless such disclosure is otherwise required by law.[445] Even in judicial proceedings, the client's consent is required before an advocate or an advocate's clerk or "servant" can disclose a communication from the client. Only communications made in furtherance of any illegal purposes, or which relate to any fact showing that a crime or fraud has been committed, are excluded from such protection.[446] The confidential nature of the advocate-client relationship facilitates the use of counsel and enables clients to make informed decisions.

The Whistleblowers Act makes no special exception for privileged and unprivileged communications. Therefore, on the face of the Act, the advocate-client privilege can be breached without any negative

[444]Art. 17(1) (i) & National Objectives and Directive Principles of State Policy No. XXVI, Para (iii), read with Directive Principle No. I, Para 1.

[445]Advocates (Professional Conduct) Regulations(S.I. No. 267–2), Regs. 7 & 10; and The Evidence Act, Cap.6 of the Laws of Uganda, s. 125.

[446]Evidence Act(Cap. 6), ss. 125–128, read with s. 1 thereof; *Henry Kayondo v. Uganda* [1992–1993] HCB 41 (SCU); *Virji & Ors v. Sood* [1973] E.A. 145 (HCK), at p. 146F–I; and *Halsbury's Laws of England*, 4th ed. (Reissue), Butterworths (1995), Vol. 44(1), Para 90. *Cf.* Bwengye, F.A.W., *Legal Practice in Uganda: The Law, Practice and Conduct of Advocates*, Marianum Publishing Company (2002), p. 136, for the view that all communications are privileged. With due respect, there is no justification for that view.

consequence when information relating to irregular, illegal or corrupt practices is reported. The immunity and incentives established in the Act severely compromise the advocate-client relationship. Clients that grasp the impact of the Whistleblower Act may be less likely to utilise an advocate-client relationship and may choose to be less forthright with their advocates going forward.

Advocates should not be transformed from "watchdogs" of their clients' interests to "bloodhounds" pursuing their own clients using a client's information as a weapon. Nor must a client's trust be abused by turning their information into a commodity for reward-hungry whistleblowers. Otherwise, in the end, advocates will be shunned, with untold consequences. Moreover, it is difficult to reconcile disclosures by advocates under the protection of the Act with the Constitutional right of an accused person to a fair trial and an advocate of their own choice.[447]

The Whistleblowers Act also raises serious concerns about law office management. It is difficult to keep a client's information out of the reach of staff in the firm. Clerks do the filing and secretaries the typing, and a particular client may be assigned to a legal assistant. Each of these firm employees becomes acquainted with the client's information at some level. Moreover, the financial incentive of whistleblowing may prove more tempting to firm employees with lower salaries and less training and indoctrination concerning the importance of the advocate-client privilege.

The Whistleblower Act has the potential of substantially undermining the law firm model. Little can be done to prevent disclosures among employees. Any provision in an employment contract that seeks to prevent or discourage an employee from making a disclosure, or that creates fear in the employee, is legally void. Equally void is a provision that prevents an employee from making a complaint

[447] Constitution, Art. 28(1) (3) (a) (d).

or taking action for relief in respect of victimisation. Victimisation is itself an offence punishable by imprisonment or a fine, or both[448], coupled with other remedies available to the aggrieved party. In addition, there is hardly any employer remedy for unmerited disclosures.[449] Unless law firms can meet the difficult burden of proving that the employee disclosure was knowingly false[450], their employees are largely protected from any punitive measure by the victimisation provision. Ultimately advocates could be forced to represent clients under a less efficient model where advocates handle all matters without non-advocate assistance.

[448]*See supra* note 70, ss. 13(1) & 16. These restrictive provisions are given retrospective effect!—s. 13(2).
[449]*See Ibid*. s. 5(4)–(7).
[450]*Ibid*. ss. 2–5 & 17.

POSTSCRIPT: THE FUTURE OF LEGAL ETHICS IN UGANDA

Pamela Tibihikirra-Kalyegira†

"We suggest that lawyers have a moral responsibility for what they know and for what they do. Their responsibility is complicated by the responsibility (also a moral responsibility) that lawyers have to clients, but lawyers should not hide from the complications of the moral life behind the illusion that the adversary system will yield the just result. The issue is not whether moral soundness in life is easy. It is whether lawyers are disabled from pursuing moral soundness. Certainly, determining the directions indicated by justice and mercy may be difficult."
Thomas L. Shaffer and Robert F. Cochran Jr.[451]

Introduction

The chapter titles of this book might offer the impression that this is a collection of legal principles and regulations governing the conduct of lawyers. What we hope is that the reader will go away with more than a mere rule-based knowledge. We would like for the reader to be inspired

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451 (1994), *Lawyers, Clients, and Moral Responsibility*, St. Paul, Minn.: West Pub. Co., pp. 11-12.

to enter into thoughtful and committed moral engagement with the ethical contours of legal practice. We hope this book is the start of a journey in which you will forge character and integrity as professional credentials.

In this concluding chapter we explore a number of gaps in the existing regulations governing the professional conduct of advocates in Uganda. We also address some related issues like the challenges of teaching legal ethics and integrating legal ethics in your conscience as a daily practice.

Shift from unclear general provisions to specific ethical guidance: Many of the gaps in the existing law of professional conduct of advocates in Uganda are directly related to the current approach of making generalized provisions. This could probably be attributed to the nature of legal practice in Uganda at the time these regulations were first enacted. However, legal practice is now getting more complex with a growing body of advocates. There is therefore a need for specificity and explanations/hypotheticals in the crafting of ethical guidelines. For example, the current limitations to practices like touting and coaching are broadly defined. What, exactly, is involved? Regulations should be more detailed, broken down.[452]

The need to rethink ethical rules to determine their appropriateness in the modern Ugandan context: There are a number of provisions within the current regulations that are somewhat out of sync with the Ugandan context. For example, minimum billing requirements do not take into account a largely poor population, particularly in rural areas. There is no provision for discounted services

[452] *Cf*. The American Bar Association Model Rules of Professional Conduct (adopted 1983) which seek to regulate legal ethics with quite detailed and specific regulations. These rules are routinely amended to respond to any changes in the practice of law.

to cater for this category. What about the regulations against coaching? Could a case be made for some coaching in the case of unsophisticated witnesses and litigants that do not understand the legal process? More importantly, should we continue to accept the adversarial model as appropriate in the context of wealth disparity and ineffective or overmatched and underpaid government systems? The list goes on.

Changing the Discovery Paradigm: As pointed out in Chapter Four on Confidentiality and Privilege, Uganda does not have a vibrant discovery practice and case law concerning evidentiary matters is limited. As such, the scope and application of advocate-client privilege with regard to matters of evidence presents potential barriers to effective discovery. The overriding presumption needs to be that all relevant evidence and all materials likely to lead to the discovery of relevant evidence should be disclosed. Until this is the case we will have trial by ambush and people using advocates to keep documents and information secret. The purpose of the advocate client privilege is not to turn evidence into confidential material. A shift to a default disclosure setting in terms of evidence should be encouraged. This will in turn require development of our jurisprudence in terms of the advocate client privilege.

Malpractice Insurance: Professional indemnity is still at the nascent stage within Uganda's legal profession. As clients and the general public become more enlightened about bringing suits against advocates for professional negligence, the need for malpractice insurance will increase and perhaps become mandatory. In such circumstances senior partners should co-sign insurance for younger lawyers who will then have more incentive to uphold the ethical tenets of the profession.

Conflicts of Interest: As discussed in Chapter three on the advocate-client relationship, this is an area that is not yet fully developed in Uganda. Even so, it is only a question of time before calls are made for

clearer ethical guidance on this matter to avoid litigation based thereon. As legal business grows and larger law firms are formed, particularly within the context of cross-border practice in East Africa, there will be increased incidences of conflicts of interest. For example, one firm could be representing multiple clients in the same matter, some of whose interests conflict or representing one client against a former client in related matters. It is imperative that we develop more specific guidelines to address this impending development, as it will make for the attraction of international business, which expects the upholding of certain standards to avoid conflicts of interest. More importantly, having concrete standards benefits both clients and advocates.[453]

Client counselling: Developing service oriented advocates: Can we change the culture where client-centred practice looks at more than finding a way, any way, to get the best result? Can we raise up advocates that will give clients sound and moral advice that considers the needs of the client and is not built on the advocate's knowledge of how to manipulate and pervert the justice system? Can we give advocates that push for the best result for the client, such as pursuing ADR; even when that course of action is less likely to line the pocket of the advocate? … these and many other questions shape the ethical dilemmas that advocates face on a daily basis. Even so, each dilemma presents an opportunity for advocates to influence an ethical outcome in their counselling role.

The potential for an Ethical "Tipping Point"*:* The public cry against corruption within the Ugandan judiciary has become the norm and elicits no surprise whenever mentioned in various reports by both public and civil society watchdogs. Through education, technology,

[453]*See e.g.* the American Bar Association Model Rules of Professional Conduct, Rule 1.7 on Conflict of Interest: Current Clients and Rule 1.8 which spells out specific rules (detailed) regarding conflict of interest for current clients.

transparency and working structures, Uganda must work to a point where bribes are seen as illegal as opposed to necessary. A primary cause of unethical conduct is the assumption that everyone would behave in a similar manner – 'everyone does it'- or that moral responsibility lies elsewhere. Achieving a culture change is difficult and economic realities in the Ugandan context make it even more difficult. Those advocates that are determined to do the right thing regardless of the influence of economic pressure and financial rewards should be supported in order to create a culture where they can thrive. The legal profession as a body needs to cultivate a passion for upholding integrity and supporting whistleblowers when ethical problems arise.

Broadening enforcement and empowering Law Council: The Law Council Disciplinary Committee is inundated with a huge case load. It sits only once a week on Fridays. The current membership of this committee is only five and it takes three to constitute a quorum, making it difficult to hold regular sessions when three members are held up due to their other duties.[454] If it is to function more effectively, the Law Council Disciplinary Committee needs to evolve into a permanent body with more regular disciplinary hearings. This would call for more staff and resources to adequately handle ethical complaints and disciplinary proceedings. Perhaps the sanctions against unethical practices should also be more punitive to serve as a deterrent and to regain the public's confidence in lawyers as a group.

There should also be a modification of the rules of procedure during disciplinary proceedings, which would make it difficult for advocates to postpone disciplinary action by simply appealing the decision of this body and continuing to practice pending the hearing of the appeal.

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[454]*See* S 18(1) Advocates Act (Cap. 267), as amended by the Advocates (Amendment) Act (Act 27 of 2002).

The current focus of disciplinary action relates to stealing clients' money through commingling of personal and client funds. There are several other professional indiscretions that are committed on a daily basis in legal practice. We need to explore other avenues for the enforcement of legal ethics among advocates in Uganda. As suggested by Ateenyi Tibaijuka in Chapter 11 on Discipline and Whistleblowing, the legal profession itself needs to develop a culture of self-policing among the bar where advocates take up the mantle of a self-regulated profession as ethical watchdogs. There is less incentive to be unethical when there are colleagues serving as mentors and checks on bad behaviour. Only by ensuring compliance with accepted standards of professional ethics can the legal fraternity protect itself as a discipline.

Integrity in Practice. How do you integrate legal ethics in your conscience as a daily practice? The typical law school experience lacks moral depth. Think back to your law student days and what marked that experience – heady intellectual discourse geared towards a lifetime of legal practice in the adversarial system: emphasis on winning at all costs, outsmarting the other side, being economical with the truth to hide the parts of your case that are not in your favour, bludgeoning the other side's witnesses with the power of harsh cross-examination to dismantle any possible counter-argument to your client's case and so on.

Law school training emphasizes the adversarial system, zealousness on your client's behalf, and blind duty to our client without due regard to moral considerations. Mind over matter. Don't get emotionally attached to issues of right or wrong. "Think like a lawyer." Divorce your conscience from the intellect.

What do we become by such training? What temperament is attracted to law in the first place? Lawyers tend to be competitive by nature. Law school compounds this attitude, which continues in legal practice with the desire for acclaimed success from both peers and

society. One could conclude that money and power (or influence if you like) are given occupational hazards of lawyers.

The pursuit of wealth and status by lawyers often begins long before law school. For example, during admissions for LLB I oral interviews at Uganda Christian University, one of the main expectations of becoming a lawyer, as stated by the majority of interviewees, is "making money." It therefore makes good sense to integrate professional ethics throughout the legal education and training curriculum. In Uganda, professional ethics is left to training at the Law Development Centre and not at the undergraduate level.[455] One would argue that all lawyers should be exposed to legal ethics and this should not be left to only those wishing to join legal practice.

Promotion of ethics through legal training: Can we teach ethics? Can moral character be taught? These are questions that have never been settled with strong adherents on either side. What is not in doubt is the need to make lawyers aware of the pitfalls that await in this area. Tibaijuka Ateenyi points out in Chapter 11 on Discipline and Whistleblowing, that some advocates and judicial officers who face disciplinary charges genuinely believe that they have not done anything wrong. While continuing legal education could address this knowledge gap, it is perhaps best to begin the teaching of legal ethics at law school.

Methods of teaching legal ethics: There are several ways of teaching legal ethics. There are scholars who focus on the teaching of rules, other scholars who advocate teaching of rules in context and yet another group of scholars who concentrate on the moral development of students.

The Pervasive method: Aside from how to teach legal ethics, the debate rages further on how to integrate the teaching of this subject

[455] Presently only Uganda Christian University Faculty of Law teaches ethics as part of its first year curriculum. There is a proposal to have legal ethics as a compulsory course in the Minimum Standards for Courses of Study in Law to be applied to all law schools in Uganda.

within the legal training curriculum. One of the popular ways of teaching ethics is by the 'Pervasive' method. Professor Deborah L. Rhode of Stanford University is a strong advocate of this method. She argues that legal ethics should be taught both as a course in its own right and legal issues addressed throughout the curriculum as they arise in all substantial areas of the law. She believes that law professors should always include discussion of ethical issues in their own areas of expertise. She also suggests that law schools should provide electives in legal ethics under different areas of substantive law so that students could choose on the basis of their future intended fields of practice.[456]

Challenges of the Pervasive method: There are some challenges to teaching ethics by the pervasive method. Professor Julian Webb of Warwick University points out that law professors who do not have adequate time to cover their own course have no incentive to extend their curriculum to cover legal ethics in their own subject area. He advocates a separate course on legal ethics be provided even if the subject is taught pervasively in other courses. He draws attention to the fact that many countries have a 'fragmented' nature of legal education; the division between law areas, between legal knowledge and legal practice and professional education. Consequently, there is no obvious place in legal education where legal ethics should be taught.[457]

Challenges of teaching Legal Ethics: The difficulty of teaching legal ethics effectively is accentuated by the large numbers of students in large lecture halls. Students themselves often have some resistance or reluctance towards the legal ethics course. Moreover there are problems

[456]Deborah L. Rhode (1998), *Professional Responsibility; Ethics by the Pervasive Method*, 2nd Edition, Aspen Law & Business.

[457]*See generally*, Julian Webb (1996), *Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England and Wales*, 30 *Law Teacher* 270 and Julian Webb (1999), *Developing Ethical Lawyers: Can Legal Education Enhance Access to Justice?* 33 *Law Teacher* 284. Also cited in Duncan N. J. (2009), *Teaching ethics pervasively or in discrete modules?*, London: The City Law School of City University London.

associated with designing course materials of appropriate depth and difficulty in assessment of ethical challenges as there might not be a foolproof right answer to a moral question or situation.

Methodology of teaching Legal Ethics: Some of the methods suggested to teach legal ethics include having students volunteer ideas, sharing of personal stories, use of movie clips, simulations and so on. Students could also learn ethical issues faced by criminal lawyers in conjunction with Criminal Procedure Law; ethical issues faced by commercial lawyers side by side with Company Law etc. These methods ensure that students study legal ethics in a more 'self-directed' manner and not passively as a body of rules.

Teaching of Legal Ethics in other Jurisdictions: Ethics is part of the substantive LLB curriculum (i.e.) compulsory in Australia and New Zealand. It does not form part of the substantive LLB curriculum in the United Kingdom or Canada. It currently does not form part of the substantive LLB curriculum in Uganda but there is a proposal to have it studied under Clinical Legal Education during the final year of the LLB programme.

In consonance with the suggested methodology of teaching Legal Ethics, many scholars agree that Clinical Legal Education is the best way to teach Legal Ethics within an experiential environment that fosters moral dialogue.

Given the pervasive professional failure throughout the legal system, there is need to change the perception and role of lawyers in society beginning in law school. Incorporation of professional ethics throughout the legal education and training curriculum should be coupled with encouraging students to consider working upcountry and to get involved in other fields of practice aside from private practice and litigation.

Law students should be introduced to Alternative Dispute Resolution[458] to save their clients time and money. Law schools should nurture their students to become social engineers, interested in public interest law, politics, development studies, civic legal education among the population on subjects like the role of the Police, the role of the Administrator General, writing a will, obtaining a land title, and so on.

Even so, while professional ethics can be taught to law students to enhance their appreciation for integrity, the restraining hand of sanctions is a much more effective tool against errant legal practitioners.

Conclusion

As Rhode and Luban[459] point out, many of the formal ethics rules governing the conduct of lawyers leave the ultimate decision to the lawyer's discretion. E.g. the American Bar Association Model Rules of Professional Conduct permit, but do not require, a lawyer to reveal confidential client information "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."[460] Bar ethical rules permit, but do not require, a corporate lawyer to resign if the corporation's highest authority insists on violating the law in a way that is likely to injure the corporation.[461] They permit, but do not require, a lawyer to withdraw from representation if the lawyer finds the client's objectives imprudent.[462] They permit, but do not require, lawyers to include "moral, economic, social and political factors" in the advice they offer

[458] Uganda Christian University Faculty of Law teaches ADR in the first year of law school. However, most Ugandan law schools do not teach ADR. Many students encounter it for the first time at the Law Development Centre.
[459]Deborah L. Rhode and David Luban, *Legal Ethics*, 3rd Edition, University Casebook Series, Foundation Press, New York 2001.
[460]Model Rule 1.6(b) (1).
[461]Model Rule 1.13(c).
[462]Model Rule 1.16(b) (3).

clients.[463] They recommend, but do not require, that lawyers perform fifty hours annually of pro bono service.[464] Rhode and Luban conclude that for these as well as many other issues that arise in legal practice, the law itself invites the lawyer to respond to dilemmas as a moral being.[465]

As the legal fraternity expands, with competition for business getting stiff and more cut throat, the incidences calling for firmer professional responsibility and regulation will increase. These calls will come from within and outside the profession. This will call for the amendment of the Advocates Professional Conduct Regulations to provide more concrete guidance on the limits within which advocates may operate without compromising the quality of legal service to their clients.

[463]Model Rule 2.1.
[464]Model Rule 6.1.
[465] Rhode and Luban, *supra* note 9 at xix.

APPENDIX A

THE ADVOCATES (PROFESSIONAL CONDUCT) REGULATIONS

Statutory Instrument 267.—2.
The Advocates (Professional Conduct) Regulations.
(Under section 77(1)(a) of the Act.)

1. Citation.

These Regulations may be cited as the Advocates (Professional Conduct) Regulations.

2. Manner of acting on behalf of clients.

(1) No advocate shall act for any person unless he or she has received instructions from that person or his or her duly authorized agent.

(2) An advocate shall not unreasonably delay the carrying out of instructions received from his or her clients and shall conduct business on behalf of clients with due diligence, including, in particular, the answering of correspondence dealing with the affairs of his or her clients.

3. Withdrawal from cases.

(1) An advocate may withdraw from the conduct of a case on behalf of a client where.—

(a) the client withdraws instructions from the advocate;

(b) the client instructs the advocate to take any action that may involve the advocate in proceedings for professional misconduct or require him or her to act contrary to his or her advice to the client;

(c) the advocate is duly permitted by the court to withdraw;

(d) the client disregards an agreement or obligation as to the payment of the advocate's fees and disbursements.

(2) Whenever an advocate intends to withdraw from the conduct of a case, the advocate shall.—

(a) give his or her client, the court and the opposite party sufficient notice of his or her intention to withdraw; and

(b) refund to his or her former client such proportionate professional fees as have not been earned by him or her in the circumstances of the case.

4. Advocate not to prejudice former client.

An advocate shall not accept instructions from any person in respect of a contentious or non-contentious matter if the matter involves a former client and the advocate as a result of acting for the former client is aware of any facts which may be prejudicial to the client in that matter.

5. Duty to appear in court, etc.

(1) Every advocate shall, in all contentious matters, either appear in court personally or brief a partner or a professional assistant employed by his or her firm to appear on behalf of his or her client.

(2) Where it is not possible for the advocate so to appear personally or to brief a partner or professional assistant employed by his or her firm, he or she shall brief another advocate acceptable to the client so to appear; except that where the advocate considers the proceedings in question to be of minor decisive value to the final outcome of the case, he or she shall not be required to obtain the client's acceptance of such other advocate.

6. Advocate to be personally responsible for client's work.

An advocate shall be personally responsible for work undertaken on behalf of a client and shall supervise or make arrangements for supervision by another advocate who is a member of the same firm of all work undertaken by nonprofessional employees.

7. Nondisclosure of client's information.

An advocate shall not disclose or divulge any information obtained or acquired as a result of his or her acting on behalf of a client except where this becomes necessary in the conduct of the affairs of that client, or otherwise required by law.

8. Advocate to account for money of a client.

(1) An advocate shall not use money held on behalf of a client either for the benefit of himself or herself or of any other person.

(2) An advocate shall make full disclosure to his or her client of the amounts and nature of all payments made to the advocate on behalf of that client and, when making any payments to the client, shall set out in writing the sums received on behalf of the client and any deductions made by the advocate from those receipts.

(3) An advocate shall return any sum or part of the sum paid to the advocate by a client as a retainer if the amount paid exceeds the value of the work done and disbursements made on behalf of the client.

9. Personal involvement in a client's case.

No advocate may appear before any court or tribunal in any matter in which he or she has reason to believe that he or she will be required as a witness to give evidence, whether verbally or by affidavit; and if, while appearing in any matter, it becomes apparent that he or she will be required as a witness to give evidence whether verbally or by affidavit, he or she shall not continue to appear; except that this regulation shall

not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on a formal or non-contentious matter or fact in any matter in which he or she acts or appears.

10. Advocate's fiduciary relationship with clients.

An advocate shall not use his or her fiduciary relationship with his or her clients to his or her own personal advantage and shall disclose to those clients any personal interest that he or she may have in transactions being conducted on behalf of those clients.

11. Advocate not to exploit client's shortcomings.

An advocate shall not exploit the inexperience, lack of understanding, illiteracy or other personal shortcoming of a client for his or her personal benefit or for the benefit of any other person.

12. Advocate to advise clients diligently.

Every advocate shall advise his or her clients in their best interest, and no advocate shall knowingly or recklessly encourage a client to enter into, oppose or continue any litigation, matter or other transaction in respect of which a reasonable advocate would advise that to do so would not be in the best interests of the client or would be an abuse of court process.

13. Unlawful arrangement with public officers, etc.

An advocate shall not enter into any arrangement with any person employed in the public service whereby that person is to secure either the acquittal of the advocate's client, the bringing of a lesser criminal charge against that client or the varying of the evidence to be adduced by or for the prosecution except where any such arrangement is deemed to be proper practice.

14. Undertakings by an advocate.

An advocate shall not.—

(a) give any undertaking to another advocate or any other person knowing that he or she has no authority or means of satisfying the undertaking; and

(b) knowingly breach the terms of an undertaking.

15. Affidavits to contain truth.

An advocate shall not include in any affidavit any matter which he or she knows or has reason to believe is false.

16. Advocate to inform the court of his or her client's false evidence.

If any advocate becomes aware that any person has, before the court, sworn a false affidavit or given false evidence, he or she shall inform the court of his or her discovery.

17. Duty of an advocate to advise the court on matters within his or her special knowledge.

(1) An advocate conducting a case or matter shall not allow a court to be misled by remaining silent about a matter within his or her knowledge which a reasonable person would realise, if made known to the court, would affect its proceedings, decision or judgment.

(2) If an irregularity comes to the knowledge of an advocate during or after the hearing of a case but before a verdict or judgment has been given, the advocate shall inform the court of the irregularity without delay.

18. Coaching of clients.

An advocate shall not coach or permit a person to be coached who is being called by him or her to give evidence in court nor shall he or she call a person to give evidence whom he or she knows or has a reasonable suspicion has been coached.

19. Advocate not to hinder witness, etc.

An advocate shall not, in order to benefit his or her client's case in any way, intimidate or otherwise induce a witness who he or she knows has been or is likely to be called by the opposite party or cause such a witness to be so intimidated or induced from departing from the truth or abstaining from giving evidence.

20. Res sub judice.

An advocate shall not make announcements or comments to newspapers or any other news media, including radio and television, concerning any pending, anticipated or current litigation in which he or she is or is not involved, whether in a professional or personal capacity.

21. Advocate may act for client of other advocate.

(1) An advocate may act for a client in a matter in which he or she knows or has reason to believe that another advocate is then acting for that client only with the consent of that other advocate.

(2) An advocate may act for a client in a matter in which he or she knows or has reason to believe that another advocate has been acting for that client, if either.—

(a) that other advocate has refused to act further; or

(b) the client has withdrawn instructions from that other advocate upon proper notice to him or her.

22. Touting.

No advocate may directly or indirectly apply or seek instructions for professional business, or do or permit in the carrying on of his or her practice any act or thing which can be reasonably regarded as touting or advertising or as calculated to attract business unfairly, and in particular, but not derogating from the generality of this regulation.—

(a) by approaching persons involved in accidents, or the employment of others to approach such persons;

(b) by influencing persons, whether by reward or not, who by reason of their employment are in a position to advise persons to consult an advocate; and

(c) by accepting work through any person, organisation or body that solicits or receives payment or any other benefit for pursuing claims in respect of accidents.

23. Publications by advocates.

(1) Subject to subregulations (2) and (3) of this regulation, an advocate shall not knowingly allow articles (including photographs) to be published in any news media concerning himself or herself, nor shall he or she give any press conference or any press statements which are likely to make known or publicise the fact that he or she is an advocate.

(2) An advocate may answer questions or write articles that may be published in the press or in news media concerning legal topics but shall not disclose his or her name except in circumstances where the Law Council has permitted him or her so to do.

(3) Where the Law Council cannot readily convene, the chairperson of the Law Council may grant the permission referred to in subregulation (2) of this regulation to the advocate.

(4) This regulation shall not apply to professional journals or publications or to any publications of an educational nature.

24. Advocate's nameplate or signboard.

(1) An advocate may erect a plate or signboard of not more than 36 centimetres by 25.5 centimetres in size containing the word "advocate", indicating his or her name, place of business, professional qualifications, including degrees, and where applicable, the fact that he or she is a notary public or commissioner for oaths.

(2) Notwithstanding subregulation (1) of this regulation, a nameplate or signboard shall, in the opinion of the Law Council, be sober in design.

(3) No advocate shall carry on any practice under a firm name consisting solely or partly of the name of a partner who has ceased to practise as an advocate.

(4) An advocate or a firm of advocates affected by subregulation (3) of this regulation shall be allowed five years from the date of the change in the composition of the firm, in which to effect the required change in the firm name.

(5) Notwithstanding subregulation (1) of this regulation, no advocate shall include on his or her nameplate, signboard or letterhead any nonlegal professional qualifications or appointments in any public body whether the appointments are present or past.

25. Advocate not to advertise his or her name, etc.

(1) An advocate shall not allow his or her name or the fact that he or she is an advocate to be used in any commercial advertisement.

(2) An advocate shall not cause his or her name or the name of his or her firm or the fact that he or she is an advocate to be inserted in heavy or distinctive type, in any directory or guide and, in particular, a telephone directory.

(3) An advocate shall not cause or allow his or her name to be inserted in any classified or trade directory or section of such directory.

26. Contingent fees.

An advocate shall not enter into any agreement for the sharing of a proportion of the proceeds of a judgment whether by way of percentage or otherwise either as.—

(a) part of or the entire amount of his or her professional fees; or

(b) in consideration of advancing to a client funds for disbursements.

27. Advocate to advance money only for disbursements.

An advocate representing a client shall not advance any money to the client except only for disbursements connected with the case on the matter in which he or she is instructed.

28. Excessive fees, etc.

(1) No advocate shall charge a fee which is below the specified fee under the Advocates (Remuneration and Taxation of Costs) Rules.

(2) Where fees are not specified, the advocate shall charge such fees as in the opinion of the Disciplinary Committee are not excessive or extortionate.

29. Advocate to account promptly and correctly.

Every advocate shall account to his or her clients promptly and correctly for all monies held in respect of clients and in accordance with the Advocates Accounts Rules set out in the First Schedule to the Act.

30. Advocate not to engage in unbefitting trade, etc.

An advocate shall not engage in a trade or profession, either solely or with any other person, which in the opinion of the Law Council is unbecoming of the dignity of the legal profession.

31. Offences under the Advocates Act, etc.

(1) Any act or omission of the advocate, which is an offence under the Advocates Act, shall be professional misconduct for the purposes of these Regulations.

(2) Any conduct of an advocate, which in the opinion of the Disciplinary Committee, whether the conduct occurs in the practice of the advocate's profession or otherwise, is unbecoming of an advocate shall be a professional misconduct for the purposes of these.

APPENDIX B

UGANDA CODE OF JUDICIAL CONDUCT

Preamble

RECOGNISING THAT the Uganda Courts of Judicature are established by the Constitution to exercise judicial power in the name of the people of Uganda in conformity with law and with the values, norms and aspirations of the people, and are enjoined to administer substantive justice impartially and expeditiously;

CONSCIOUS THAT in conformity with those values, norms, and aspirations, the Courts in exercising judicial authority must uphold the principles laid down in the Constitution, - as well as in Regional and International Conventions to which Uganda subscribes;

AWARE that the real effectiveness of judicial authority lies in the respect and acceptance the public accords to its exercise, which in turn ultimately depends on the proper manner in which the administration of justice is conducted;

RECOGNISING that in order to strengthen the rule of law, to protect human rights and freedoms and to properly administer justice, and in order to enhance and maintain public confidence in the Judiciary, it is imperative for it both at individual and at institutional level, to respect and honour the judicial office as a public trust and to strive to protect judicial independence; and

HAVING reviewed and modified the code known as "The Code of Conduct for Judges, Magistrates and other Judicial Officers 1989".

NOW WE THE JUDICIAL OFFICERS OF UGANDA DO HEREBY ADOPT the following principles and rules designed to provide guidance for regulating judicial conduct
AND to be known as "The Uganda Code of Judicial Conduct".

1. Independence

Principle: *An independent Judiciary is indispensable to the proper administration of justice. A Judicial Officer therefore should uphold and exemplify the independence of the Judiciary in its individual and institutional aspects.*

1.1 A Judicial Officer shall exercise the judicial function independently on the basis of his or her assessment of the facts, and in accordance with conscientious understanding of the law, free of any direct or indirect extraneous influences, inducements, pressures, threats or interference, from any quarter or for any reason.

1.2 A Judicial Officer shall reject any attempt, arising from outside the proper judicial process, to influence the decision in any matter before the Judicial Officer for judicial decision.

1.3 A Judicial Officer shall be independent of judicial colleagues in respect of decisions which he or she is obliged to make independently, Proper professional consultation shall be excepted.

1.4 A Judicial Officer shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

2. Impartiality

Principle: *Impartiality is the essence of the judicial function and applies not only to the making of a decision but also to the process by*

which the decision is made. Justice must not merely be done but must also be seen to be done.

2.1 A Judicial Officer shall perform judicial duties without fear, favour, ill-will, bias, or prejudice.

2.2 A Judicial Officer shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the legal profession, the litigants and the public, in the impartiality of the Judicial Officer and of the judiciary.

2.3 A Judicial Officer shall avoid close personal association with individual members of the legal profession who practice in his or her court, where such association might reasonably give rise to suspicion or appearance of favouritism or partiality.

2.4 A Judicial Officer shall refrain from participating in any proceedings in which the impartiality of the Judicial Officer might reasonably be questioned.

Without limiting the generality of the foregoing a Judicial Officer shall disqualify himself or herself from participating in any proceedings in the following instances:-

2.4.1 Where the Judicial Officer has personal knowledge of the disputed facts concerning the proceedings;

2.4.2 Where a member of the Judicial Officer's family is representing a litigant, is a party, or has interest in the outcome of the matter in controversy, in the proceedings.

3. Integrity

Principle: *Integrity is central to the proper discharge of the judicial office. The behaviour and conduct of a Judicial Officer must re-affirm the peoples' faith in the integrity of the judiciary.*

3.1 A Judicial Officer shall respect and uphold the laws of the country.

3.2 A Judicial Officer shall at all time and in every respect be of an upright character and ensure that his or her conduct is above reproach in the view of a reasonable, fair-minded and informed person.

3.3 A Judicial Officer shall exhibit and promote high standards of judicial and personal integrity.

3.4 In addition to observing the standards of this Code personally, a Judicial Officer shall encourage, support and help other Judicial Officers to do the same.

4. Propriety

Principle: *Propriety and the appearance of propriety are essential to the performance of all the activities of a Judicial Officer. A Judicial Officer shall avoid impropriety and the appearance of impropriety in all judicial and personal activities.*

4.1 A Judicial Officer shall at all time conduct himself or herself in a manner consistent with the dignity of the judicial office, and for that purpose must freely and willingly accept appropriate personal restrictions.

4.2 A Judicial Officer shall exhibit and promote high standards of judicial conduct.

4.3 A Judicial Officer shall not use or lend the prestige of the judicial office to advance his or her private interests, or the private interests of a member of the family or of anyone else, nor shall a Judicial Officer convey or permit others to convey the impression that anyone is in a special position to improperly influence the Judicial Officer in the performance of judicial duties.

4.4 A Judicial Officer shall refrain from conduct and from associating with persons, groups of persons and organisations, which in the mind of a reasonable, fair-minded and informed person, might undermine confidence in the Judicial Officer's impartiality or otherwise with regard to any issue that may come before the Courts.

4.5 A Judicial Officer shall not, without authority of the law or the consent of the parties, carry out investigation of the facts of a case before him or her in the absence of any of the parties, nor communicate with any party to such a case in the absence of the other party.

4.6 A Judicial Officer shall refrain from all active political activity or involvement, and from conduct that, in the mind of a reasonable fair-minded and informed person, might give rise to the appearance that the judicial officer is engaged in political activity.

4.7 A Judicial Officer, by himself or herself or through a family member, or other person, shall neither ask for, nor accept, any gift, bequest, loan, hospitality, or favour, from any person with interest in any litigation before the courts, or from any person in relation to anything done or to be done or omitted to be done by the Judicial Officer in connection with the performance of judicial duties. Loans from banks and other financial institutions shall be excepted.

4.8 Save for holding and managing appropriate personal or family investments, a Judicial Officer shall refrain from being engaged in financial or business dealings which may interfere with the proper performance of judicial duties or reflect adversely on the image or impartiality of the Judicial Officer.

4.9 A Judicial Officer, whilst the holder of judicial office, may own and manage property and may be a dormant partner or shareholder in a firm or company but shall not serve as an officer, manager or employee of any business concern, and shall under no circumstances

practice law or be an active or dormant partner or associate in a firm practicing law.

4.10 Subject to the proper performance of judicial duties, a Judicial Officer may take part in civic and charitable activities that do not in the mind of a reasonable, fair-minded and informed person reflect 'adversely upon the Judicial Officer's impartiality or performance of judicial duty.

4.11 Subject to the proper performance of judicial duties, a Judicial Officer may engage in such activities as to write, lecture, teach and may participate in other activities concerning the law, the legal system, the administration of justice and related matters, and may serve as a member of a body devoted to the improvement of the said matters.

4.12 A Judicial Officer may receive reasonable remuneration and actual reimbursement of expenses for the extrajudicial activities permitted by this code, if such payments do not give the appearance of inducing the Judicial Officer in the performance of judicial duties or otherwise give the appearance of impropriety.

5. Equality

Principle: *All persons are entitled to equal protection of the law. A Judicial Officer shall accord equal treatment to all persons who appear in court, without distinction on unjust discrimination based on the grounds of sex, colour, race, ethnicity, religion, age, social or economic status, political opinion, or disability.*

5.1 A Judicial Officer shall not in the performance of judicial duties, by words or conduct manifest bias or prejudice towards any person or group on basis of unjust discrimination.

5.2 A Judicial Officer shall not be a member of, nor be associated with, any society or organisation that practices unjust discrimination

6. Competence and Diligence

Principle: *Competence and diligence are prerequisites to the performance of the judicial office. A Judicial Officer shall give judicial duty precedence over all other activities.*

6.1 A Judicial Officer shall endeavour to maintain and enhance knowledge, skill and personal qualities necessary for the proper and competent performance and discharge of judicial duties.

6.2 A Judicial Officer shall promptly dispose of the business of the court, but in so doing, must ensure that justice prevails. Protracted trial of a case must be avoided wherever possible. Where a judgement is reserved, it should be delivered within 60 days, unless for good reason, it is not possible to do so.

6.3 A Judicial Officer shall maintain order and decorum in court, and shall be patient and dignified in all proceedings, and shall require similar conduct of advocates, witnesses, court staff and other persons in attendance.

Promotion and Enforcement

The Judicial Integrity Committee, Peer Committees, and The Judiciary as a whole shall promote awareness of the principles and rules set out in this Code and shall encourage all judicial officers to comply with them. Enforcement of these principles and ensuring the compliance of Judicial Officers with them, are essential to the effective achievement of the objectives of this Code. The enforcement of this Code shall take into account the legitimate need of a Judicial Officer, by reason of the nature of judicial office, to be afforded protection from vexatious or unsubstantiated accusations, and to be accorded due process of law, in the resolution of complaints against him or her.

Definitions

In this Code, unless the context otherwise permits or requires, the following meanings shall be attributed to the words used:

"Judicial Officer" shall have the same definition as is in the Constitution.

"Judicial Officer's family" includes the Judicial Officer's spouse, son, daughter, son-in-law, daughter-in-law, parent and any other close relative or employee who lives in the Judicial Officer's household.

Published this 20th day of June 2003

APPENDIX C

SELECTED CASE ANNOTATIONS FROM THE DISCIPLINARY COMMITTEE OF LAW COUNCIL

Compiled and Annotated by
George W.K.L. Kasozi †

Prefatory Note: The following is an instructive set of case annotations gleaned from the Disciplinary Committee of Law Council. These case annotations provide insight on the type of cases that result in disciplinary actions and should give the reader a sense of how the Disciplinary Committee handles matters brought before it. The facts, issues and holdings in these case annotations provide helpful instruction on the professional standards that Ugandan advocates must maintain. Future advocates should read these case annotations as cautionary tales and carefully consider the relevant teaching points in each matter.

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Advocate must not while acting for his/her client indulge in a conduct which is tantamount to misconduct. Misconduct may be either by commission or omission. The prohibited unprofessional or dishonourable or unworthy conduct justifies disciplinary action at the hands of the relevant body. In Uganda it is the Disciplinary Committee of the Law Council.

It is important that we see the practical application of this and other ethical provisions in the context of Uganda. We will refer to some of the complaints which have been brought before the Disciplinary Committee. The proceedings before the said Committee are quasi-criminal.

In *Stephano Ddungu v. Sulaiman Musoke c/o Muwema, Mugerwa and Co. Advocates,* [466] the Disciplinary Committee was to determine whether or not the Respondent was guilty of professional misconduct, that is, failure to carry out client's instructions, failure to account for client's money and conduct unbecoming of an advocate contrary to the Advocates Act and Advocate (Professional Conduct Regulations.

It was alleged by the complainant that he paid the sum of Uganda Shillings 16,500,000/= (Uganda Shillings Sixteen Million Five Hundred thousand only) to the Respondent with instructions to compensate squatters who occupied land which the complainant had purchased from one Mr. John Sebaana Kizito. The Respondent prepared the sale agreement. The Complainant further alleged that the Respondent did not pass on the said money as per his instructions, with the result that the squatters were not compensated and as a thus did not vacate the land in question.

The Disciplinary Committee was satisfied that on the basis of the uncontested evidence adduced, it had been established that that the Respondent was guilty of professional misconduct. In their view, the Respondent was entrusted with money by the Complainant, with clear

[466] LCD 131/2006.

instructions to pass it on to the squatters on the land the complainant had bought. The Respondent had also issued a receipt, which indicated in no uncertain terms the Complainant's instructions. There was no evidence that the Respondent had carried out these instructions and that there was no record of variation or alteration of the said instructions.

The Disciplinary Committee found the Respondent guilty of failing to carry out the client's instructions with due diligence contrary to Regulation 2(2) of the Advocates (Professional Conduct) Regulations, Statutory Instrument 267 -2; and guilty of conduct unbecoming of an advocate contrary to Regulation 31 (2) of the Advocate (Professional Conduct) Regulations. However, regarding whether the Respondent had failed to account for the client's money, contrary to Regulation 8(2) of the Professional Conduct) Regulations, Statutory Instrument 267 -2, the Respondent was found not guilty. The Respondent was ordered to refund Ushs 16, 500,000; pay compensation to the complainant Shillings 3,000,000/=; pay complainant's costs of Shillings 350,000; and pay the Disciplinary Committee's costs of Shillings 500,000/=.

An advocate must be mindful that he/she is holding him/herself out as competent and qualified to act for the client and must take due diligence in the conduct of the client's case, failing which he/she may be liable. This was noted by The Disciplinary Committee in *Umar Musaazi v. Attorney General.*[467]The Disciplinary Committee had occasion once again to pronounce itself on the charges of professional misconduct and professional negligence. In this matter The Respondent Mr. John F. Sengooba was charged with 3 counts, that is – Failure to carry out Client's instructions contrary to Regulation 1(2) of the Advocates (Professional Conduct) Regulation 1977; Professional Negligence contrary to paragraph 1 (2) of the Advocates (Professional Conduct) Regulations 1977; and Conduct unbecoming of an Advocate contrary to

[467] .LCD 156/2003.

Regulation 30 (2) of the Advocates (Professional Conduct) Regulations 1977.

The Complainant instructed the Respondent to recover a debt due from the Ministry of Lands, Housing and Urban Development in the sum of Uganda Shillings 1,400,000/=, interest thereon and costs. The Respondent upon receipt of the instructions filed defective pleadings in court and on 8th October 2003, the Chief Magistrate Her Worship E. K. Kabanda dismissed the suit[468] with no order as to costs. In her ruling, she observed that:

1. There was no proof of service of sermons on the Attorney General on the Record.
2. That there was non compliance with Order 5 rule 1 of the Civil Procedure Rules by the Respondent.
3. Statutory Notice of Intention to Sue was not annexed to the pleadings.
4. The plaint did not disclose a cause of action.

The Disciplinary Committee found that the Respondent had carried out his client's instructions. He had filed a plaint and appeared in court when the matter came up for hearing and was present when judgment was delivered, although he failed to communicate the details of the judgment to the complainant. The Disciplinary Committee also noted that the relationship between an advocate and his client is a contractual relationship in which the advocate can sue for his remuneration and the Client can sue for negligence. The Disciplinary Committee referred to the judgment in *Africa Cotton v. Hunter Gregg,*[469] where the firm of advocates, duly instructed by the client, failed to lodge and register a

[468] See, Umar Musaazi v. Attorney General Mengo Civil Suit No. 32 of 2001.
[469] [1932] 14 KLR 7at p.15.

caveat in order to secure a loan for the client. The firm of advocates was held liable for negligence. In this case Sheridan CJ *inter alia* said:

> *… an advocate holds himself out to his clients as possessing adequate skill, knowledge and learning for the purposes of conducting all business that he undertakes whether contentious or non contentious. If, therefore he causes loss or damage to his client, owing to want of such care as he ought to exercise, he is guilty of negligence giving rise to an action for damages by his Client and, in addition he forfeits his right to receive costs of the work rendered to his client by reason of negligence.*

In the instant case the Disciplinary Committee noted that an advocate of the standing of the Respondent would lodge and annexe to the pleadings all documents in support of his client's claim. The Respondent would also be expected to prepare his amended plait with requisite skill to ensure it discloses a cause of action; that having regard to the lapses stipulated in the court ruling the Respondent's errors constituted professional negligence because as noted by the Trial Magistrate they were purely elementary blunders which could have been avoided by application of basic skill and care; that in the present circumstances the action by the Respondent of failure to annex relevant documents to the pleadings and non attendance at the disciplinary hearing on several occasions while reprehensible do not constitute professional misconduct. The disciplinary committee hence found the Respondent guilty of professional negligence. He was ordered to refund the complainant's instruction fees of Shillings 200,000/=; pay damages to the complainant in the sum of 300,000/=, and pay the Committee's costs of Ug Shillings 200,000/=.

Where an advocate fails or refuses to surrender any monies collected by him for and on behalf of the client, the client may resort to taking action against such advocate before the Disciplinary Committee. This

was settled by the Principle Judge, Justice J. H. Ntabgoba, in *Kawenja Othieno and Co v. M/S. Zaver and Sons Limited* [470] Miscellaneous Application. This application was brought by motion on notice. It was brought under Section 38 of the Judicature (Amendment) Act 2002, Rules 5 and 8 of the Law Reform (Miscellaneous Provisions) Rules of Court) Rules, Statutory Instrument No. 74 -1. It sought an order certiorari, to direct the Disciplinary Committee of the Law Council to deliver the record of its proceedings in its Disciplinary case No. LCD.45 of 2002.

The Applicants in the instant miscellaneous application had represented the Respondent M/S Zaver Somji and Sons had in High Court Civil Appeal No. 114 0f 1998, wherein he challenged the decision of the Minister of Finance and Economic Development by which he had declined to grant a repossession to M/S. Zaver Somji and Sons Ltd of property comprised in LRV.500 Folio 13, Butambala Block 121 Plot 44 Bweya, known as Bweya Estates, referred to as suit property. Court entered judgment for the applicants/plaintiffs and ordered that a repossession certificate of the suit property be granted. Thereafter a bill of cost was taxed in favour of the judgment creditor in the sum of Uganda Shillings 41, 277, 100/=. This included the lawyers (Advocates') fees and disbursements.

The applicants paid to M/S. Zaver Somji and Sons, Ltd, (the complainant before the Law Council) only Shs. 4,000,000/=. The complainant allege that in addition, the applicant should have paid them (complainants) a further sum of 21,200,000/=, but that they (applicants) have refused to pay.

The complainants who did not live in Uganda instructed one Dhikusooka, to lodge in the Law Council the complaint on behalf of the complainant. There was preliminary objection raised in the Law

[470] Miscellaneous Application No. 109 of 2003, arising from Disciplinary Case No. LCD 45 of the Law Council

Council's Disciplinary Committee, challenging Mr Dhikusooka as a proper representative of the complainant in accordance with Order 3 rule 2 of the Civil Procedure Rules. The objection was dismissed by the Disciplinary Committee holding that under order 3 rule 2(b) he (Dhikusooka) was allowed to represent the company in matters before the Committee. It was immaterial whether the respondents had met the principals directly because the principles still recognised Dhikusooka as their agent.

The Respondents did not appeal against the said ruling of the Disciplinary Committee. Following the ruling, the Disciplinary Committee proceeded with the hearing of the complaint against the advocates (applicants). During the proceedings the Committee found, and the applicants conceded, that a sum of Shs 11,000,000/= held by the appellants should have been paid to the complainants. The Committee then ordered the applicants to deposit the said sum with the Committee, pending resolution of the complaint. The applicants then decided to challenge the order of the Disciplinary Committee and applied for a prerogative order of **certiorari.**

The court listened to the procedure employed by the Disciplinary Committee during disciplinary hearings as outlined by Ms Hellen Obura, Secretary to the Law Council, as she then was. It was satisfied that the order of the Disciplinary Committee requiring the applicant in the instant case to deposit the shs 11,000,000/= with the Law Council, pending resolution of the complaint was a legal order and could not be challenged. Court dismissed the application with costs to the Respondents.

The Disciplinary Committee has continued to ensure that all advocates behave in an ethical manner as explained in *Waiswa James and Sabaidu Boneface v. Badagawa*[471], where the respondent had 7

[471] LCD 105/2003.

complaints against him. The prosecution adduced evidence that five (5) of the said complaints had prima facie cases recorded against the respondent. The prosecution also used the current complaint against the respondent to argue that having numerous complainants against one advocate was prima facie evidence of unprofessional conduct. The respondent had been summoned to appear before the Disciplinary Committee, but did not do so. He also undertook to refund all the monies in question, but he only paid part of it.

Counsel Maranga for the respondent had told the Disciplinary Committee that the respondent had been absent for good reason, namely that he had been receiving summons late from the post office. He also submitted that the respondent had been put on 8 months T.B treatment which required seclusion.

The Disciplinary Committee sympathised with the respondent regarding his ill health, but noted that this would not absolve the respondent of his liability towards his clients, and it would be absurd to assume that life or living came to a stand still because of the ill health of the respondent.

The Disciplinary Committee further observed that section 16 of the Advocates Act emphasises that Advocates are officers of the High Court and shall be subject to its jurisdiction and that of the Disciplinary Committee of the Law Council.

The prosecutor drew the attention of the Committee to the duty which advocates owe a duty to the public by citing the works of Olaa Orjo - A Guide to Professional Conduct and Etiquette of Legal Practitioners 1969, wherein reference was made to *Re: Abuah Abuah*.[472], where justice Edimola had this to say about the legal practitioners duty to the public:

[472] 1962 ALL N. LR p.279

> *Legal Practitioners are officers of court. It is our bound duty to see that officers of court who carry out that duty should be trusted not only by the court but by the public. We therefore owe the public the duty to see that members of the public are not exposed to risk in their dealings with these men. This is not only in cases like the present where the misconduct has been connected with the profession of the legal practitioners but also in cases where the misconduct not connected with the profession such as to make it obvious that the legal practitioner is not a fit and proper person and not of sufficient responsibility with duties which the honourable profession demands from its members and which enjoins them.*

The Disciplinary Committee came to the conclusion that in light of the above analysis of the pleadings, submissions and efforts of the parties, the Committee's effort to have special session for the respondent's case after continuously failing to obtain his presence; further coupled with the great inconvenience to the claimants and, great dishonour to the profession; the Respondent was guilty on both counts and made the following orders:

(i) The Respondent hereby be suspended from legal practice pending disposal and completion of all the complaints pending against him.

(ii) The Respondent shall pay half the costs of the special session that was held to consider his case on 24th May 2006.

(iii) The Respondent shall pay the transport costs incurred by the complainants for the sessions which they have attended at which he has been absent, including transport costs during the special session.

(iv) The Respondent is admonished not to bring into gross disrepute again the name of the legal profession by repeating any such and/or other acts that tantamount to professional misconduct.

(v) The complaints against the Respondent shall continue to be heard by the Committee.

In *Impetus Uganda v. Atim Pule*[473] the Disciplinary Committee was asked to determine whether or not the Respondent was guilty of professional misconduct, i.e. acting fraudulently or improperly in the discharge of one's professional duty and conduct unbecoming of an advocate contrary to the Advocates Act (Professional Conduct) Regulations.

It was alleged by the complainant that the Respondent was instructed to procure land for purposes of constructing a factory thereon. The complainant paid shs 4,120,000 to the Respondent, who incidentally turned out to be an impostor. Upon hearing evidence in the case the Committee was satisfied that the prosecutor had made a prima facie case against the respondent and concluded as follows:

(A) The Respondent is guilty of acting fraudulently or improperly in the discharge of professional duty contrary to section 74 (i) (k) of the Advocate Professional Conduct Regulations.

(B) The Respondent is guilty of conduct unbecoming of an advocate contrary to Regulations 31 (2) of the Advocates (Professional Conduct) Regulations. He was thus ordered to refund Ushs 4, 120,000/= and costs to the complainant; pay the Committee's cost of Ushs 200,000. He was also suspended for a period of 6 months.

In *Benon Tushemereirwe Kiuhura v Humphrey Rugambanengwe*[474], the Respondent had six complaints pending against him before the Disciplinary. On 7th March 2006, the said complaints were fixed for

[473] LCD 90/2005
[474] LCD 106/2005

hearing before the Disciplinary Committee. The Respondent had been served by substituted service after the prosecution failed to locate and serve him. On 7th April 2006 the Disciplinary Committee made an order suspending the Respondent from the Roll of Advocates indefinitely until all complaints pending against him before the Committee were disposed of; until the Respondent paid the cost running the notices giving rise to the proceedings; and until the Respondent paid the Committee's costs. The Committee found the respondent guilty as charged and made the following order.

1. The Respondent be struck off the roll of advocates.
2. The Respondent meets part of the cost of publishing the hearing notice in the press.
3. The Respondent meets the costs so far incurred by the complainants in following up the complaints.
4. The Respondent meets the Law Council costs.
5. The Respondent be admonished not to bring into disrepute again the name of the legal profession by repeating any such and other acts that are tantamount to professional misconduct.
6. Hearing of all pending cases against the Respondent to continue before the Committee.

An advocate has a duty towards his client, the court, his opponent and himself. Although the advocate is under a fundamental duty to give of his best for the client's interest, the advocate must be mindful of his other legal duties which may conflict with client's interest. The degree of skill required is that which pertains to a professional man that is the general level of skill currently possessed by members of the legal profession.

Goldin J, in *Honey and Blanckenberg v Law*,[475] pronounced himself on the duties of legal practitioner (attorney) when he said:

[475] 1966 (2) SA 43.

> *In his performance of his duty or mandate an attorney holds himself out to his clients as possessing adequate skills, knowledge and learning for purposes of conducting all business he undertakes. If he causes loss or damage owing to want of such knowledge as he ought to possess, or want of such care as he ought to exercise, he is guilty of negligence, giving rise to an action for damages by his client.*

The client is entitled to expect from his advocate reasonable skill, learning, diligence, attention and best advice in his power to give confidence and honesty at all material times. Doe this mean that the advocate must take over sole responsibility for determining how, when where and what to expect by way of compensation/damages. This was reiterated recently by the Disciplinary Committee of the Law Council in *Haji Kizito Bulwadda v Patrick Furrah*[476]. The Committee found that the advocate was guilty of acting unprofessionally in discharging his duties. The ruling by the Disciplinary Committee was read posthumously, after the complainant passed on. Prior to his demise the complainant had made allegations of the respondent's unethical conduct, whereupon the respondent was charged with four counts namely:

1. Acting without client's instructions contrary to 2 (1) of the Advocates (Professional Conduct) Regulations SI 267-2,
2. Conduct unbecoming of an advocate contrary to Regulation 3 (2) of the Advocates (Professional Conduct Regulations SI 267 – 2,
3. Failure to account for client's money contrary to Regulation 8 of the Advocates (Professional Conduct) Regulations SI 267 – 2,
4. Conduct unbecoming of an advocate contrary to Regulation 3 (2) of the Advocates (Professional Conduct) Regulation SI 267 - 2

The gist of the complaint against the Respondent was contained in two written complaints dated 5/04/07 and 17/05/10 as well as two oral

[476] LCD 49/2007

statements made before the Committee on 21/08/09 and 12/02/10. The complainant stated that he lodged civil suit No. 1091 of 2000 and civil suit No. 1523 of 2000 in the High Court of Uganda at Kampala through his advocate Mwesigwa Rukutana and Co. in which the Respondent was working as an advocate.

During the prosecution of the cases the Respondent was having personal conduct thereof. He connived with the defendants in the said cases to remove caveats that had been lodged on the instructions of the complainant to protect the suit land. During conduct of the cases the Respondent also made application to have civil suit 1091of 2000 settled out of court with out the complainant's instructions. Finally, the Respondent entered into consent judgment without the knowledge of the complainant to wit an agreement to compensate the complainant and his co-plaintiff with Shs.40 Million. The complainant denied authorising the consent or receiving the sum of shs.40 million that was the subject of consent judgment. He claimed that as a result of the consent judgment he suffered damages and therefore sought compensation to the tune of shs.150, 000,000.

Although the matter preceded Exparte due to the failure of the Respondent to heed most summons of the committee, he had on 12/6/2007 filed a response to the complaint in which he denied the allegations of the complainant. He (Respondent) argued that the complainant and his daughter in law Ganja Shamim (the first plaintiff in the suit), consented to being paid compensation of shs.40, 000. He undertook to forward documents in support thereof but by the time of making the ruling had not done so. He further contended that the matter was being handled by the firm of M/s. Mwesigwa –Rukutana and Co. Advocates as a firm, and as such, the complainant could not be maintained against him as an advocate as he was working as an agent of the firm. The matter was set down for preliminary hearing on 7/11/08, but the respondent was absent despite the fact that he had been duly

served. The matter was then adjourned to 12/12.08 and the respondent was condemned to costs of Shs.25, 000.

On 13/02/09 the respondent was present and requested for a meeting settle the matter amicably. The meeting was scheduled for 24/2/09, at the secretariat, but never took off as the respondent again failed to appear as the respondent again failed to appear. He sent his clerk and undertook to pay the complainant's transport costs of shs.50, 000 for the failed meeting.

With reference to count 1, did the Respondent act without the client's instruction? The Disciplinary Committee noted the general rule that seems to protect advocates when representing their clients. That advocates are given quite wide powers to make decisions for their clients at their discretion. However, the Disciplinary Committee agreed with the prosecution that the facts of the case required them to depart from the general rule. That the powers of the advocate in any and all circumstances should be exercised in conformity with the general rule that an advocate should act in a manner that supports the wishes of the client. He/she can only do so by knowing and understanding the client's desires. That the advocate has a duty to consult his client at all times and also protect their interests, and that this is more so with consent judgments. In this regard the Disciplinary Committee found two cases of *Betuco v Barclays Bank and Peter Mulira v Mitchell Cotts Ltd*[477] very instructive. In the said case their Lordships meticulously laid down the procedure to be followed before and at the signing of a consent judgment, where it was observed:

> *The law regarding consent judgments is that the parties to a civil suit are free to consent to a judgment. They may do so orally before a judge who then records the consent or they do so in*

[477] CA 15/07

> *writing and affix their signatures to the consent. In this case, still the judge has to sign the judgment. (Emphasis supplied)*

The Disciplinary Committee also noted that their Lordships' reasoning in the above mentioned cases goes back to the historical and cardinal principle of the fiduciary relationship between an advocate and their client which dictates that the advocate offers the best service possible and protects their client above all else.

That the respondent did not offer any strong evidence against the complainant's arguments that he was not party to consent judgment. He failed to produce the court record indicating that consent was arrived at a one time hearing before the trial judge. It was a simple matter for him to retrieve and certify that part of the record for the benefit of the Committee and that the certified copy of the proceedings dated 24/10/01 and 25/2/02 had no record of a consent being entered before Justice Katusi. The Committee thus came to a conclusion that the complainant did not instruct the respondent, hence when he signed and filed the judgment the respondent acted outside his instructions.

Regarding counts 2 and 4, did the Respondent in the conduct of the suit act in a manner that is unbecoming of an advocate? The Disciplinary Committee was of the view that the reputation and confidence that the legal profession inspires should be every advocate's most valuable asset, and that in the instant case the Respondent's actions were unprofessional and unbecoming of him, thus the said counts were proved. The Disciplinary Committee also found that prosecution proved count 3, that the Respondent did not pay any money to the complainant.

The Disciplinary Committee made the following as fair remedies and disciplinary actions against the Respondent:

1. He shall pay the complainant's costs of Shs. 145,000 to cover transport and subsistence of the times that the complainant has

come to court. We have taken into consideration previous awards by the Committee.

2. He shall pay Law Council costs of Shs. 1,000,000.
3. He shall pay the complainant Shs. 40,000,000 as money had and received from the consent judgment and decree in HCCS 1091/2000.
4. The above sum of Shs. 40,000,000 shall attract an interest of 3% per month from 17/5/10 (the date that the second complaint was filed with the Law Council), until payment in full. The steep interest is explained by the fact that the complainant has not been able to use his money for the period it was wrongly retained by the respondent. Sadly he even died before partaking of the fruits of this ruling. Similar grants have been made by the Commercial Court against errant advocates who fail to properly account for client's money and then go ahead to misappropriate it. See for example the case of *Paul Nalukoola Muwanga v. Bob Kasango (HCT-OO-CC-MA-444.2011)*
5. The sum in 1, 2, 3 and 4 shall be made within 21 days of this ruling.
6. The Respondent's behaviour naturally excludes him from people expected to practice in this honourable profession. He needs time off practice to reflect on his disrespectful, fraudulent and unacceptable behaviour and maybe improve. He is hereby suspended from practice as an advocate of the courts of judicature of Uganda for a period of 12 months (w.e.f the date of this judgment) and his practicing certificate is suspended for that period. The Secretariat is directed to notify the President of the Uganda Law Society and the Registrar of the Courts of Judicature accordingly.

The Secretariat is directed to notify the representatives of the complainant's estate of the contents of this ruling and take appropriate action if they so wish.

In the matter of *Prince David Namugala v Magellan Kazibwe*[478], the Respondent was charged with two counts that is Count 1, acting improperly in the discharge of professional duty contrary to Section 74 (k) of the Advocates Act Cap 267. It was alleged that advocate Magellan Kazibwe purported to witness the signature of the complainant's father, the late Prince George W. Mawanda on the 27 August 2002, yet he passed away on 26 June 2000, thereby causing loss and suffering to the estate of the deceased which conduct is unprofessional. In Count II, the respondent was charged with conduct unbecoming of an advocate contrary to Regulation 3 (1) and (2) of the Advocates (Professional Conduct) Regulations SI 267 -2. The particulars of the offence are that Advocate Magellan Kazibwe purported to witness the signature of the complainant's father the late George W. Mawanda on the 27th August 2002 yet he passed away on 26th June 2000 thereby causing loss and suffering to the estate of the deceased as a result of the Respondent's negligence which conduct of him as an advocate.

In reply the Respondent stated that as a preliminary point of law, the complainant had no *locus standi* in bringing a complaint of this nature against anybody in view of the fact that he was just a mere heir/child/beneficiary but not the administrator or executor of the estate of the late Prince George Mawanda. He thus prated for the dismissal of the complaint.

He further stated that the above notwithstanding, fraud in land matters must be attributed to the parties to the transaction but not witnesses. That the transfer instrument dated 27th August 2002 was between Prince George Mawanda (as vendor/transferor) and P & O

[478] LCD 58/2007, See also Daily Monitor, Monday, December 19, 2011, p. 6.

Investments Ltd (as the purchaser/transferee) and it was presented to him for attestation by Mr. Lukyamuzi Musoke, the Managing Director of his client P & O Investments Ltd already executed by the respective parties thereto.

That he had no knowledge of the death of Prince George Mawanda at the material time and that he did not forge the signature of Prince George Mawanda. He also stated that he signed on behalf of P & O Investments Ltd as the applicant for registration of the transfer in its name on Land Form 6 (Consent to Transfer Form) as an advocate of P & O Investments Ltd which was his client at the time and not an agent of Prince George Mawanda and that he had no further interest.

The Respondent further relied on an Investigation Report from the Director General of Internal Security Organisation (ISO) dated 2nd December 2003, which had exonerated the respondent's client P & O Investment from wrong doing. It also made a finding that the complainant had played a central role in the transaction and warned him against abusing public offices by bringing such complaints.

The respondent stated that since he did not forge the signature on the said document he therefore did not occasion any loss to the estate of the late Prince George Mawanda and that on the contrary it was the complainant who was being fraudulent. He therefore denied having committed any act of professional misconduct and called upon The Law Council to dismiss the complaint with costs.

After hearing both parties the committee found that the preliminary evidence disclosed a prima-facie case of conduct unbecoming of an advocate. It ordered that charges be accordingly preferred and adjourned the matter to 15th January 2010.When the matter came for plea on 4th February 2011, before a new committee, the respondent told the committee that:

> *"I wish to render an apology to this Committee for the unprofessional mistake of witnessing the signature of the complainant's late father which appeared in a land Transfer Form. I admit that this was a matter of professional misconduct. I therefore seek the indulgence of the Committee to pardon me for that mistake. I also pray that I be allowed to render a formal apology to the complainant in writing and it be regarded as a closure to this matter.*

He was suspended from practicing law for 12 months and ordered to pay compensation to the relatives of the deceased complainant Shs.40, 000,000.

Finally, in *Prince David Namugala v Magellan Kazibwe*, the respondent was charged with two counts. Count 1 – Acting improperly in the discharge of professional duty contrary to section 74 (k) of the Advocates Act.[479] The particulars of the offence are that Advocate Magellan Kazibwe purported to witness the signature of the complainant's father, the late George W.Mawanda on the 27th August 2002, yet he had passed away on 26 June 2000, and as a result caused loss and suffering.

Count II – The respondent is charged with conduct unbecoming of an advocate contrary to Regulation 3(1) & (2) of the Advocates (Professional Conduct) Regulations, SI 267 -2.

It was alleged that Advocate Magellan Kazibwe purported to witness the signature of the complainant's father the late George W. Mawanda on the 27th August 2002, yet he had passed away on 26th June 2000, and as a result caused loss and suffering to the estate of the deceased. This loss having been occasioned by the respondent's negligence, which conduct was unbecoming of an advocate.

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[479] Cap. 267.

The respondent argued in reply that the complainant had no *locus standi* in bringing a complaint of this nature against anybody in view of the fact that he was just a mere heir/child/beneficiary, but not the administrator or executor of the estate of the late George Mawanda. He therefore prayed for dismissal of the complaint.

He further argued that fraud in land cases must be attributable to the parties to the transaction and not witnesses. That the transfer instrument dated 27th August 2002 was between Prince George Mawanda as the (vendor/transferor) and P & O Investments Ltd (as the purchaser/transferee) and it was presented to him for attestation by Mr Lukyamuzi Musoke, the Managing Director of his client P & O Investments Ltd. Already executed by the respective parties.

The Respondent further denied knowledge of the death of Prince George Mawanda at the material time. That he did not forge the signature of Prince George Mawanda and that he signed on behalf of P & O Investments Ltd. as the applicant for registration of the transfer in its name on Land Form 6 (Consent to transfer Form) as an advocate of P & O Investments Ltd. That these were his clients at the time; and that he was not an agent of Prince George Mawanda, and that he had no further interest in the transaction. The respondent relied on the report from the office of Director General of Security Organisation (ISO), dated 2nd December 2003, which had absolved clients P & O Investments from wrong doing, but had found that the complainant had played a big role in the transaction. That now he did not forge any signature on the transfer transaction he did not occasion any loss to the estate of the late Prince George Mawanda. He denied having committed any act of professional misconduct and therefore asked the Law Council to dismiss the complaint.

The hearing of the complaint commenced before the old Committee and was adjourned many times before it came for formal dismissal on 6th November 2009, and later passed to the new Committee. Having

listened to both parties the new committee ruled that there was a prima facie case and accordingly ordered that the charges be preferred and the matter was adjourned to 15th January 2010 for plea.

On 4th February 2011 the Respondent told the new committee that:

> *I wish to render an apology to this committee, for the professional mistake of witnessing the signature of the complainant's late father which appeared in a land Transfer Form. I admit that this was a matter of professional misconduct. I therefore seek indulgence of this committee to pardon me for that mistake. I pray that I be allowed to render a formal apology to the complainant in writing and it be regarded as a closure of this matter.*

Upon hearing the confession the Committee ruled as follows:

> *We notice that the respondent seems to be admitting the wrong although the charges had not been read over to him to understand the particulars of the charges being brought against him.*

The Committee ordered that the charges be read and the Respondent takes plea before his payer could be considered. The respondent asked for adjournment to seek legal representation which was granted. He got the services of counsel Mugenyi Richard, who when he appeared before the Committee that that there had been a meeting between the complainant and Respondent and that the Respondent had written an apology to the complainant who in turn had promised to withdraw the matter and which the complainant had done. The foregoing was confirmed by Stella Nyandria, Prosecuting Counsel, and called upon the complainant to do the same. The complainant wrote as follows:

> *I hereby inform the Council that Mr Magellan Kazibwe, the defendant in the*

> *above matter has today 8/2/2011 written an apology to me conceding to have committed a professional misconduct and results of which led to both financial and property loss both to me and the estate of my late father, George William Mawanda. In consideration of his pleas and explanations to me regarding this matter and his expressed remorsefulness about the whole affair, plus his heightened fears about jeopardizing his professional career, have decided to forgive him however the Council is at liberty to deal with him as it may deem fit.*

The Committee proceeded to make its ruling, but in the process of doing so asked Respondent for a copy of the Respondent's apology, which to their amazement raised new matters, particularly so because the Respondent had never raised them before the Committee. The Committee thus reserved the ruling.

The Committee summoned advocate Ellis P. Kasolo who had been implicated by the apology. In his defence Mr Kasolo argued that Mr Kazibwe is an advocate in his right. He agreed having worked with him for ten years after which he (Kasolo) left. Mr Kasolo said that while he was away, Mr Kazibwe left his firm. He further said that Mr Kazibwe witnessed the transfer in his personal capacity and not under his (Kasolo's) instructions.

The committee noted:

> *We wish to point out that both the respondent and his counsel seemed to be pre occupied with the fact that respondent had made an apology and it had been accepted by the complainant therefore the matter should stop at that. That is not the reason why Law Council exists. It is neither a warehouse for complaints nor a family claim court. It is a professional disciplinary body entrusted with maintaining standards and bringing back into line its erring advocates. The complainant seems to have appreciated*

> *this fact better than the advocates when in his final withdraw finally states I have decided to forgive him, however, the Council is at liberty to deal with him as it may deem fit.*

The Disciplinary Committee noted with regret that many lawyers did not take the business of witnessing seriously. That they just affix their stamps and signatures on documents that are brought before them even in absence of the parties. That this practice is wrong and unprofessional, and that a deponent must appear before a Commissioner for Oaths, as was held in *Kakooza John Baptist v Electoral Commission and Yiga Anthony.*[480]

The Committee also echoed the opinion expressed in *Re Solicitor,*[481] where it was highlighted that a professional's most valuable asset is collective reputation and confidence which that aspires and that the reputation of the profession is more important than the fortunes of an individual. The committee also referred to *Suresh Gelani v. Joseph Ekemu,*[482] where in the judge quoted from the Professional Conduct of Solicitors, England Law Society.[483]

Advocate Magellan Kazibwe was accordingly suspended from legal practice for 4 months. He appealed to the High Court and at the time of compiling the annotations the appeal was not yet heard. It may be some time before it is heard and the matter put to rest. Be that as it may, Mr Kazibwe has been found guilty of acting improperly in the discharge of professional duty and having indulged in conduct unbecoming of an advocate.

Where there is no evidence against respondents or where evidence adduced by prosecuting counsel is insufficient the Disciplinary Committee has no option but to dismiss the case as evident in *Charles*

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[480] Election Petition Appeal No. 11 of 2011 (SC).
[481] [1956] WLR 1312
[482] LCD 27/99
[483] 1986 Edition at p. 2016.

Sajjabbi v Erick Muhwezi[484] and *Mayanja Richard v Kateera and Kagumire Advocates.*[485]

Once The Law Council is satisfied that the disbarred advocate has reformed, will reinstate the advocate as was observed in *the matter of Petition by Kateeba*[486]. In this matter seven years after having been removed from the roll of advocates, Kateeba applied for reinstatement, which was granted. Similarly in *Azedi Ntalo v A.A.R. Owori of Owori and Co. Advocates*[487] and *Joseph Ekemu*[488] were reinstated to the roll of advocates.

In conclusion it is submitted that there has been an attempt to show the commendable task of the Law Council in Uganda in reigning in the errant Learned Counsel and remind them of their duty to demean themselves under the law. This is a positive measure to reassure the members of the public that although some members of the legal profession indulge in conduct unbecoming of advocates, the legal profession does not take kindly to such unprofessional conduct. This is also a step towards redeeming the image of the learned profession in the eyes of the lay populace.

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[484] LCD /1996
[485] LCD 99 / 2008
[486] Petition No. 4 of 2000. It should however be noted that earlier on the Law Council had declined restore his name after only 3 years since it was removed from the roll. (LCD 11/CAK.)
[487] LCD/2003.
[488] Petition for reinstatement.

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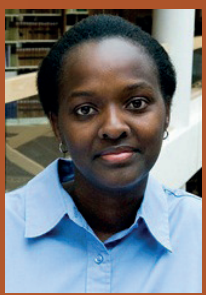

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