PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE

WORKING PAPER RELATING TO THE DISCIPLINARY AND COMPLAINTS PROCEDURE OF THE LEGAL PROFESSION

1977

THE PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE

WORKING PAPER RELATING TO THE DISCIPLINARY AND COMPLAINTS PROCEDURE OF THE LEGAL PROFESSION

1. Introduction

1.1 In its Eighth Report, the Public and Administrative Law Reform Committee indicated that it was carrying out a review of the disciplinary procedures of a number of professional occupations. The Law Practitioners Act 1955 is regarded by many professions as containing a model providing a constitution and procedure for the discipline of their respective professions. For this reason and at the request of the Minister of Justice the Committee has directed particular attention to the disciplinary provisions governing the legal profession. It is also aware that its independent study coincides with a substantial review of the entire Act being carried out by the Law Society.

1.2 At the outset the Committee wrote to the New Zealand Law Society and all District Law Socieities requesting information relevant to its inquiry. The detailed responses of many district societies were particularly helpful and the Committee has been able to form a fairly comprehensive view of the manner in which disciplinary charges and complaints against legal practitioners are handled throughout New Zealand..

1.3 At the same time the Committee undertook a thorough study of the relevant provisions of the Law Practitioners Act. It also assembled as much background material as possible, including reports and articles relating to disciplinary and related matters in the United Kingdom, Canada, Australia and the United States of America. It corresponded with Sir Godfrey Place, the Lay Observer appointed in the United Kingdom in 1975. Apart from information which he conveyed to it direct, the Committee recently received his First Annual Report.

1.4 The Committee has formulated certain tentative conclusions relating to the discipline of the legal profession and the handling of complaints made against practitioners. It now wishes to submit this Working Paper to the New Zealand Law Society, District Law Societies and other interested bodies or persons for comment. The Committee hopes to be able to complete and forward its report to the Minister of Justice early next year.

1.5 One further preliminary point. In conducting its inquiry the Committee has been impressed with the immense amount of time and effort expended by practitioners on a purely voluntary basis in connection with the Law Society's disciplinary and complaints procedures. It is undoubtedly a public-spirited contribution which is most praiseworthy. Consequently, it would be unfair if the Committee did not go out of its way to make it clear that nothing it has to say in this Paper is to be construed as critical of the many practitioners who have served their profession with a high sense of duty and considerable dedication.

2. General Principles

2.1 The Committee found it convenient to adopt the summary contained in the Report of the Ontario Royal Commission Inquiry into Civil Rights (the McRuer Report, published in five volumes between 1968 and 1971) which defines the three groups having an interest in the efficacy and fairness of disciplinary proceedings of self-governing bodies. These are stated to be :

> "(1) The public, whose benefit and protection are the primary objectives of the whole process;
>
> (2) Members of the self-governing body, who are or may be subjected to discipline; and
>
> (3) The profession or occupation itself, which has a general interest in ensuring the maintenance of high standards of professional or occupational conduct." (page 1183.)

2.2 Bearing the interests of these groups in mind the Committee has, in its general review of disciplinary procedures, adopted five broad principles by which the adequacy of existing and future disciplinary arrangements can be judged. These are :

> (1) Representatives of the public should participate in the disciplinary process;
>
> (2) Investigative and adjudicative functions should be kept separate;
>
> (3) Procedures for disciplinary hearings must provide both the member whose conduct is under inquiry and the complainant with a fair hearing;
>
> (4) Grounds for suspension, cancellation of registration or membership or any other punishment must be appropriate to the profession or occupation;
>
> (5) Adequate provision must be made for an appeal from decisions of disciplinary bodies.

2.3 The Committee considers that these principles apply to the disciplinary structure and procedures of the legal profession. Certain matters require elaboration, however, before the Committee's specific proposals are spelt out.

3. The Power of Self Discipline

3.1 It is important to question the widespread assumption that the legal profession (or any other profession) has a "right" to govern or discipline itself. In the Committee's view no such automatic right can be maintained. Although the power to regulate its affairs is based on a long and historic tradition and has received legislative recognition the profession cannot claim any prerogative to that effect.

3.2 The McRuer Report points out; "The granting of self-government is a delegation of legislative and judicial functions and can only be justified as a safeguard to the public interest". (page 1162). In the Committee's view it is because the disciplinary role is a delegated function that the duty to protect the public interest arises. While professional status may necessitate a code of conduct and the enforcement of that code against errant members, the power of the profession to determine the standards by which it will be governed and to supervise the enforcement of those standards must find its ultimate authority in the extent to which the public is served and protected.

3.3 The McRuer Report also stresses the point that the power of self-government is not given to reinforce a professional or occupational status. No right of self-government should be claimed merely because the term "profession" has been attached to the occupation. (page 1162). The Committee agrees with this viewpoint and endorses the conclusion arrived at :

> "The traditional justification for giving powers of self-regulation to any body is that the members of the body are best qualified to ensure that proper standards of competence and ethics are set and maintained. There is a clear public interest in the creation and observance of such standards. This public interest may have been well served by the respective bodies which have brought to their task an awareness of their responsibility to the public they serve, but there is a real risk that the power may be exercised in the interests of the profession or occupation rather than in that of the public. This risk requires adequate safeguards to ensure that injury to the public interest does not arise.

> "We recommend that the principle applied in creating the British Medical Council be adopted in Ontario. Lay members should be appointed by the Lieutenant Governor in Council to the governing bodies of all self-governing professions and occupations." (page 1166.)

3.4 A further observation from the same Report made in connection with the extensive disciplinary powers vested in professional bodies may also prompt a closer re-examination of the legal profession's traditional role. It reads :

> ". . . That such wide judicial powers as those conferred on the self-governing bodies should be placed in private hands may be expedient, but it is anomalous. Disciplinary powers are penal powers. When these powers are conferred on private individuals who take no oath of office, and for whom in most cases the government has no responsibility for appointment, a private court is created. Such powers remind one of the private justice of feudal times, when the Lord of the Manor had the right to hold the court for his tenants. The private disciplinary justice meted out by the self-governing bodies is, in a very real sense, an anachronism the survival of which can only be justified if all the interests concerned are better protected by this method than they could be by any other." (page 1182.)

3.5 In perhaps a more pragmatic sense, the Committee would suggest that three factors converge to reinforce the responsibility of the profession to safeguard consciously the public interest in respect of its disciplinary proceedings. First, the profession ejoys a statutory monopoly; secondly, it is substantially free from government control and regulation, and, thirdly, it prohibits advertising by members of the profession thus eliminating any effective competition. The Committee does not take issue with any of these matters but merely wishes to point out that each factor, of itself and in combination with the other factors, demonstrates the profession's clear responsibility to be mindful of the public good.

3.6 Questions of professional ethics or misconduct or incompetence will generally be matters which the profession and its leading members will, or should, be best able to judge. Nevertheless, it is implicit in any form of professional self-government that the interests of the governed may tend to predominate over the interests of the public which the profession serves. Consequently, while it would readily acknowledge that the profession has a general interest in encouraging and maintaining high standards of professional conduct and competence and that individual members who may be disciplied have a vital interest in ensuring that the disciplinary proceedings are fair, the Committee is satisfied that the self-regulatory function must be primarily directed at the protection and benefit of the public.

4. Lay Participation

4.1 The Committee accepts the concept of lay involvement in the disciplinary and complaints procedure of the legal profession. It would propose that lay participation should be accomplished in two ways; first, by including lay members on the bodies responsible for hearing and determining charges against practitioners and, secondly, by appointing a lay person or persons to review the Law Society's treatment of complaints against practitioners. The former would represent the public interest on the disciplinary bodies of the Law Society and the latter would provide the public with a safeguard against the profession's insulated handling of complaints against its members.

4.2 The concept of lay participation is far from being a novel proposal. Indeed, it has attracted widespread support. In 1974 the United Kingdom Parliament enacted legislation providing for the appointment of lay representatives to the Solicitors' Disciplinary Tribunal. At the same time it constituted the office of lay observers and the first Lay Observer was appointed pursuant to that legislation on the 17th February 1975. These innovations reflected experiments and proposals which the Council of the Law Society had itself initiated in response to considerable public and political pressure. Again, the notion that the public should be represented on disciplinary agencies is a consistent thread running through the Rport of the Special Committee on Evaluation of Disciplinary Enforcement (the Clark Report, 1970) commissioned by the American Bar Assocation. Laymen, although not outnumbering lawyers, have already been included on disciplinary boards in no less than seven States. In Canada, as already indicated, the McRuer Commission recommended that the principles of the British Medical Act 1956 should be followed by making provision for the appointment of lay members to each of the governing bodies of the self-governing professions (page 1209). A public presence of some is or will be established on certain governing councils of the Canadian legal profession. (See H. W. Arthurs, "Counsel, Clients and Community", (1973), Vol. 11, No. 3, Osgoode Hall Law Journal, 437, at p.449). For example, in 1960 the Law Society of Ontario voluntarily invited lay representatives to participate in its governing body. Within New Zealand the Public Issues Committee of the Auckland District Law Society recently endorsed the suggestion made by the Honourable J. R. Hanan, when Minister of Justice, that a kind of lawyer's ombudsman could be appointed to satisfy the public they were receiving justice from the legal profession. Moreover, most of the articles referred to by the Committee favour some form of lay involvement. (See esp. W. R. Flaus, "Discipline Within The New Zealand Legal Profession". 1976 V.U.W.L.R. 337.)

4.3 In the Committee's view, two principles underlie the concept of the public involvement in the disciplinary proceedings of the legal profession. The first is that it

will enable the public interest to be represented. The second is the corollary of the first; that is, that it will help to assure the public that its interests are in fact being protected.

4.4 It has been stated that the main reason for including lay participants in the disciplinary system of the United Kingdom was to make the profession more responsive to the public. (See S. D. Ross, "The Solicitors (Amendment) Act 1974 (U.K.); Its Relevance to Australia", (1975), Vol. 49 A.L.J. 268, at p.270.) It is the Committee's opinion that lay participation would in fact have that effect in New Zealand. At the present time the public can only trust that the organised profession will be sensitive to its needs and sufficiently responsible to endeavour to meet those needs. In the last resort it must depend on the integrity and ability of the elected members of the profession, or their appointees, to administer justice as between members of their own profession and members of the public. The use of laymen in the system would enable the public to be represented and introduce an element of public accountability for the actions of the profession in dealing with those practitioners who have abused their professional standing and failed to meet the confidence reposed in them by the public.

4.5 The Committee accepts that practitioners engaged in the disciplinary and complaints process consciously believe that they are acting in the interests of both the profession and the public and it would not wish to impugn the integrity or conscientiousness of any members who are involved in that process. The fact that disciplinary matters and complaints are necessarily looked at though lawyers' spectacles would seem to provide an inherent and unavoidable limitation in the present system. In any proceedings it is possible that compassion for the hapless lawyer, the niggling feeling that "there but for the grace of God . . . .", preoccupation with the image and reputation of the profession or familiarity with the respondent produce, or combine to produce, a bias which can only be offset by the presence of the public's representative.

4.6 It is appreciated that no lay person working within the structure of the profession's disciplinary system will be fully representative of the public or reflect all the views and attitudes of the community. Much will depend on the individuals appointed. However, even accepting this reservation, the lay participant can still bring to the process a detached attitude, different ideas and a new approach and a re-evaluation of traditional thinking. At the very least, the public will have a voice in a process which has hitherto been the lawyer's private domain.

4.7 Public discontent with the lawyers' self-disciplinary system which existed in the United Kingdom and the widespread resentment of the legal profession which exists in the United States because of its self-serving attitude is not nearly so evident in this country. Nevertheless, it cannot be said

that the profession is free from criticism on this score. Members of Parliament, the Ombudsman, the Consumers Institute and Citizens' Advice Bureaus all report that aggrieved citizens take their complaints about solicitors to them. Presumably, even if they are aware of it, they distrust or are sceptical about the service provided by the profession. A number of articles in the news media have also expressed views to the effect that lawyers are concerned to protect themselves and that the Law Society "exists for the benefit of its members".

4.8 Undoubtedly, the belief that the basic motivation of the profession in exercising self-disciplinary procedures is the protection and preservation of the profession has some prevalence. It is clearly undesirable that this should be the case. Yet, until some positive action is taken to introduce a lay element into its disciplinary system the legal profession will be subject to increasing suspicion that its self-disciplinary arrangements are a facade; that it is actuated only because failure to act would threaten the economic security of the profession; and that the "victims" of the culprit solicitor's misdoings are poorly compensated by the penalties generally imposed for professional misconduct.

4.9 It would seem important, therefore, that the public should not only be made aware that the profession operates a comprehensive disciplinary and complaints system but that they should be assured that the system operates to safeguard the public interest. In this respect, lay representation on the profession's disciplinary bodies will reassure the public that its interests are being protected while lay observers will provide the dissatisfied complainant with effective recourse outside the ranks of the profession and demonstrate to the public that the profession is concerned to ensure that all complaints are treated fairly and without favour to its members.

4.10 However, for the reasons given above the Committee does not accept the view that the proposal to involve members of the public in the disciplinary process is to be regarded as a matter of public relations only. It believes that lay members will be able to exert a definite influence on the profession's general approach to disciplinary matters as well as on the course of particular charges or complaints. In merely encouraging the profession to re-examine and continually reassess its thinking and decisions they will make a valuable contribution to the disciplinary process.

5. Outline of Proposals

5.1 The broad outline and main features of the disciplinary structure and procedures put forward by the Committee for consideration may be summarised.

5.2 Right of appeal:

(1) A right of appeal would lie to an independent appellate court or tribunal from the orders or decisions of the professions highest disciplinary body.

(2) The independent appellate body would be either -

(a) a single, specialised appellate court or tribunal which would hear appeals on disciplinary matters from all professions, or

(b) the Administrative Division of the Supreme Court.

(3) The accused practitioner, the complainant and the Council of the Law Society which laid and prosecuted the charge would be able to exercise the right of appeal.

5.3 Law Practitioners Disciplinary Tribunal:

(1) The Disciplinary Committee of the New Zealand Law Society would be reconstituted and renamed the Law Practitioners Disciplinary Tribunal.

(2) Members of the New Zealand Council or of Councils of District Societys would be ineligible to sit on the Tribunal.

(3) Members of the Tribunal would be appointed for a term of six years.

(4) The Tribunal would comprise five members of which not less than one, nor more than two, would be lay members.

(5) Practitioner members would be appointed by the Council of the New Zealand Law Society.

(6) Lay members would be appointed by the Governor General in Council and remunerated from moneys appropriated by Parliament.

(7) The Tribunal would exercise the jurisdiction presently conferred on the Disciplinary Committee and, in addition, would hear appeals from decisions of the Regional Disciplinary Boards. In respect of those appeals its decision would be final except on a question of law.

5.4 Law Practitioners Regional Disciplinary Boards:

(1) Six Regional Disciplinary Boards would be constituted, four in the North Island and two in the South Island.

(2) Up to six practitioners would be appointed to a Board by the Councils of the District Law Societies included in that Board's region.

(3) Board members would be appointed for a term of six years.

(4) A Board would be properly constituted when it consisted of three members, one of whom would be a lay member.

(5) Lay members for each Board would be appointed by the Minister of Justice and remunerated from moneys appropriated by Parliament.

(6) The Board would exercise the adjudicative function presently conferred on Councils of District Law Societies.

5.5 Grounds for Misconduct:

(1) The general grounds for disciplinary action would be as follows :-

(a) Professional misconduct;

(b) Conduct unbecoming a practitioner;

(c) Conviction of a practitioner for any offence punishable by a sentence of imprisonment which reflects on his fitness to practise law or tends to bring the profession into disrepute; and

(d) Professional negligence.

(2) Penalties which might be imposed by the Disciplinary Tribunal (at present the Disciplinary Committee) and the Regional Disciplinary Boards (in lieu of the Councils of District Law Societies) would be substantially increased.

5.6 Councils:

(1) Councils would cease to exercise their existing adjudicative function.

(2) The prime role of Councils in the disciplinary process would be to :-

(a) Investigate misconduct in the profession and handle the complaints of members of the public;

(b) Lay charges and prosecute practitioners for such misconduct, either before the Law Practitioners Disciplinary Tribunal or the Regional Disciplinary Board depending on the seriousness of the charge. (Regional Disciplinary Boards would also have the power to refer a charge direct to the Disciplinary Tribunal when it considered that the matter warranted the attention of that body.)

(3) The investigative powers and initiative of Councils would be enlarged to enable them to fulfil more adequately their policing role.

5.7 Lay Observer:

(1) A Lay Observer or, if more than one is required, Lay Observers would be appointed to review the Law Society's treatment of complaints for any District or combination of Districts.

(2) Lay Observers would be appointed by the Governor General in Council and remunerated from moneys appropriated by Parliament.

(3) A Lay Observer would, at the request of the complainant, review the Law Society's treatment of a complaint and report to the Council of the Law Society concerned, the complainant, and the practitioner involved.

(4) A Lay Observer would be able to request the Council of a District Law Society to initiate an investigation into known or suspected areas of misconduct.

(5) If more than one Lay Observer was appointed, a senior Lay Observer would be responsible for administrative matters and the compilation and presentation of an annual report to Parliament.

6. Right of Appeal

6.1 Under Section 50 of the Law Practitioners Act, an appeal against any order or decision of the Disciplinary Committee lies to the Supreme Court at the instance of the practitioner being charged, or the applicant when the proceedings have been taken on the application of any other person. Every appeal is by way of re-hearing and is to be

heard by at least three Judges. The Committee believes that a right of appeal should be retained but it is not satisfied that an appeal to the Full Court is the most suitable form of appeal.

6.2 A right of appeal from the profession's disciplinary body is necessary to ensure that justice is done to the practitioner who is charged, the complainant and the general public. The accused member's professional status and livelihood may depend on the outcome of the charge against him. At the same time, if the structure and procedure of the appellate court or tribunal is such that the accused is given favoured treatment something less than justice is done to the complainant and the public at large.

6.3 The Committee has therefore considered two alternative proposals; first, a right of appeal to a single appellate court or tribunal which would hear appeals from all professional disciplinary bodies and, secondly, a right of appeal to the Administrative Division of the Supreme Court.

6.4 With regard to the first alternative the Committee envisages a specialised and independent appeal court or tribunal. It would exercise appellate jurisdiction over all professional disciplinary bodies or other groups having powers of suspension or cancellation on grounds similar to those relevant to the professions. The appellate tribunal would consist of a legally qualified chairman and two or three members appointed by the Governor General in Council. In hearing and determining an appeal the tribunal would consist of the chairman, two permanent members of the tribunal and a person (other than a member of the prosecuting body) nominated by his professional organisation from the profession of which he is a member. In the case of the legal profession, the Council of the New Zealand Law Society would appoint a member to the tribunal for the hearing of appeals relating to legal practitioners.

6.5 The principal advantages of this appellate procedure are twofold. First, the tribunal would acquire considerable familiarity with matters relating to the professions and professional misconduct generally. This would be conducive to the establishment of a uniform procedure in all cases and result in each profession benefiting from the experience of the others. Secondly, since the tribunal would be independent of any one profession it would not be vulnerable to the charge that it was concerned with the interests of that profession or the particular member charged to the detriment of the public interest.

6.6 As against this it has been said that such an independent tribunal could not bring to any particular case the close knowledge of the practice and standards of the particular profession which is the main justification for the present system. This ability, however, would seem to be more appropriate to the specification of a code of behaviour and the formulation of charges than to the adjudicative process itself. Moreover, if necessary, the tribunal could receive

expert evidence on what constitutes professional misconduct in the profession concerned. (See the McRuer Report, 1186).

6.7 The alternative proposal is for the right of appeal to lie to the Administrative Division of the Supreme Court. Lay assessors could be added to the Court as required. A right of appeal to the Administrative Division already exists in respect of a limited number of professional groups and this could readily be extended to the legal profession.

6.8 Consistent with its overall view that the Council of the New Zealand Law Society and the Councils of District Law Societies should be divested of their adjudicative function but vested with an expanded investigative and prosecuting role, the Committee considers that both the complainant and the Council which laid the charge, as well as the practitioner who has been convicted and sentenced, should have a right of appeal.

7. Law Practitioners Disciplinary Tribunal

7.1 The Committee considers that the Disciplinary Committee of the New Zealand Law Society should be reconstituted in a different form and renamed.

7.2 At the present time its name indicates that the Disciplinary Committee is an adjunct of the New Zealand Law Society. Having regard to the Committee's proposals for the reconstitution of the Disciplinary Committee it would seem appropriate to recognise its status and independent role by renaming it after the style of the Solicitors' Disciplinary Tribunal in the United Kingdom. Although lacking originality, "The Law Practitioners' Disciplinary Tribunal" may suggest itself as an apt name.

7.3 The present Disciplinary Committee is constituted under Section 33 of the Law Practitioners Act. It is appointed by the Council of the New Zealand Law Society and consists of not less than five nor more than eight members of the Society. Although the Council appoints members and has the power to remove any member from office at any time, the Disciplinary Committee has come to regard itself as an independent body constituted by statute and not answerable to the Council or the Society. Membership has been relatively permanent, new appointments only being made by the Council when a vacancy arises through the death or voluntary retirement of a member. In some instances members have served for a considerable length of time.

7.4 The functions of the Disciplinary Committee are set out in section 34 of the Act. Where a charge of professional misconduct or of conduct unbecoming a barrister or solicitor has been made against any practitioner the Disciplinary

Committee is obliged to inquire into the charge. If the practitioner is found guilty the Disciplinary Committee may order that the practitioner's name be struck off the roll or that he be suspended from practice or that one of the lesser penalties contained in subsection (2) of section 34 be imposed. However, section 35 provides that orders should not be made striking the name of a practitioner off the roll or suspending a practitioner from practice unless he has been convicted of a crime involving dishonesty within the meaning of section 2 of the Crimes Act 1961 or is, in the opinion of the Disciplinary Committee, guilty of misconduct in his professional capacity or of conduct unbecoming a barrister or solicitor or has otherwise been guilty of grave impropriety or infamous conduct and for those reasons is not a fit and proper person to practise as a barrister and solicitor. Section 36 provides that a practitioner subject to the disciplinary function of the Disciplinary Committee (other than the making of an interim suspension order) is to be given a reasonable opportunity to be heard. Otherwise the procedure to be followed is laid down in The Law Practitioners Act (Disciplinary) Rules 1968 which were made by the Disciplinary Committee under section 47 of the principal Act.

7.5 The Committee considers that members of the Council of the New Zealand Law Society or any Council of a District Law Society should be ineligible for appointment to the proposed Disciplinary Tribunal. Under the Law Practitioners Act charges may be laid against practitioners by both the New Zealand Law Society and District Law Societies. In practice this means the Councils of those Societies. It seems to the Committee that it is wrong in principle that a member of the body initiating proceedings against a practitioner should be able to sit on the tribunal determining his guilt or innocence at a later date. Nor does it seem to the Committee that it is any answer for a Council member to withdraw from discussion and voting when the decision to charge a practitioner is made; the practitioner concerned is entitled to have the charge against him adjudicated without the apparent intrusion of a representative of the prosecuting body.

7.6 The Committee also believes that the Act should be amended to provide for members of the Disciplinary Tribunal to be appointed for a limited term. The power to appoint any member for a second or further term should be expressly excluded. In addition, the ability to remove a member from office should be restricted to cases where a member is guilty of misconduct, becomes incapacitated or neglects his responsibilities. The Committee considers that the apointment of members for a fixed term without any possibility of renewal for a further term, or of removal from office without proper cause, would ensure that the Tribunal possessed a greater measure of formal independence than the present Disciplinary Committee.

7.7 Appointment for a limited term would mean that membership on the Tribunal would rotate on a regular basis. The Clark Committee believed that adequate rotation of disciplinary agency membership was a significant factor in

effective enforcement. Lack of periodic rotation, the Committee claimed, can result in the perpetuation of outmoded practices and procedures and tend to make the agency less representative of the bar whose conduct it supervises. It reported that effectively limiting a member's tenure of office only by his life expectancy bred a sense of complacency and a feeling of proprietary relationship between the chairman of the committee and the duties with which he was charged. It concluded that while too frequent rotation may result in lack of expertise, infrequent rotation often resulted in rigidity. It therefore recommended that disciplinary agency members should be appointed for a three year term of service, with no member eligible to serve for more than two consecutive terms. (page 39).

7.8 The Committee accepts that too frequent rotation of members of the Disciplinary Tribunal could result in a lack of experience on the Tribunal. It is obviously desirable that a new member should have time to gain experience and then time to make use of it. Nevertheless, the Committee regards it as important that the procedures, policies and approach of the Disciplinary Committee should be constantly seen through new eyes and re-evaluated. A term of appointment for six years (a period which coincides with the New Zealand Law Society's own term of office for its various committees) would achieve an appropriate balance between the desirability of new members obtaining experience and the need to avoid rigidity in membership, policies and approach. The terms of members should, of course, be staggered to ensure continuity.

7.9 For the purposes of hearing and determining a charge, the Disciplinary Tribunal should comprise five members of which not fewer than one, nor more than two, should be lay members. It envisages that the Council would appoint practitioner members to the Disciplinary Tribunal but that the Governor General in Council would appoint the lay members. The substance and appearance of independence on the part of the lay members would be lost if they were appointed by the Council. For the same reason the lay appointees should be remunerated from moneys appropriated by Parliament. Finally, the Committee considers that lay members should also be subject to a six year maximum term of appointment.

7.10 By way of comparison it may be noted that the Solicitors' Disciplinary Tribunal in the United Kingdom is appointed by the Master of the Rolls and consists of both solicitor members and lay members. For the purposes of determining and hearing applications and complaints the Tribunal is deemed to be properly constituted when not less than three members, of which at least one must be a lay member, are present. However, the number of solicitor members present must exceed the number of lay members. Lay members are paid out of moneys provided by Parliament such fees and allowances as the Lord Chancellor may, with the approval of the Minister of the Civil Service, determine.

7.11 The Committee's proposal differs in two main respects. First, practitioner members of the Disciplinary Tribunal would be appointed by the Council and, secondly, five rather than three members would be required for it to be properly constituted. In the Committee's view the appointment of practitioner members by the Council has the marked advantage of ensuring the appointment of members in whom the Society has confidence. Their membership, moreover, would be balanced by the lay representatives appointed by the Government. The Committee also considers that five members would be appropriate. If the Committee's proposals are accepted the Disciplinary Tribunal would be, for all practical purposes, the principal disciplinary body possessing extensive jurisdiction and hearing appeals from Regional Disciplinary Boards consisting of three persons.

7.12 The Disciplinary Tribunal would, in the Committee's proposal, exercise both an original and appellate jurisdiction. It would exercise the jurisdiction (with the grounds revised as suggested below) presently conferred on the Disciplinary Committee by sections 34 and 35 hearing any charges referred to it by the Regional Disciplinary Boards or by the Councils of the New Zealand or District Law Societies. In addition, it would hear appeals from the decisions of the Regional Disciplinary Boards.

7.13 The possibility should not be excluded that the single specialised court or tribunal suggested in paragraphs 6.4 to 6.6 of this Paper should replace the Disciplinary Tribunal proposed at this level. In other words, an independent disciplinary tribunal constituted in the manner described in paragraph 6.4 could hear charges and appeals relating to all professions of which the legal profession would be only one. A right of appeal would then exist from that tribunal to the Administrative Division of the Supreme Court. Comments which the Committee is seeking from other professions will have a bearing on the Committee's conclusion on this point.

8. Law Practitioners Regional Disciplinary Boards

8.1 The Committee believes that the present structure and procedures for disciplining practitioners at the District level is unsatisfactory. District Councils are required to investigate a complaint, lay a charge against the practitioner, prosecute the charge, hear and determine the matter and, if the practitioner is convicted, impose the appropriate penalty or refer the matter to the Disciplinary Committee. The Council acts as police, prosecutor and judge; the investigative and adjudicative functions are merged. The Committee believes that this confusion of functions is undesirable.

8.2 Because the Councils of a District Law Society are responsible for dealing with complaints against their members their investigative and prosecuting functions should be

retained. However, the Committee believes that their present adjudicative role should cease. This function would seem inconsistent in principle with their task of initiating a charge and prosecuting the practitioner concerned. It would also seem to foster the view that lawyers are called upon to judge one of their own and might therefore either dismiss a charge where a conviction would be justified or impose a lenient penalty when greater severity would be warranted in the public interest. Rather than vesting the responsibility in an elected body of practitioners it would seem preferable for the adjudicative function to be performed by a statutory body charged with that specific function.

8.3 Moreover, the size of the Councils of the larger District Societies would seem unnecessarily unwieldy for the hearing and determination of disciplinary charges. With a large number of members present to hear and determine a charge it could well be thought that they might tend to be inefficient in discharging their adjudicative function. Discussion or consideration of the charge must be rendered more difficult and compromise decisions would seem more likely. Moreover, responsibility for a decision is likely to be diffused in that individual members may not feel a sense of close or direct responsibility for the decision. These disadvantages would not attach to a smaller body having express statutory responsibility for the adjudicative function.

8.4 In the case of the smaller Districts, however, the problem would appear to be that the local legal community is in effect required to discipline each other. In these smaller centres practitioners necessarily know one another and must pass judgment, if judgment is to be passed, on those with whom they are personally acquainted. Even if objectivity were possible under these circumstances, the public could well suspect favouritism or worse when charges were not sustained or a minimal penalty was imposed. It therefore appears to the Committee that a disciplinary structure which extends beyond the boundaries of the smaller Districts would be desirable.

8.5 The Committee proposes that six Regional Disciplinary Boards be established to cope with disciplinary matters not handled at the national level. While the Committee wishes to invite the Law Society to suggest the specific details of such a proposal it would envisage that four Boards would be established for the North Island and two for the South Island. It contemplates that a panel of up to six practitioner members would be appointed to each Board by the Councils of the Districts included within the region over which the Board is to exercise jurisdiction on a basis proportionate to District membership. Board members at the regional level would also be appointed for a term of six years. A quorum would consist of three members, one of whom would be a lay member. It is thought that at this level three members would be the appropriate number to hear and determine disciplinary charges. By establishing a Board of six practitioner members and enabling it to sit with a quorum of three, including a lay member, the Committee considers that it should be possible to exclude from

any sitting a member from the area of the complaint where the charge concerns a practitioner in a smaller centre.

8.6 The proposal put forward by the Committee is similar to the system provided in the Medical Practitioners Act 1968. That Act provides for a Medical Practitioners' Disciplinary Committee and Divisional Disciplinary Committees in respect of any Division or group of Divisions of the Medical Association of New Zealand.

8.7 Consistent with its view that the disciplinary process should include lay representation the Committee also believes that a lay member should be appointed to each of the six Regional Disciplinary Boards. It contemplates that the Minister of Justice would appoint the lay representatives for a term of three years, renewable for a further term of three years. Lay representatives would not, of course, need to be engaged on a full-time basis. They should be able to perform their duties; that is, preparing for disciplinary proceedings and attending the hearing and determination of charges, on a part-time basis only. Apart from travelling and other expenses, it could well be regarded as an honorary appointment but any remuneration required should again be paid from the public purse. The Fees and Travelling Allowances Act 1951 may be adequate for this purpose.

9. Grounds of Misconduct

9.1 The Committee has concluded that the grounds on which disciplinary action may be taken against a practitioner as set out in the Law Practitioners Act need to be revised and updated. Reference to "grave Impropriety" and "infamous conduct" would appear redundant and serve little purpose today. Moreover, certain grounds appear unnecessarily restrictive. Finally, the Committee is concerned to ensure that the general grounds referred to in the Act should be supplemented by a code of ethics which, while drafted with the main purpose of protecting the public and not the profession itself, should nevertheless be as specific as possible in order to protect practitioners from the injustices which may follow from broad, undefined and uncertain laws.

9.2 The Committee would suggest that the following grounds are appropriate as general grounds for taking disciplinary action;

(a) Professional misconduct;

(b) Conduct unbecoming a practitioner;

(c) Conviction of a practitioner for any offence punishable by a sentence of imprisonment which reflects on his fitness to practice law or tends to bring the profession into disrepute;

(d) Professional negligence.

9.3 The Committee has only included conduct unbecoming a practitioner after considerable thought having been initially attracted to the view that only conduct bearing on the practitioner's professional capacity should be subject to disciplinary action. Any activity involving fraud or dishonesty would fall within this category. For the rest, private conduct, however eccentric, misguided or immoral it might be judged does not seem to be the business of the profession.

9.4 To a large extent the Committee remained reluctant to accept that the private conduct of a practitioner should be exposed to disciplinary action by the Law Society. In particular, it believes that areas of behaviour involving questions of sexual morality, where community standards and understanding constantly change, should be beyond the reach of a profession's disciplinary machinery. Similarly, the Committee would in general except political activity, such as political activism or even, in certain circumstances, civil disobedience where it is recognised that a person should be entitled to act in accordance with the dictates of his conscience. Nevertheless, even in these areas no hard and fast rules can be drawn.

9.5 To the Committee's mind, however, there is a further category of activity which a practitioner may persue in his private capacity which justifies the inclusion of unbecoming conduct as a ground for disciplinary inquiry. This is conduct which bears on the practitioner's standing as a barrister and solicitor and which can reflect on the professional reputation of all practitioners. Sharp and unfair business practices or the unconscionable exploitation of other members of the community are examples which come to mind. In many cases of this sort the practitioner is exerting an expertise or superiority which, in part at least, is based on his status, qualification or experience as a lawyer. He may well be abusing or taking advantage of a general trust reposed by the community in barristers and solicitors because they are in fact members of a respected and reputable profession. Consequently, the Committee concluded that a lawyer is in fact a lawyer around the clock and cannot escape the consequences of conduct which, although not committed in his capacity as a practitioner, is unbecoming and reflects on the integrity and reputation of the profession as a whole.

9.6 The Committee would also extend the existing ground relating to the conviction of practitioners for a crime involving dishonesty within the meaning of section 2 of the Crimes Act 1961 (being crimes against property described in Part X of the Act). It would suggest that conviction for any offence punishable by a sentence of imprisonment should be a ground for disciplinary action, although not all convictions would or should merit a prosecution. Clearly offences which do not impugn the practitioner's capacity or reflect adversely on the integrity or responsibility of the profession would not normally attract the attention of the Society. In yet other cases, such as a conviction following a prosecution in the nature of a test case on a point of law, the circumstances surrounding the conviction could be such as to absolve the

practitioner from blameworthy conduct in the eyes of both the profession and the community. However, respect of the law of the land is of fundamental importance and the Committee considers that the wider ground is justified on that basis. Both the profession and the public have the right to expect that members of the legal profession will be among the first to demonstrate deference to the cardinal requirement of an ordered society - that the law be obeyed.

9.7 Although concerned with the generality of such grounds as professional misconduct and conduct unbecoming a practitioner, the Committee has accepted that the use of indefinite phrases is inescapable. It is impossible to stipulate in advance all the "varieties and shades" of activity which will be regarded as professional misconduct or conduct unbecoming a practitioner. Indeed, as already indicated, a measure of flexibility may be desirable. However, although accepting that the use of general phrases will always be necessary, the Committee considers that it should be possible to formulate a comprehensive code of ethics which will indicate the activity which constitutes misconduct either expressly, by necessary implication or by way of illustration or analogy.

9.8 Irrespective of the practical difficulties involved, therefore, the Committee believes that standards of professional behaviour should be defined with as much precision as possible. A practitioner should be able to ascertain and know in advance the prohibited activity for which he may be disciplined and punished. (See the McRuer Report, page 1190.) Consequently, the Committee has concluded that even though it may not be exhaustive, a detailed code of ethics should be drafted by the New Zealand Law Society to indicate the content and nature of broad terms such as professional misconduct and conduct unbecoming a practitioner.

9.9 As an additional measure, the McRuer Commission recommended that self-governing professional bodies should draw up an itemised list of activities which had been classified as professional misconduct. It suggested that as new activities were classified by the disciplinary body's exercise of power under the professional misconduct clause, whether by rulings or decisions in actual cases, they should be added to the list and circulated to the profession. The Committee would make the same recommendation in respect of the legal profession.

9.10 Moreover, the Committee considers that the term "professional misconduct" should be statutorily defined. Under the present law, to be guilty of professional misconduct, a practitioner must be shown to have done something which would "reasonably be regarded as disgraceful and dishonourable by solicitors of good repute and competency". (See 36 Halsburys Laws of England, (3rd Ed.), para. 308, p.222; Re a Solicitor Ex parte The Law Society [1912] 1 K.B. 302, applying Allison v. General Council of Medical

Education and Registration [1894] 1 Q.B. 750, C.A., at p.763; and Re a Solicitor [1960] V.R. 617, per Dean, J. at p.260.) In the Committee's view the words "disgraceful and dishonourable" import into the judicial definition a standard of conduct which is far removed from modern notions of what activity should properly constitute professional misconduct. In its view, any conduct which falls below the standard of ethical behaviour which is reasonably regarded as necessary to uphold the standing and reputation of the profession and ensure the protection of the public should be capable of being adjudged professional misconduct. The Committee would therefore recommend that a suitable statutory definition be drafted and would appreciate the Society's thoughts in this respect.

9.11 The Committee would also suggest that the Society should consider including negligence on the part of a practitioner within the scope of its disciplinary process. "Gross negligence" is already referred to as a ground for disciplinary action in the statutes governing a number of professions. The Committee appreciates that a practitioner can be the subject of civil proceedings at the suit of the wronged client who may or may not obtain satisfactory redress. However, the disciplinary body can always take such civil proceedings, or the possibility of the proceedings, into account. Moreover, the Committee does not consider that all cases of negligence would or should attract the Law Society's disciplinary jurisdiction. Whether or not this is the case must depend on all the relevant circumstances. (See A Guide to the Professional Conduct of Solicitors, issued by the Council of the Law Society in the United Kingdom in 1974, at pages 28 - 29.)

9.12 What the Committee does not accept is that it is permissible to disregard the interest which the general public has in being protected from negligent or incompetent practitioners. Representing a client competently should be accepted as part of a practitioner's professional duty and not just an aspect of the law of tort or contracts. Furthermore, practitioners are almost invariably insured against claims based on allegations of professional negligence. Where the negligence is clearcut the claim will generally be settled out of court by the insurance company indemnifying the practitioner. It is only where the issue is arguable that the claim is likely to proceed to court with the consequent possibility of publicity for the practitioner or firm involved. It is ironic that if a practitioner is going to be negligent it is in his interest to be clearly negligent for he then escapes any adverse consequences other than the loss of the client and the humility and inconvenience of dealing with his indemnifier. Such cases of negligence go unchecked. For these reasons, the Committee regards it as important that the Law Society accept responsibility to discipline the lawyer who has been guilty of negligent conduct. This point is pressed further in paragraphs 10.19 to 10.21 dealing with the problem of the incompetent lawyer.

9.13 It is no doubt already a matter of concern to the Law Society that the monetary penalties prescribed in the

Law Practitioners Act are seemingly inadequate. The Disciplinary Committee may impose a penalty not exceeding $1,000.00 and District Councils are limited to a penalty not exceeding $200.00 plus a maximum of $100.00 in respect of costs. Both fines were stipulated by the Law Practitioners Amendment Act 1968 when the Disciplinary Committee's maximum penalty was increased from $200.00 to $1,000.00. The penalties nevertheless appear to the Committee to be totally inadequate. Having regard to today's money values and the disciplinary structure and procedures it has proposed, the Committee considers that a maximum penalty of $5,000.00 for the Disciplinary Tribunal (or Disciplinary Committee) and $2,000.00 for the Regional Disciplinary Boards would be appropriate. The Boards would also require power to order payment of a suitable sum in respect of the costs of the investigation and prosecution.

10. Councils

10.1 It has already been indicated that the Committee considers that the Councils of the New Zealand and District Law Societies should cease to exercise any adjudicative function. Within the disciplinary process the investigative and prosecuting role would be their prime task. The Committee contemplates that after investigating a matter a District Council would, where appropriate, lay a charge or charges against the practitioner concerned before the Regional District Board or, if the case was sufficiently serious, before the Law Practitioners Disciplinary Tribunal. It would formulate the charge and prosecute it at the hearing before either disciplinary body employing the Society's solicitor or counsel where that course was considered necessary. Finally, it would have a right of appeal from the decision of the Regional Disciplinary Board to the Disciplinary Tribunal and, again, from the decision of that Tribunal to the appellate court or tribunal discussed in Section 6 of this Paper.

10.2 To some extent the criticism that lawyers are concerned to protect themselves could also be levelled at Councils in relation to the performance of their investigative and prosecuting role; that is, it could be alleged that they may tend to be dilatory in investigating evidence of malpractice and reluctant to prosecute one of their own number. However, it seems to the Committee that this criticism would not have the same force as it has in relation to the adjudicative function and, in any event, would be countered by the appointment of Lay Observers along the lines suggested by the Committee in Section 11.

10.3 Clearly, a Council's principal task within the investigative framework will be the handling and processing of complaints against practitioners made to it by members of the public. As already mentioned, the reports received from District Societies were of considerable assistance to

the Committee. Two points were immediately noted. The first was the fact that there was a surprisingly high number of complaints about practitioners lodged with District Societies during the past year. However, because some Councils do not keep complete records it is not possible to indicate the actual number. The number of complaints is greater in the major cities. This is especially so in Auckland, a fact which does not appear to be wholly explicable in terms of the greater number of practitioners resident in the Auckland District.

10.4 The second point to emerge was that there was no uniform approach or standard procedure as between Districts for handling complaints. In some Districts complaints are dealt with by the full Council, in other Districts a formal committee procedure is utilised and in yet other Districts an informal means of resolving complaints on a more or less personal basis is adopted. It may well be, of course, that, because of the disparity in the size of District Societies throughout New Zealand, the uniform approach or standard procedure would be impracticable or undesirable.

10.5 The Committee's review led it to the conclusion that greater attention could be given to the method by which the complaints of the public are resolved. It believes that the Law Society should examine the Law Practitioners Act with the object of enlarging the powers of a Council to investigate and pursue inquiries where it has reasonable cause to believe or suspect that there has been misconduct or a lack of competence on the part of a practitioner. Other measures could be adopted aimed at preventing the incidence of misfeasance and complaints.

10.6 It is apparent that there is an understandable reluctance on the part of practitioners to report their fellow members in the profession to the Law Society for apparent misconduct or incompetence. In such circumstances a false sense of fraternity appears to intrude upon the practitioner's clear duty to assist the profession to police itself and maintain its standards and reputation. Practitioners are in a particularly advantageous position not only to detect misconduct or incompetence but also signs of possible defalcation or incapacity whether evident by reason of ill-health, economic difficulties or otherwise. In such cases an early warning to the Council that something could be amiss might well be of direct benefit to the named practitioner in that informal remedial or preventative measures could be set in train.

10.7 Consequently, the Law Society may consider it is appropriate to emphasise to all practitioners that, subject always to such duties as they may have to their clients, they have a responsibility to report suspected instances of misconduct, incompetence or incapacity to the Society. The appropriate procedural machinery should be instituted by which practitioners who have such misgivings about another practitioner may make them known in confidence to the Council.

10.8 The duty of a practitioner under these circumstances is confirmed by reference to Rule 3.2 of the Society's Code of Ethics. In that Rule it is specifically provided that there is a duty on every practitioner who has grounds to suspect defalcations by another practitioner (subject to any overriding duty to a client) to forward a confidential report to the Council of the District Law Society. Reason to suspect that things are wrong may arise from any number of causes such as an "extravagent mode of living, dishonour of cheques or delay or procrastination in effecting settlements".

10.9 The Council of the Law Society in the United Kingdom has gone further and ruled that it is the duty of every solicitor, except where there are strong reasons to the contrary, to report any facts which give him good reason to believe that another solicitor may have been guilty of conduct falling short of the proper standards of the profession. (See A Guide to the Professional Conduct of Solicitors, para. 61 at page 73, and Sir Thomas Lund, The Professional Conduct and Etiquette of Solicitors at page 81. See also Disciplinary Rule 1-103(A) of the American Bar Association's Code of Professional Responsibility for an unqualified obligation imposed upon a lawyer to report unprivileged knowledge of a violation of the Rules to the appropriate disciplinary authority.) In the Committee's view the rules of the New Zealand Law Society and District Law Societies should be redrafted to explicitly incorporate this wider duty to report facts in relation to suspected professional misconduct or incompetence.

10.10 Another aspect that the Committee wishes to refer to is the inherent tendency of the profession to treat complaints as private disputes between the practitioner and the client lodging the complaint. Considerable attention appears to be directed to the task of ensuring that any default is rectified or, if a sum of money is involved, that restitution is effected or a refund made. This is, of course, essential. In the Committee's opinion, however, what is not acceptable is the notion that once the complaint has been rectified or restitution effected the matter may be regarded as closed. Consideration must still be given to the broader public implications of misconduct or incompetence by a practitioner.

10.11 Failing to protect the general public from the delinquent practitioner is inconsistent with the profession's policing role. Effective disciplinary enforcement requires that the practitioner who has been guilty of misconduct or incompetence be disciplined, that future misconduct and similar incompetence on his part and the part of others by deterred and that other clients and the public generally be protected from practitioners who may continue to jeopardise their interests. Merely coping with the particular complaint does not accomplish these ends. Consequently, the Committee has formed the view that Councils should be more conscious of the possible need to pursue disciplinary action against the offending practitioner.

10.12 The Committee also believes that Councils should be prepared to commence investigations and disciplinary proceedings of their own initiative without waiting for a specific complaint to be submitted to them. It is the Committee's impression that at the present time most District Councils rely upon the receipt of a complaint to found any inquiry or disciplinary action. Yet, there are cases in which no specific individual is aggrieved as, for example, convictions for such offences as perjury or tax evasion. Other cases of professional misconduct are unlikely to be reported simply because the client as well as the practitioner benefits from the misdirected activities. Indeed, for any one of numerous reasons, the client may lack sufficient motivation to make a complaint. Such cases of misconduct, even though not subject to a complaint, nevertheless violate the standards fixed by the profession and the object of policing the profession with reasonable uniformity is defeated unless disciplinary or complaints procedures are instigated.

10.13 The Committee also considers that the task of initiating investigations should extend beyond particular cases of unreported misconduct or incompetence and encompass known or suspected areas of systematic misconduct. It may, for example, be suspected that a number of practitioners are touting for business in a particular area of legal practice or consistently overcharging in respect of certain kinds of legal work. In all cases of general misconduct of this kind the Committee believes that the Councils of District Law Societies have a responsibility to initiate investigations and take the necessary disciplinary proceedings.

10.14 The Committee has been informed that the Law Society is undertaking a thorough re-examination of its adult procedures with the object of improving the effectiveness of the audit system. A number of large claims against the Solicitors' Fidelity Guarantee Fund has drawn attention to the need for the whole scheme to be overhauled and the Committee regards the Society's review as being timely as well as desirable. While this review is primarily a task for the Law Society, the Committee's research has prompted it to advance one suggestion for consideration. It believes that greater use could be made of spot audit inspections of practitioners and law firms by specially qualified accountants or retired practitioners. Conceivably, the inspectors could be retained from moneys appropriated from the Solicitors' Fidelity Guarantee Fund. It seems to the Committee that it would be prudent to employ the Fund in preventing defalcations and not merely in making good the loss suffered by clients as a result of a practitioner's misappropriation of their moneys.

10.15 Spot checks can be directed against practitioners or firms who, because of audit irregularities, an unwarranted series of complaints, the particular nature of a complaint or knowledge of a firm or persistent rumour, give cause for definite suspicion. For that reason, it is obvious that District Law Societies should be involved in the organisation of the scheme. Not without some point, it is claimed that

spot inspections of this kind cast an unwarranted stigma on those practitioners or firms selected when the subsequent inspection shows that there is nothing amiss with their accounts. To the Committee's mind, however, any opprobrium which might follow from being selected could be reduced or eliminated if the scheme was extended to cover a number of practitioners or firms chosen at random each year. It envisages that the scheme would extend to two categories; those who have aroused the suspicion of the Law Society and those selected at random. Including the latter category should promote the maintenance of high standards of accounting and office management as well as serving to minimise the slur otherwise inherent in any system of spot inspections.

10.16 Another aspect which has attracted the Committee's attention arose out of its consideration of the responses received from the various District Law Societies. These indicated the types or categories of complaints which are commonly made to the Councils. Delay in handling and completing a matter, failing to reply or provide information to a client, misgivings as to the competency with which a matter had been handled and allegedly excessive costs would seem to represent the bulk of complaints. The Lay Observer's Report indicates that the position is much the same in the United Kingdom. As a consequence, the Committee has concluded that specific disciplinary charges relating to these heads of complaints should be formulated by District Societies. It can readily be appreciated that a Council will be reluctant to charge a practitioner with an offence involving any one or more of these elements when it would be necessary to allege professional misconduct (or unprofessional conduct). This is likely to remain the case even if professional misconduct is re-defined by statute to include conduct which is not necessarily so bad as to be "disgraceful or dishonourable". Specific charges should also decrease the likelihood that complaints of this description will be treated solely as disputes to be resolved as between the complainant and the practitioner and not also as matters requiring disciplinary attention.

10.17 Consequently, the Committee considers that the Law Practitioners Act should be amended to clarify that District Councils have the power to make rules specifying particular offences for which practitioners can be held accountable. On the bases of its inquiries it would suggest that the specific charges could include the following matters -

- undue delay in handling or completing a legal matter,
- charging a client excessive costs,
- unreasonably failing or refusing to reply, or to reply satisfactorily, to a proper inquiry from a client or another solicitor or unreasonably failing or refusing to provide a client with information to which he is entitled and which he has duly requested,
- handling a legal matter incompetently, and

- being held responsible by the Council of the District Law Society, or the appropriate committee of the Council, for a specified number of legitimate or avoidable complaints over a given period of time.

10.18 The Committee considers that some attempt should be made to deal with practitioners or firms responsible for a series of legitimate complaints. In at least one major District reported complaints against particular firms represent a problem requiring attention. Apart from prosecution on a specific charge as mentioned in the previous paragraph, the Committee would suggest that it may be necessary to institute a system whereby the Council of the District Law Society, or the Regional Disciplinary Board acting on the complaint and report of the Council, conduct an inquiry into whether or not the practitioner's practising certificate should be cancelled or withheld.

10.19 Throughout this section the Committee has referred to incompetence as a matter coming within the purview of the Society's disciplinary and complaints process. It is the Committee's impression that many in the profession do not regard lack of competence on the part of a practitioner as something which calls for the attention of the Law Society. The luckless client, it is apparently felt, can change his solicitor and have any default remedied or otherwise pursue his civil remedies. Frequently, however, the defect cannot be rectified by another solicitor, at least in full or without cost to the client. Just as frequently, civil proceedings present a formidable and daunting prospect and may not be economically feasible having regard to the small amount in issue.

10.20 More importantly, as already indicated, the Committee considers that negligence and lack of competence should in certain circumstances be subject to disciplinary action. The changing attitude to this question is apparent from the way in which Sir Thomas Lund deals with it in The Professional Conduct and Etiquette of Solicitors (at pages 61 - 62) published in 1960 and the much more flexible approach adopted in A Guide to the Professional Conduct of Solicitors (at pages 28 - 29) printed in 1974. In the latter work it is noted that standards change over the years and that a higher standard of efficiency and attention to business is now expected of a solicitor than was the case in former years.

10.21 To the Committee's mind the American approach is even more pertinent. Reference to The American Bar Association's Code of Professional Responsibility may be of some assistance to the Society. Paragraph 6-1 of the Ethical Considerations relating to Canon 6 of that Code summarises the essential elements of a lawyer's responsibility to represent a client competently. These are; first, that a lawyer should act with competence and proper

care in representing clients; secondly, that he should strive to remain proficient in his practice; and thirdly, that he should accept employment only in matters with which he is or intends to become competent to handle. These matters are then traversed in more detail in the subsequent paragraphs, the full text of which is attached as Appendix II. Not only is the need to act competently acknowledged to be a professional responsibility but the obligation of a practitioner to keep abreast of current legal developments is expressly recognised. Moreover, lawyers are exhorted not to accept employment in matters beyond their competence.

10.22 The American Bar Association holds that the organised bar must demand adherence to these standards by its members. In short, the public is entitled to protection from the incompetent lawyer. Lawyers have already recognised the collective responsibility to purge the profession of dishonest lawyers. Yet, as stated by the President of the American Bar Association in 1974 ". . . from the client's point of view, the incompetent lawyer is as bad as the dishonest lawyer, and the point of view that counts is that of the client". (60 A.B.A.J. 249 at p.274.) The Committee supports this view and considers that the disciplinary and complaints process should be extended to cover lack of competence on the part of a practitioner.

10.23 After a year's experience, the Lay Observer in the United Kingdom has expressed the view that there is a need for the public to know that they can readily obtain impartial and expert advice when they are considering taking proceedings against a solicitor. He suggested that lists of solicitors who have the skill and experience for professional negligence litigation should be compiled and made available to the public on demand. The Committee considers that much the same facility is required in this country.

10.24 It is unsatisfactory that a client having a grievance in respect of the professional capabilities of his solicitor should find it difficult to obtain legal representation. In the Lay Observer's words; ". . . The present process of clients hawking their affairs to solicitors haphazardly recommended by friends or bank managers does not make for public confidence in an aspect of the law where suspicion of excessive loyalty is inevitable". (pages 4 - 5). If the aggrieved client receives a series of opinions expressing the view that no cause of action exists (and is charged for those opinions) he will be likely to conclude that the profession is arraigned against him. If on taking his grievance to the Law Society he finds that it adopts a neutral stance and will do no more than suggest that he refer to another solicitor he will be likely to conclude that the Society has also taken the side of the practitioner. Nor is it satisfactory for a practitioner who is wrongly alleged to have been negligent to be subject to the continuous and possibly obsessed harrassment of a disgruntled ex-client lacking confidence in the legal advice hs is receiving.

10.25 Consequently, District Law Societies should consider preparing lists of suitable practitioners to whom aggrieved members of the public alleging negligence against a solicitor may be referred. The same list could also be utilised by the Council when a question of incompetence arises in the course of investigating a complaint and it is not clear whether the allegation is justified. In many cases which would not warrant litigation both the complainant and the practitioner could well be prepared to accept the opinion of a lawyer nominated by the Law Society.

10.26 The Committee has been informed that the question has arisen, in at least one District, as to whether or not the administrative costs incurred by a District Society in investigating and handling a complaint should be passed on to the erring practitioner. It is important to clarify that the Committee does not consider a power to that effect as being inconsistent with its proposal that Councils cease to exercise an adjudicative function. Although the power to require the payment of expenses, or a contribution to expenses, possesses a punitive flavour the Committee regards it as primarily providing Councils with the ability to recover their administrative costs from those members of the profession who are responsible for them. Consequently, while cognisant of the legal problems associated with finding a practitioner liable for the payment of a sum of money without affording him the opportunity to confront and examine the complainant, the Committee would be prepared to endorse an amendment to the Law Practitioners Act clarifying that Councils of District Law Societies have the power to order that the administrative and other costs and expenses incidental to the investigation and handling of a complaint against a practitioner or firm may be recovered in whole or in part as a debt due to the Society. As it would seem that this power would require to be a discretionary power exercisable where the complaint was justified or otherwise avoidable the Committee would suggest that practitioners dissatisfied with a Council's ruling could be given a right to appeal to the Regional Disciplinary Board.

10.27 Publicity relating to disciplinary action in the profession would seem to be generally discouraged. Lack of precise knowledge of what is happening extends to many members of the profession itself. It is apparently believed that the public image of the profession will be damaged by the disclosure that professional misconduct exists, or exists to the extent that it does. In the Committee's view, however, it is fallacious to think that the profession secures a better reputation by suppressing information relating to its disciplinary activities and complaints procedures. The public does not believe that all lawyers are beyond reproach any more than they think that all lawyers are suspect. They would, the Committee believes, be reassured by knowing the steps taken by the Law Society to curb the activities of those who have fallen short of its standards. Dissemination of information about disciplinary proceedings would also

serve to improve the effectiveness of the disciplinary and complaints process providing other practitioners with an incentive to avoid similar misconduct and offering the profession as a whole guidance about the activity with which the Law Society is concerned.

10.28 Consequently,the Committee considers that relevant information concerning disciplinary matters should be published in media likely to reach both members of the profession and the public. The information need not, of course, identify the culprit practitioner where the harm or consequences of identification would be out of proportion to, or otherwise unwarranted by, the offence Finally, publication should not be limited to formal proceedings but should extend to all aspects of disciplinary and complaints activity undertaken by the profession's disciplinary bodies or District Law Societies.

10.29 It is evident from the information furnished by the District Law Societies that many Councils do not keep permanent recores of complaints received. The Committee considers that such records should be maintained. The records should include adequate details of the complaint, the processing of the complaint and the Council's decision or the result achieved. Such records would be useful in two respects. The first is as a record against which any further complaints against the same practitioner or firm can be evaluated. It is only when the past record of a practitioner is taken into account that it is possible to assess adequately the extent to which he is in default of his professional responsibilities. Moreover, a satisfactory record is essential if it is to be accepted that a number of inexcusable complaints against a particular practitioner or firm may warrant disciplinary action. Secondly, a permanent record is necessary for the purpose of obtaining sufficient basic data on which to base general remedial action. Patterns which emerge from the collation of statistics can frequently indicate when action is required and what steps should be taken to improve the situation. For these reasons District Councils should keep and maintain satisfactory permanent records of complaints received and their treatment of those complaints.

11. Lay Observer

11.1 In 1969 the then Minister of Justice, the Hon. J. R. Hanan, addressing the New Zealand Law Society Conference on the subject of "Law Reform" stated :

> "As Minister of Justice, I have repeatedly had it forced on me that people who have complained about the way a solicitor has handled their affairs often feel a sense of frustration and of justice denied. I receive some hundreds of such letters in a year from

> "people, many of whom are not impossible people and are, in fact, very decent people . . . . Many citizens undoubtedly feel that in dealing with complaints of this sort the Law Society will not be completely objective and unbiased, and that no lawyer will condemn another lawyer unless something spectacularly bad has occurred. We ourselves may know that justice has been done but to borrow a phrase that we are fond of applying to others, is it always seen to be done by the clients?" (Reported 1969. N.Z.L.J., 365, at p.367.)

11.2 Mr. Hanan went on to suggest the creation of something like a Lawyer's Ombudsman. He expressed the opinion that this proposal would do more to raise the image of the legal profession and to satisfy the public that they were receiving justice from the profession than almost anything else. Because it is in substantial agreement with these sentiments, the Committee is strongly in favour of constituting the office of Lay Observers to review the Law Society's treatment of complaints by members of the public.

11.3 Reference has already been made to the Solicitors (Amendment) Act 1974 in the United Kingdom. Section 45 of that Act provides that the Lord Chancellor may appoint one or more persons, to be known as Lay Observers, to examine any written allegation made by or on behalf of a member of the public concerning the Society's treatment of a complaint about a solicitor or an employee of a solicitor. No barrister or solicitor may be appointed as a Lay Observer. The Lord Chancellor is empowered to give general directions to Lay Observers about the scope and discharge of their functions and may appoint staff to assist them. Remueration for Lay Observers is to be paid out of moneys provided by Parliament. For its part, the Law Society is obliged to furnish a Lay Observer with such information as he may reasonably require and to consider any report or recommendation which it receives from him. It must notify him of any action which is taken in consequence of his report. Finally, Lay Observers are required to submit annual reports to the Lord Chancellor relating to the functions conferred on them by the Act and a copy of any such report is to be laid by the Lord Chancellor before Parliament.

11.4 The directions which have been issued by the Lord Chancellor are brief. A Lay Observer is to seek from the Society whatever information he considers necessary for the purpose of examining an allegation. He is not to re-examine an allegation, or examine a fresh allegation relating to the same complaint, unless he is satisfied that he has received relevant information which could not reasonably have been provided in relation to the allegation when it was originally examined. When a Lay Observer has examined an allegation he is to send a written report of the results of his examination to the complainant, to the Society and to the person about whom the complaint was made.

In the annual reports the Lay Observer is prohibited from identifying any individual or firm. Apart from this, a Lay Observer is authorised to follow such procedure in examining allegations as he thinks fit.

11.5 The Committee believes that the English model of Lay Observers should be adapted for use in New Zealand. One or more Lay Observers could be appointed by the Governor General by Order in Council as required and remunerated from moneys appropriated for that purpose by Parliament. The Committee would invite the Society to comment on the possibility that the lay representatives appointed to the proposed Regional Disciplinary Boards could also serve as Lay Observers. It is appreciated that where a lay representative had, in his capacity of a Lay Observer, reviewed the Society's treatment of a complaint leading up to a charge before the Regional Disciplinary Board he would be disqualified from sitting on the Board in respect of that particular matter.

11.6 Because the function of these Lay Observers may be seen as being similar to Ombudsmen appointed under the Ombudsmen Act 1975, (who are also remunerated from funds provided by Parliament) the Committee has considered the question of whether one or more of these Ombudsmen might not be the appropriate person or persons to undertake this task. It has been suggested that it would be an unfortunate precedent to confer upon such Ombudsmen a specialised jurisdiction in respect of professional groups. However, the Committee has deferred making a final decision on this point.

11.7 Assuming that the appointments are not made under the Ombudsmens Act, the Committee does not consider that the name Lay Observer is wholly appropriate. The functions contemplated for this officer go beyond the mere observation of the Society's treatment of complaints and include a power to review, the initiation of inquiries and reporting to Parliament. However, the description 'Lay Ombudsman' is also regarded as unsatisfactory because of its association and identification with the Ombudsmen appointed under the Ombudsmens Act. The Committee has considered alternative names such as 'Lay Moderator' or 'Lay Examiner' but has decided to invite the Society to suggest a more appropriate title. In the meantime, however, the name Lay Observer is used in this Working Paper.

11.8 The Committee envisages that the Lay Observer's functions should be much the same as his counterpart in England. Upon receipt of a written request from the complainant he would review the District Law Society's handling of the matter. His jurisdiction would extend to the handling of complaints relating to employees of practitioners. If he was satisfied that the Society had handled the complaint fairly and diligently he would advise the complainant of that fact. If, however, he was dissatisfied with the Society's treatment of the matter,

either because the investigation had been inadequate, the Council's decision apparently questionable or insufficient or the inquiry had been dilatory, he would report to the Society with or without a recommendation as to what he thought should be done. The complainant and the offending practitioner would also be advised of the action he had taken. It would then be for the Society to deal with the matter. Because it is a responsible profession the Committee does not consider that a Lay Observer's report or recommendation would go unheeded and for that reason it believes that no further direct sanction would be necessary.

11.9 In addition to reviewing complaints and reporting to the District Council the Committee believes that a Lay Observer should be able to request the Law Society or a District Council to initiate an investigation into any area of practice which he believes warrants scrutiny. Such a power would reinforce the Lay Observer's ability to further the public interest. It would also be in line with the Committee's view that the Law Society and District Councils should be prepared, without receiving specific complaints, to initiate inquiries and investigate known or suspected areas of systematic misconduct.

11.10 The First Annual Report of the Lay Observer in the United Kingdom is a most useful document. It reassures the public that, with the exception of some minor matters of detail or explanation, the Law Society's treatment of complaints is adequate. It goes on to make a number of positive conclusions and recommendations which will be of undoubted benefit to both the public and the profession. Apart from the examples already given, the Report stresses that delays throughout the whole range of legal processes has caused considerable distress to individual members of the public and that it is necessary for these delays to be studied with a view to reducing them. Again, it also suggests that there is a need in some solicitors' offices for better standards of estimating costs and furnishing up-to-date accounts.

11.11 The Committee considers that reports of this description, written by persons with direct experience in the area of complaints but outside the profession itself, would be of considerable value. It is therefore of the view that the Lay Observer in New Zealand should also be required to furnish annual reports to Parliament. If more than one Lay Observer is appointed, the annual report could be compiled by a senior Lay Observer who would also be responsible for the overall administration of Lay Observers throughout New Zealand.

11.12 As has already been stated, the Committee considers that the appointment of Lay Observers would have considerable benefits for both the profession and the public. Conscious of the Lay Observer's function the District Law Societies

would strive to ensure that their treatment of complaints was beyond reproach. At the same time the public would be able to see that the Law Society was not reacting to complaints in such a way as to protect its own members but that it handled complaints diligently and fairly. In all, the confidence of the public in the profession would be enlarged.

12. Conclusion

12.1 The Committee is confident that the acceptance and implementation of the measures it has proposed would not only be in the interests of the public but would also be in the long term interests of the profession. Ultimately the profession's well-being and survival depends on public confidence and that confidence will be impaired unless its disciplinary system truly serves the public interest. Public dissatisfaction in this critical area is to be avoided.

12.2 Yet public attention has, for a number of reasons and from a number of different sources, been increasingly directed at the profession's ability to deal with its erring members. The structure and procedure by which it disciplines its members and deals with complaints has come under closer scrutiny. Many people have questioned the profession's apparent prerogative to discipline itself challenging the notion that self-discipline means private discipline. Many are asking why the interests of the public should not be safeguarded ahead of the interests of the guilty practitioner or the interests of the profession as a whole. Public discontent in this country may still not be high when compared with the situation which existed in the United Kingdom and which exists in the United States today. Nevertheless, unless the profession is prepared to assist in improving its disciplinary system it cannot be said with any certainty that more radical reforms will not eventually be imposed from outside. In this respect it may be appropriate to conclude with a portion of a report by a State Bar Ethics Committee in the United States:

> "A good and decent profession has a headache that cries out for fast relief. We have been put on notice repeatedly. We will compound our own cure or someone will mix up a dose which will curl our hair."

APPENDIX 1

NORTHERN NEWS

NEWSLETTER OF THE AUCKLAND DISTRICT LAW SOCIETY

No. 12 – 1976

Solicitors Before Council On Disciplinary Charges

Suspicions of a partner led to a solicitor appearing before the Council on a number of charges. The partner had been concerned to find certain transactions involving loans to the practitioner without security and without the written acknowledgement required under Regulation 27 (b) of the Solicitors Audit Regulations.

The solicitor, aged about 30, pleaded guilty to a number of charges before the Council.

The charges were:

1. That he received the sum of $8,000 by way of loan from a client without security and without the written acknowledgement required by Regulation 27 and consequently without the deposit of copies of an acknowledgement with the Auckland District Law Society, the New Zealand Law Society and the auditor.
2. That he borrowed another sum of $8,000 from another client without security and without acknowledgement and without the deposit of copies.
3. That he wrote to a Bank for which he was acting in connection with an advance by way of mortgage stating that the documents had been registered, whereas the documents had not at that time been forwarded for registration.
4. That he had purchased from a client a rural property on terms favourable to himself without arranging for the client to be independently advised.
5. That he arranged a contribution from a client to a nominee company mortgage carrying interest at 8½% contrary to the direction contained in the authority from the client that the interest be a minimum of 9% and without obtaining the correct form of authority for lending via the nominee company.
6. That as sole executor in the estate he deposited $6,000 with a finance company in breach of his duty as a trustee.

After hearing a lengthy explanation from the solicitor, the Council resolved that on each of the first two charges he would be censured and fined $50 and ordered to pay costs of $60.

On the third charge he was censured, fined $150 and ordered to pay costs of $60. On the fourth charge he was censured, fined $200 and ordered to pay costs of $60.

On each of the last two charges he was censured and ordered to pay costs of $60.

As announced some time ago it is intended to publish, over a period, reports of Society prosecutions as well as other information on complaints. The cases reported have not necessarily occurred recently. In most cases mitigating facts are not reported because of the risk of identifying the practitioners.

The Council was very concerned that in relation to the conflict of interest charge he had not even at the time of the hearing of the charge advised his client to seek independent advice. He did ask his client to write to the Society saying that he had no objection to the sale which resulted in the client going to another solicitor and repudiating the transaction.

In mitigation the solicitor traversed the internal affairs of the firm and referred to both overwork and ill health.

* * *

APPENDIX 2

CANON 6

A Lawyer Should Represent a Client Competently

ETHICAL CONSIDERATIONS

EC 6-1 Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice[1] and should accept employment only in matters which he is or intends to become competent to handle.

EC 6-2 A lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs,[2] concentrating in particular areas of the law, and by utilizing other available means. He has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of his younger associates and the giving of sound guidance to all lawyers who consult him. In short, a lawyer should strive at all levels to aid the legal profession in advancing the highest possible standards of integrity and competence and to meet those standards himself.

EC 6-3 While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified.[3] However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which he is not and does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.[4]

EC 6-4 Having undertaken representation, a lawyer should use proper care to safeguard the interests of his client. If a lawyer has accepted employment in a matter beyond his competence but in which he expected to become competent, he should diligently undertake the work and study necessary to qualify himself. In addition to being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work.

EC 6-5 A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.

EC 6-6 A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so. A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his liability for malpractice of his associates in the corporation, but only to the extent permitted by law.[5]

DISCIPLINARY RULES

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.[6]

DR 6-102 Limiting Liability to Client.

(A) A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

---

[1] "[W]hen a citizen is faced with the need for a lawyer, he wants, and is entitled to, the best informed counsel he can obtain. Changing times produce changes in our laws and legal procedures. The natural complexities of law require continuing intensive study by a lawyer if he is to render his clients a maximum of efficient service. And, in so doing, he maintains the high standards of the legal profession; and he also increases respect and confidence by the general public." Rochelle & Payne, *The Struggle for Public Understanding*, 25 Texas B.J. 109, 160 (1962).

"We have undergone enormous changes in the last fifty years within the lives of most of the adults living today who may be seeking advice. Most of these changes have been accompanied by changes and developments in the law. . . . Every practicing lawyer encounters these problems and is often perplexed with his own inability to keep up, not only with changes in the law, but also with changes in the lives of his clients and their legal problems.

"To be sure, no client has a right to expect that his lawyer will have all of the answers at the end of his tongue or even in the back of his head at all times. But the client does have the right to expect that the lawyer will have devoted his time and energies to maintaining and improving his competence to know where to look for the answers, to know how to deal with the problems, and to know how to advise to the best of his legal talents and abilities." Levy & Sprague, *Accounting and Law: Is Dual Practice in the Public Interest?*, 52 A.B.A.J. 1110, 1112 (1966).

[2] "The whole purpose of continuing legal education, so enthusiastically supported by the ABA, is to make it possible for lawyers to make themselves better lawyers. But there are no nostrums for proficiency in the law; it must come through the hard work of the lawyer himself. To the extent that that work, whether it be in attending institutes or lecture courses, in studying after hours or in the actual day in and day out practice of his profession, can be concentrated within a limited field, the greater the proficiency and expertness that can be developed." *Report of the Special Committee on Specialization and Specialized Legal Education*, 79 A.B.A.Rep. 582, 583 (1954).

[3] "If the attorney is not competent to skillfully and properly perform the work, he should not undertake the service." Degen v. Steinbrink, 202 App.Div. 477, 481, 195 N.Y.S. 810, 814 (1922), *aff'd mem.*, 236 N.Y. 669, 142 N.E. 328 (1923).

[4] *Cf. ABA Opinion* 232 (1941).

[5] *See ABA Opinion* 303 (1961); *cf.* Code of Pr Responsibility, EC 2-11.