The Self-Regulation of the Legal Profession in Canada and in England and Wales

December 1999

ISBN 1-89078-30-3

Canadian Cataloguing and Publication Data

Hurlburt, W. H.
The Self-regulation of the Legal Profession in Canada and in England and Wales

Co-published by:

Law Society of Alberta
600, 919 - 11th Avenue S.W.
Calgary, Alberta
Canada T2R 1P3

Alberta Law Reform Institute
402 Law Centre,
University of Alberta
Edmonton, Alberta
Canada T6G 2H5

Includes bibliographical references.
ISBN 1-896078-30-3

1. Practice of Law--Canada. 2. Practice of Law--Great Britain.
3. Legal Ethics--Canada. 4. Legal Ethics--Great Britain.
I. Law Society of Alberta. II. Alberta Law Reform Institute. III. Title.
KE330.H87 2000 340'.023'71 C00-910013-X
KF297.H87 2000

PREFACE

This book is about a profession, about the professionals who make up that profession, and about the professionalism which should, and, I think, in fact commonly does, animate those professionals in the regulation of the affairs of their profession. At the risk of raising invidious perceptions by quoting myself, I will quote some remarks I made in June 1997 to a University of Alberta Convocation at which Bachelor of Education graduands received their degrees, because I think that they will help to explain my approach to the subject of the book.

These remarks were as follows:

> "Eminent Chancellor, my subject is: what it means to be a professional. My examples are the lawyer-professional, the physician-professional and the teacher-professional.
>
> Professionals, Eminent Chancellor, invite trust individually. They assure clients, patients, and students and guardians that they will give them loyal and skilful service. Professionals also invite trust collectively. They ask society for exclusive rights to perform professional services and for legal powers to regulate their professions. In return, they undertake to exercise those legal powers to ensure that professional services are given loyally and skilfully.
>
> Professionals profess to have special knowledge and skills. Professionals profess to apply their special knowledge and skills for the benefit of others. A lawyer professes to apply their special knowledge and skills for the protection of their clients' rights under law. A physician professes to apply their special knowledge and skills for the protection of their patients' health. Teachers profess to apply their special knowledge to the service of pupils by diagnosing their needs and promoting their learning.
>
> Professionals individually and collectively have thus undertaken a special duty. It is a duty which is profoundly moral and ethical as well as legal. It is based on the trust invited by each individual professional. It is also based on a form of social contract between the profession as a whole and society. It precludes a professional from using the lawyer-client relationship, the physician-patient relationship, the teacher-student relationship for the professional's own benefit.

And it is not enough that a professional gives **loyal** service. They must give service that is up to a high professional standard of quality. A university degree is fundamental to the art of the lawyer, the physician, the teacher, but it is only a beginning. The professional must throughout their professional life keep up and enhance their professional skills and knowledge. Much of this can be done by debate and discussion with other professionals. Much must be done by reading and by participating in educational seminars and courses.

Being a professional can be burdensome for a lawyer who must spend weary and stressful hours in a trial or even a contract negotiation; for the country doctor who must respond to the needs of patients almost beyond the limits of human endurance; for the teacher who must cope daily with the immaturity of the young and with the ingratitude of their elders. Being a professional can also be painful, because there are many conditions that are beyond the power of the professional art to cure or even to alleviate.

Those are the burdens of being a professional. But professionals are human beings. They are no different from other men and women. They have wants, needs and desires like everyone else. If they are to assume the burdens, there must be something in it for them.

In fact, there is a great deal in it for the professional. First comes a chance to earn a livelihood and occupy a respected place in society. Next comes the sheer intellectual pleasure of mastering a complex and important art and applying it well. Most important of all is the satisfaction of achievement: of playing a part in the advancement of the rule of law and the protection of rights under law; of playing a part in the prevention, alleviation or healing of suffering; of playing a part, in the full development of the potential of each individual student.

Of course, not everyone who is called a professional is truly professional. No legal qualification can guarantee that every holder has the personal and moral strengths necessary for professionalism. Professional organizations and professionals do what is humanly possible to encourage true professionalism and to discourage time-serving, incompetence and disloyalty.

> But it is possible to serve one's professional time without commitment and with minimum involvement. The price is the concealment of moral and professional emptiness behind an apparently professional facade, which creates its own stresses without the counterbalancing rewards of true professionalism. There are limits to what human endeavour can do to ensure that professional standards are adhered to, but what is truly important is the existence and pervasiveness of professionalism, not the occasional lack of it."

The legal profession's self-regulatory system which is the subject of this book is a human institution, with all the inevitable human imperfections of all human institutions. I have not tried to conceal those imperfections. Even the reader who accepts that statement will, of course, have to decide whether my vested interest in the system, arising from an investment in that system of significant parts of my energies during half of a professional lifetime, obscures my perceptions of the imperfections. I can only say that I have tried to maintain as objective a view as the circumstances permit, and that the experience I have accumulated has led me to believe that, admitting, and indeed asserting, the imperfections of the system and those who operate it, I believe that it is intended to function in the highest interest of the public as well as the profession, and in large measure does so.

ACKNOWLEDGMENTS

In 1996, the Institute for Advanced Legal Studies, University of London, awarded me an Inns of Court Fellowship, which carried with it working facilities at the Institute, including its marvellous library, and a flat in the Inner Temple. My project was initially to examine the progress of the Canadian law societies had made in the promotion and supervision of lawyers' competence and quality of service and thus to update the work of the 1978 Conference of the Federation of Law Societies on the Quality of Legal Services and the Federation's 1980 Workshop on the same subject. However, the project, as projects often do, expanded itself into this book on the self-regulation of the legal profession in Canada and in England and Wales. I am most grateful to the Institute and to the Director, Dr. Barry Rider, for their catalytic function and for the friendship and support which they gave me during the term of the Fellowship. I am most grateful also for the opportunity to live at the centre of the life of the English Bar, to accept the extensive hospitality of the Inns of Court, and to renew old friendships and make new ones.

In May of this year, the Law Society asked for the use of much of this book in draft as a contribution to the Benchers' deliberations on the future of self-regulation. The Law Society then decided that it would be useful to the Benchers and possibly to others to have the whole book available in more suitable form, and agreed to take part in its publication. I am most grateful to the Law Society, and in particular to the President, Terrance D. Clackson, Q.C., the President-elect, Alan D. Macleod, Q.C., and the Secretary, Peter Freeman, Q.C., for taking the initiative in that respect.

I have throughout been supported by the Alberta Law Reform Institute, and in particular by the Director, Professor Peter Lown, Q.C. The Institute has undertaken the burden of getting the book into publishable form and making the arrangements for publication and most of the arrangements for distribution. I am most grateful for that support as well.

The views expressed in this book are my own. They are not necessarily the views of either the Law Society of Alberta or the Alberta Law Reform Institute.

Table of Contents

CHAPTER I - INTRODUCTION

A. Purpose of Book

[1] The legal profession in Canada and in England and Wales[1] is said to be "self-regulating" and to have powers of "self-regulation".[2] The notion is that the legal profession – that is, lawyers collectively – regulate the way in which lawyers practise law. The purpose of this book is to describe, in an historical context, the notion of self-regulation and its implementation in the two countries, and to assess its appropriateness for the present and the future.

B. The Content of Self-Regulation

1. What is Self-Regulation?

[2] At the threshold, it is necessary to consider what self-regulation denotes. As used in the context of the self-regulation of the legal professions in the two countries, it is not a precise term. Rather, it is imprecise to the point of vagueness.

[3] As a matter of English, "self-regulation", in this context, denotes a process under which an identifiable group of people "control, govern or direct" their own activities "by rules or regulations".[3] That raises some general questions: (1) whose activities are regulated? (2) do the legal professions exercise the powers that are characterized as self-regulation? (3) what activities are regulated? (4) what is the extent of the powers of self-regulation?

---

[1] In England, barristers and solicitors are considered to belong to different professions, and the same is true of the advocates and the notaries in Quebec. I think, however, that it is conceptually better to treat the self-regulating profession and its branches in the two countries as one profession, and I will do so in this book, except where reference is made to one or more of the different professional groups.

[2] The term "self-governing" is often used instead of "self-regulating". I prefer the latter term: "self-governing" may carry the inappropriate connotation that the self-governing entity is somehow not subject to ordinary law.

[3] See Oxford English Dictionary, 2nd edition: Self-regulation: "regulation, control or direction by or of oneself (itself)". Regulation: "the act of regulating, or the state of being regulated. Also an instance of this." Regulate: "to control, govern, or direct by rule or regulations; to subject to guidance or restrictions...." In this context, "self-regulation" must mean that there are coterminous groups of regulators and regulated (the facts that some solicitors are not members of the Law Society and some barristers do not subscribe to the Bar Council being anomalous).

2. The Bodies Which Exercise the Powers of Self-Regulation

[4] The legal profession is readily identifiable both in Canada and in England and Wales. In Canada, it consists of the members of the provincial and territorial law societies[4], which are corporations created by statute in every province and territory. In England, the solicitors' branch of the profession consists of the persons whose names appear on the roll, or list, of solicitors maintained by the Law Society,[5] and the barristers' branch consists of the members of the four Inns of Court, which are voluntary associations.

[5] The legal profession does not itself exercise the powers of self-regulation. In Canada, the benchers or councils of the Canadian law societies exercise the powers.[6] In England and Wales, the Council of the Law Society exercises the powers of self-regulation of the solicitors' branch of the profession and the Bar Council and the Benchers of the Inns of Court exercise the powers of self-regulation of the barristers' branch. However, to the extent that those governing bodies are elected or otherwise named by the profession, it can appropriately be said that the profession is self-regulating even though the powers are not exercised by the whole bodies.

[6] In Canada, everyone who practises law is obliged by law to be a member of one of the statutory corporations, the governing bodies of which are mostly elected by the members who are entitled to practise, so that the regulators and the regulated are the same.[7] Some members of the governing bodies are appointed by governments or outside agencies, but the elected members are in a majority and therefore can control the

---

[4] The Law Societies of Alberta, British Columbia, Manitoba, Newfoundland, New Brunswick, the Northwest Territories, Ontario, Prince Edward Island, Saskatchewan and Yukon; the Nova Scotia Barristers Society; and the Bar of Quebec and the Chamber of Notaries. The new territory of Nunavut was created after the text of this book was written, and the book does not deal with the legal profession in that territory.

[5] See *Solicitors Act 1974 (U.K.), 1974, c. 47, s.6.*

[6] In some cases, the membership has some limited powers of control over the governing body. See Chapter II.

[7] The Benchers of the Law Society of Upper Canada were not elected until the enactment of *An Act to make the Members of the Law Society of Ontario elective by the Bar thereof*, S.O. 1871, c.15 which provided that, except for the ex-officio Benchers, they were to be elected by the members of the Bar.

exercise of the self-regulatory powers. So the legal profession in Canada can appropriately be said to exercise the powers of self-regulation through its elected governing bodies.

[7] In England and Wales, solicitors need not be members of the Law Society. Those who are not members, though regulated by the Law Society, do not vote for members of the Law Society Council. Barristers must be members of one of the four Inns, but the benchers are named by the benchers themselves. and only those barristers who subscribe to the Bar Council are entitled to vote for members of the Council. Although the groups whose conduct is regulated are not coterminous with the groups who name the regulators, it is nevertheless still appropriate to say that the legal profession in England and Wales exercises the powers of self-regulation through its elected or self-selected governing bodies.

3. The Scope of Self-regulatory Powers

[8] The term "self-regulating" is also imprecise because it is used to describe governing bodies with widely varying powers. It is by no means clear what powers a professional body must have before it can be said to be "self-regulating".

[9] If a legal professional body controls admission to the practice of law, including qualifications for admission; if it has the power to determine what standards of conduct and competence professionals must adhere to; and if it has the power to impose sanctions, including disbarment, for improper conduct or failure to provide competent service; then it can be said to be self-regulating. But something less will do. In Alberta, for example, the qualifications for admission to membership of the Law Society are prescribed by law, and the Law Society has little standing with respect to the educational component of the qualifications,[8] but the Law Society of Alberta is regarded as having the power of self-regulation. In England, the Office for the Supervision of Solicitors operates with a significant degree of independence from the Law Society, and the Solicitors Disciplinary Tribunal, which has the power to strike solicitors' names from the register, is composed of solicitors and non-solicitors appointed by the Master of the Rolls, but the Law Society is regarded as having the power of self-regulation. There is no point in trying to decide

---

[8] *Legal Profession Act,* S.A. 1990, c.L-9.1, ss. 39,40.

what quantity of regulatory powers a professional body must have in order to be described as self-regulating. The term will be used in relation to the governing bodies of the legal profession in Canada and in England and Wales, and will take its precise meaning from the context in which it is used.

4. External Controls[9]

[10] The term "self-regulating" is also imprecise because it suggests that the professional governing bodies can exercise their powers of self regulation without interference. But this is not so. The courts have always had powers to act in the major areas of apparent professional self-regulation, whether through judicial review, visitation or appeal, or through direct control over counsel appearing before them and over solicitors as officers of the court. In some cases, other agencies have supervisory or veto powers. In England, for example, the *Access to Justice Act 1999* has given the Lord Chancellor an ultimate power of veto over changes in the rules of conduct and the admission regulations made by the Law Society and by the Inns and the Bar Council. It has gone further and given the Lord Chancellor power to make such rules and regulations. In some Canadian jurisdictions, regulations or bylaws require the approval of the Lieutenant Governor in Council. The English Legal Services Ombudsman and the Quebec L'Office des Professions have supervisory powers over some activities of the governing bodies. In Canada, even those professional governing bodies that have theoretical control over admission to practice and the qualifications for admission, although they may be able to exercise a veto in extreme cases, cannot effectively dictate the content of academic legal education.

5. The Duty to Exercise Self-regulatory Powers in the Public Interest

[11] In both Canada and England, there is also an overriding restriction on the exercise of the powers of self-regulation: they must be exercised in the public interest.

[12] Except for the Inns, the members of the profession elect most of the members of the governing bodies. In a sense, the elected members of the governing bodies are responsible to the members of the profession who

---

[9] See Chapter II for more complete descriptions of these external controls.

elect them. But, in the exercise of delegated self-regulatory powers, that responsibility is superseded by a higher duty. The powers of self-regulation are only powers to regulate in the public interest.[10] The members of the profession cannot dictate the way in which those whom they elect are to exercise the powers of self-regulation.

C. The Exclusive Right to Practise

[13] The self-regulatory powers of the legal professions in England and Canada depend on the exclusive, or nearly exclusive, rights of their members to render legal services in general, or specified legal services, and to use certain professional designations. The activities reserved for lawyers vary from jurisdiction to jurisdiction. In Canada, the most common provision is that only lawyers may engage in the practice of law, or the practice of a barrister and solicitor, sometimes with a list of specific included activities. In England and Wales, solicitors have the exclusive right to practise as solicitors of the Supreme Court and a right, shared with other groups, to engage in conveyancing, while barristers have a formerly exclusive right to act as advocates in the higher courts, which is now shared with some solicitors, and, in some types of proceedings, with some members of the Institute of Legal Executives.

[14] Effectively, anyone who proposes to act as a lawyer must become a member of a self-regulatory professional body (or, in the case of an English solicitor, must obtain enrolment on the Solicitors' Roll by a self-regulatory body). Self-regulatory powers over qualifications and admission to practice can thus be enforced against entrants to the profession. Once admitted, the lawyer must continue to be a member of the self-regulatory body (or must continue to be registered on the Solicitors' Roll). Self-regulatory powers over conduct and competence can be enforced against the lawyer because the lawyer must continue to be registered or enrolled by the professional body in order to practise.

---

[10] The questions whether the powers of self-regulation are intended to be, and are in fact, exercised in the public interest are discussed in Chapter IV. Note that there may be an argument that the statements in the text do not apply to the Inns of Court, which do not depend on legislative delegation for their powers, though the argument is much weaker since the enactment of the *Court and Legal Services Act 1990.*

[15] The system of self-regulation thus has two sides. The powers of self-regulation are one side. The rights to render services which are largely reserved to lawyers, and to use professional designations, are the other side.

D. Ends and Means of Self-regulation

[16] Chapter V of this paper discusses the purposes of the self-regulation of the legal profession. It tries to demonstrate that the ultimate purpose of self-regulation is the protection of clients and society, and that the more immediate goal of self-regulation is to do whatever is practicable to ensure that, within limits prescribed by law, legal ethics and the public interest, lawyers will serve clients competently, faithfully and confidentially.[11] To the extent that this immediate goal is achieved or approximated, clients and society are protected.

[17] Chapter III describes in greater detail devices of self-regulation employed by the governing bodies of the professions. One group of devices is designed, in a positive way, to promote the competence and ethical motivation of those who provide legal services. A second group of devices is designed to police and penalize failures of competence and ethical conduct. A third group of devices partakes of both aspiration and policing. A fourth is a group of devices for the compensation of clients for serious departures from standards of ethical conduct and competence of service. Although not all of these devices are employed by every law society, and although the use of them is often subject to control by the courts or by organisms of government, I submit that they collectively constitute systems of self-regulation.

E. Plan of Book

[18] The plan of this book is as follows:

1. Chapter II describes the structure of the Law Society and Bar of England and Wales and the Canadian law societies (all of which are collectively included for the purposes of this book in the term "law societies") and gives an historical account of the acquisition of their

[11] These words seem to me to epitomize the lawyer's duty. They are a free adaptation from Law Commissioner Whitelock's address to the new sergeants in 1648 as quoted at Cranston 1995, 6, the Commissioner's actual words being "secrecy, diligence and fidelity". "Diligence", in his view, included what I regard as "competence".

self-regulatory powers and of the restrictions placed on those powers from time to time.

2. Chapter III describes the regulatory devices adopted by the law societies and argues that, taken collectively, those devices amount to regulatory systems designed to ensure, as far as practicable, that legal services will be delivered competently, faithfully and confidentially.

3. Chapter IV examines the notion of professionalism, which animates self-regulation, and argues that there exists in the legal profession a spirit of professionalism which recognizes that professionals are driven by factors which drive other people but which also recognizes that professionals owe overriding duties to those whom they serve.

4. Chapter V
   (a) develops the theme that self-regulatory powers are delegated to and received by the governing institutions of the legal professions in what is perceived to be the public interest;
   (b) identifies the public interest involved;
   (c) identifies "professionalism" and a "social contract" as the basis of the self-regulation of the legal professions; and
   (d) addresses the question whether or not self-regulation is in fact in the public interest.

5. Chapter VI discusses the future of self-regulation.

[19] There is one Appendix. It is a discussion of the meaning of "competence" and its relation to other notions such as that of "diligence", concepts which are necessary to an understanding of self-regulation but are better examined separately so as not to disrupt the discussion.

F. Sources

[20] Except for statutes and matters within my own knowledge, I have relied exclusively on secondary sources. A list of books, articles and other materials referred to in the text is attached.

CHAPTER II - AN HISTORICAL ACCOUNT OF THE ACQUISITION AND RESTRICTION OF POWERS OF SELF-REGULATION OF THE INSTITUTIONS OF THE LEGAL PROFESSIONS IN CANADA AND ENGLAND

A. Introduction to Chapter II

[21] Self-regulation of the legal profession in Canada and England is carried on in the names of institutions of the legal profession which I collectively refer to as law societies. The powers of self-regulation are in fact exercised primarily by the governing bodies of the law societies, that is, by functionaries elected or appointed to exercise the powers of the law societies,[1] though, as will be seen, the discipline power has in some cases come to be exercised in individual cases by other professional authorities. This chapter will give a brief account of the origins of those institutions and governing bodies and of the major steps in the acquisition of their self-regulatory powers. It will point out that the acquisition of powers of self-regulation and the development of systems for the exercise of the powers were not sudden developments but, rather, were processes that continued over time. The account will start with the delegation of powers to a governing body by a legislature, or, in the case of the Bar of England and Wales, by the higher courts, and it will be brought up to the point at which the governing body had acquired substantial powers over qualification for the practice of law and over the conduct of practitioners. The account will then go on to describe restrictions on the self-regulatory powers, some of which restrictions have long existed and some of which have been more recently imposed.

[22] The chapter will first deal with the Canadian law societies in an order based roughly on the time of acquisition of significant self-regulatory powers. It will then give a brief comparative account of the

[1] It will be noted below that in several of the Canadian law societies some members of the governing body are named by the governing statutes and others are appointed by a governmental organism. However, the statutes leave the effective control of the governing bodies in the members elected by the profession. It will also be noted that some of the statutes give members some control over some decisions of the governing bodies.

history of the powers of the Inns of Court and the later acquisition of self-regulatory powers by the Bar Council and by the Law Society of England and Wales.

[23] The imprecision of the term "self-regulation" and related terms has been referred to in Chapter I. For the purposes of this chapter, the focus will be upon two kinds of power. The first is power over admission to practice: a governing body will be treated as having a regulatory power if it can prescribe conditions of admission to practice, even though the statute conferring the power establishes some of the basic requirements for admission, such as the time that must be spent under articles, or even the basic academic qualification. The second is the discipline power, which is not complete until the institution itself can impose sanctions, including the termination of a lawyer's right to practise: a governing body will be treated as having full self-regulatory power even though the courts retain a visitorial power, an appellate jurisdiction, a concurrent power of discipline or a concurrent or even overriding power of reinstatement. The account in this chapter will set out the steps by which the delegation of the admission and discipline powers was completed.

B. The Legal Profession in Canada

1. Barristers, Solicitors, Advocates and Notaries

[24] Except for Quebec, the legal profession is "fused" in every province of Canada and in the two older territories. That is, in every province and territory examined in this book,[2] except Quebec, Canadian lawyers are legally entitled to engage in both the work traditionally done by barristers and the work traditionally done by solicitors, and there is one self-regulatory institution for the fused profession.[3] In Quebec, legal practice is divided between the Bar of Quebec and the Chamber of Notaries, each group having its own self-regulatory institution.

---

[2] This book does not examine the regulation of the legal profession in the new Territory of Nunavut.

[3] See, however, Glenn 1989-90 p. 436: "...there is no single profession of, for example, attorney, but rather the junction of the distinct professions of barrister and solicitor and the removal of formal incompatibility between them. At the same time one is a member of two professions with separate roles and recognizably distinct functions. The concept of junction is distinct from that of fusion".

[25] The legal profession in Canada was not always fused. In Ontario, for example, the 1797 Act of Upper Canada that established the Law Society of Upper Canada recognized the difference between barristers and attorneys by prescribing one set of requirements for admission to practice as an attorney and another set of requirements for a call to the bar as a barrister. Justice William R. Riddell had "no doubt that [the 1797 Act] was intended effectually to divide the profession into two branches, so that the same person should not be at the same time Barrister and Solicitor".[4] But, despite a number of efforts to bring about the separation of the two branches,[5] and despite the removal of attorneys from the jurisdiction of the Law Society in 1822 (to which solicitors and attorneys were returned in 1857), it has always been possible in Ontario for a lawyer to be both barrister and attorney, or barrister and solicitor,[6] and nowadays all Ontario lawyers are both barristers and solicitors, so that the distinction does not have practical consequences.[7] Legislation in the other older provinces also made the distinction[8] – it was not until 1961, for example, that a lawyer admitted to practice in Manitoba was required to be both a barrister and solicitor[9] – but, as in Ontario, it was always **possible** for a lawyer to be both barrister and solicitor, and most

---

[4] Riddell 1916, at 11.

[5] Justice Riddell said that three attempts to introduce the English system of prohibiting the same person from being both a barrister and a solicitor were defeated by the benchers, the judges and the Legislature respectively: Riddell 1916, at 137.

[6] According to Justice Riddell, there were no solicitors in Ontario until after the Chancery Act of 1837 (which created the Court of Chancery): Riddell 1928, at 90; see *An Act to Establish a Court of Chancery in this Province* S.U.C 1837 c. 2. In 1881, the term "attorney" was abolished in Ontario: solicitors and attorneys were thereafter to be designated "Solicitors of the Supreme Court of Ontario": *Judicature Act*, S.O. 1881, c.5, s. 74.

[7] See *The Law Society Act*, R.S.O. 1990, c. L-8, s. 28(c).

[8] For B.C., see Watts 1984, at 50, where he refers to the Ordinances regulating entitlement to practice in British Columbia and Vancouver Island and concludes by saying that the Ordinance of 1868 provided that barristers could practice as solicitors and vice versa. Note that Gibson 1977, at 36, mentions that in 1882, after a legislative change in Manitoba, 36 were called as barristers and solicitors; 3 as barristers only and 40 as solicitors only. In 1961, a Law Society of Manitoba rule required everyone to qualify as both; and in 1976 1044 annual certificates were issued to barristers and solicitors and 2 to barristers. Cole 1987, at 229-30, while referring to the "quasi-divided" nature of the profession, says that lawyers in Upper Canada were never prohibited from obtaining both admission to practice as an attorney and call to the bar. In fact, the majority were both barristers and solicitors.

[9] I have relied for this statement on Gibson, 1977, at 30, citing, note 12, Rules of Law Society of Manitoba, October 1961, s. 41.

lawyers were both. In Alberta and Saskatchewan, from the beginnings of the present Law Societies, lawyers were both barristers and solicitors.[10]

[26] There are two components of the legal profession in Quebec.[11] One component is the advocates. The other is the notaries.[12] An ordinance of 1785 provided that no one could be both advocate and notary, and that has been the law of Quebec ever since.[13] Each of the professions has a governing institution. The Bar of Quebec is the governing institution of the advocates. The Board of Notaries is the governing institution of the notaries.

[27] Notaries were an institution in New France as they were in France itself. According to Kimmel, they were the only legal advisers in the colony until the Conquest, though according to Professor Baker, graduates of a structured academic program were licensed by the executive to act as "assessors" before the courts from 1744 onwards.[14] Notaries were briefly abolished after 1763, but were again recognized when the Quebec Act of 1774 re-established the civil law. Acting in contested litigation is reserved for members of the Bar of Quebec, but notaries act as legal advisors in addition to performing the public functions of authenticating marriage contracts, deeds of hypothec, donations inter vivos and wills.

2. Structure of the Law Societies and Their Governing Bodies

---

[10] *The Legal Profession Act,* S.A. 1907, c. 20, s.3 designated the members of the society as both barristers and solicitors. The Saskatchewan Act, 1907 S.S. c. 19, s.3, did the same. *The Legal Profession Ordinance,* C.O.N.W.T. 1898, c. 51 had provided only for "advocates", who appear from the context to have included both barristers and solicitors.

[11] The *Barreau du Quebec Act* provides for the enrolment as solicitors of law professors and some lawyers from outside the province. This book will not deal with them.

[12] The Quebec notary should not be confused with the notary public in other provinces. The latter are not, as such, members of the legal profession, though they may be entitled to prepare some legal documents.

[13] See *An Ordinance concerning Advocates, Attornies, Solicitors and Notaries, etc.*, 25 Geo. 3 (1785) c. 4 (Que.), which is described and quoted in part by Riddell 1928, at 23-26.

[14] Kimmel 1984, 110; Baker 1981, 60.

[28] In Canada, except for Quebec, a statute of each province and territory[15] establishes one law society for the province or territory and provides that all lawyers who practise law in the province or territory must be members of the law society of that province or territory. Two Quebec statutes establish the two Quebec law societies, the Bar of Quebec and the Board of Notaries respectively, and provide, in effect, that all lawyers who practise law in Quebec must be members of one or the other.

[29] Each of the law societies has two organs: the members and a governing body.[16]

[30] The first organ is the members. A provincial or territorial statute may provide for a number of classes of members: the New Brunswick Law Society Act, for example, provides for honorary members and life members and treats students-at-law as student members of the Law Society.[17] However, it is the lawyers entitled to practise who are the effective membership of the law societies. The second organ is a governing body, which is most often called "the Benchers", though the governing body of the Law Society of New Brunswick is a "Council", that of the Bar of the Quebec is a "General Council", and that of the Board of Notaries is a "Bureau".

[31] Some members of governing bodies are named by the constituting statutes: in the Law Society of Upper Canada, for example, the Benchers include the federal Minister of Justice and Solicitor General, all past and present Ontario Attorneys General, all past Treasurers, and all past

---

[15] This account does not deal with the newly-established Territory of Nunavut or with its law society.

[16] The Bar of Quebec is divided into a number of geographical sections, and each section is a separate corporation. However, the governing body that exercises the powers of self-regulation is the General Council of the Bar, and the statements in the text are generally applicable to the Bar: *Barreau du Quebec Act*, R.S.Q., 1977, c. B-1. The *Notarial Act*, R.S.Q.. 1977 s. 75 provides only for electoral divisions.

[17] *Law Society Act*, S.N.B., 1973 c. 80 s. 4(1). Cf. Alberta which provides for a class of "inactive" members who are not entitled to vote: *Legal Profession Act,* R.S.A. 1990, c. L-9.1 s. 13(3).

Benchers who have held the office of elected bencher for 16 years.[18] Frequently, some members are appointed by outside authorities: provision for a number of "lay Benchers" is common; and, in Quebec, there is provision for appointment of some Council members by l'Office des Professions. However, in every case the members of the law society elect the majority of the members of the governing body, and the elected members, constituting the majority, are able to exercise the governing body's powers.[19]

[32] Some of the statutes confer powers on the members of a law society, as differentiated from the governing body. In New Brunswick, regulations made by the Council must be confirmed by meetings of members, and meetings of members can amend regulations.[20] In Yukon, rules made by the Executive "respecting the admission, conduct or discipline of members of students-at-law or respecting admission fees or membership fees" have to be confirmed by a 2/3 majority at a meeting of members.[21] In British Columbia, new rules about a considerable number of subjects involving the internal structure of the Law Society, including rules about the annual fees, can be made only with an affirmative vote of 2/3 of the members who vote in a referendum.[22] A different kind of power is that conferred by the Alberta *Legal Profession Act*: a 2/3 majority of members on a mail vote can compel the Benchers to implement a resolution previously passed by the members "to the extent that they [the Benchers] are by law able to do so",[23] a provision which might possibly be construed as requiring the Benchers to implement a resolution even though they believe it to be contrary to the public interest. In British Columbia, there is also a mechanism by which the members can bind the Benchers, but the escape clause is more appropriately conceived: the

---

[18] *Law Society Act*, R.S.O., 1990 cl. L-8 ss. 12, 14, 23 as amended by the *Law Society Amendment Act, 1998*, S.O. 1988, c.21. This is rather more than the average.

[19] Note that the Bar of Quebec includes some members who are called "solicitors" and who do not vote: *supra,* note 11. Note also that the presiding officer is more often elected by the members of the governing body but may be elected directly by the members of the law society.

[20] *Law Society Act*, S.N.B., 1973, c. 80, s. 41.

[21] *Legal Profession Act*, R.S.Y., 1986, c. 100 s. 6(4).

[22] *Legal Profession Act*, S.B.C. 1998 c. 9 s. 12.

[23] *Legal Profession Act,* S.A., 1990 c. L-9.1 s. 28.

Benchers must not implement a resolution "if to do so would constitute a breach of their statutory duties".[24]

[33] Such membership powers are exceptional and are exercised only infrequently. In most cases, the effect of the constituting statutes is that it is the governing body of a law society, and not the members of the society, who exercise the society's regulatory powers. That is, subject to the exceptions mentioned above, the only effective legal power that the statutes give to the members in relation to the societies' regulatory powers is the power to elect the governing bodies who will exercise the powers.

3. Evolution of the Governing Institutions and Self-regulation

a. Ontario

[34] The Law Society of Upper Canada was the first of the Canadian law societies to be established. A 1797 statute of Upper Canada[25] authorized existing practitioners to form themselves into a Society

> as well for the establishing of order amongst themselves, as for the purpose of securing to the province and the profession a learned and honourable body, to assist their fellow-subjects as occasion may require, and to support and maintain the constitution of the said province.[26]

The 1797 Act did not incorporate the Society. However, an Act of 1822[27] incorporated "the treasurer and benchers of the law society for the time being, and their successors to be nominated and appointed according to the rules and by-laws of the said society", with the usual powers of a corporation. According to Justice Riddell,[28] this intentionally left the original Law Society untouched, so that there were two organizations with the same name, one being the incorporated treasurer and benchers, and the other being the unincorporated group of members who had been

---

[24] *Legal Profession Act*, S.B.C. 1998, c. 9 s. 13. At least 1/3 of all members in good standing must vote, and 2/3 of those who vote must vote in favour.

[25] S.U.C. 1797, c. 13. This account is guided by Riddell 1916 & 1928 and Cole 1987.

[26] Ibid. at s.1.

[27] S.U.C. 1822, c.5,s.1.

[28] Riddell 1928, at 79.

called or admitted. Nowadays, however, "[t]he Society is a corporation without share capital composed of the Treasurer, the benchers and the other members from time to time."[29]

[35] In some respects, the Law Society of Upper Canada was patterned after the Inns of Court. The members of governing body were and are called "Benchers"; the head of the Society was and is called "Treasurer". Initially, apart from the Attorney-General and Solicitor-General and some judicial functionaries, the Benchers were appointed by the Benchers, but S.O. 1870-71, c. 15 provided for election by the bar.[30] However, in Professor Baker's view, there were important differences. The Law Society was not a voluntary organization. It recognized that its authority came from the Legislature, not from the courts. From its inception, the Law Society was much concerned with legal education, in which the Inns at that time played little part.[31] Professor Baker says also that "[w]hile the structural similarities [between the Law Society and the Inns] are superficially compelling, substantive counterparts are limited". The circumstances of the new colony had much to do with shaping the Law Society.

[36] The 1797 Act provided that only members of the Law Society could practise as barristers or attorneys,[32] and also provided that, except for existing practitioners and persons having specified extra-provincial qualifications, applicants for membership must have served under articles for five years and must also have been on the books of the Society for five years (in the case of barristers) or three years (in the case of attorneys). The Act thus provided for two branches of the legal profession. Sec. 5 provided for the admission of barristers and sec. 6 provided for the admission of solicitors. Local applicants must satisfy the

---

[29] *Law Society Act*, R.S.O. 1990, c. L-8, s. 2.

[30] According to Justice Riddell (Riddell 1928, at 107), "from the earliest period, the Benchers had been a self-perpetuating body", but, he said, the change to elective Benchers was made on principle and not because the previous system had been abused or wrought appreciable harm.

[31] Baker 1981, 67.

[32] According to Justice Riddell 1928, at 90, the *Law Society Act* of 1797 provided for solicitors as well as attorneys, but there were no solicitors until after the *Chancery Act* of 1837, S.U.C. 1837, c.2, established the Court of Chancery, as solicitors were practitioners in courts of equity.

rules and regulations of the Society. The Society thus had power over the admission and (subject to the statutory requirements) the qualifications for admission of local applicants.

[37] There was, however, a significant dilution of the Law Society's powers over admission. It was declared lawful for a barrister from England, Scotland or Ireland or any Canadian province, "on producing testimonials of good character", to be admitted to practice by the judges of the King's Bench, though persons so admitted were obliged, within one month of call, "to conform to all the rules and regulations" of the Law Society. In 1822, this provision was repealed, and it was declared "lawful" for such persons to be "called by the said law society to the degree of a barrister", but with no requirement that the Law Society admit such persons.[33]

[38] In 1822, the provision requiring attorneys to be members of the Law Society was repealed, and the King's Bench was given the power of admission of attorneys,[34] subject to a requirement that an applicant must have served five years under articles.[35] However, by a statute of 1857, jurisdiction over admissions of attorneys (and also over solicitors, who had made their appearance in the province in the meantime) was given back to the Law Society, through a power to examine and certify

---

[33] S.U.C.1822, c.5,s.2. There was another form of dilution which was not so significant. Under S.U.C. 1794, c.4, s.2, the Lieutenant Governor was given power to licence up to 16 solicitors and advocates. S.U.C. 1803, c.3, s.1, authorized the Lieutenant Governor to license 6 persons to practice the profession of law as barristers and attorneys who, "from their probity, education, and condition in life" were deemed fit and proper to practice. The applicant was required to get a certificate of ability and fitness from the King's Bench and was required and entitled to be admitted to the Law Society. 5 were licensed. In addition, the Legislature from time to time between 1803 and 1939 admitted 65 persons to practice by special statutes: see Cole 1987, at 87-110.

[34] It appears from Riddell 1916, 14-16, this was done at the instance of the Law Society. It appears that the intention was to separate the two branches of the legal profession. The effort was not successful.

[35] S.U.C. 1822, c.5. Oddly enough, it appears that attorneys, and later solicitors as well, were required by S.U.C. 1823, c.3, to pay a levy to the Treasurer of the Law Society to pay for reports of judgments of the King's Bench, though the purpose was to encourage law reporting and this may have merely been the collection mechanism: Riddell 1928, 81-2.

attorneys before admission by the courts.[36] The role of the Law Society in legal education will be referred to later in this book.

[39] Until 1876, the situation with regard to the discipline power was somewhat shadowy. Sec. 2 of the 1797 Act gave the Law Society power "to form a body of rules and regulations for its own government, under the inspection of the judges of the province for the time being, as visitors of the said society...". This is far from a clear statement that the "body of rules and regulations" could prescribe rules of conduct for lawyers in their practices and impose sanctions for breach of such rules, though the provision, by making the rules and regulations subject to the inspection of the judges, as visitors, suggests that the rules and regulations might affect the rights of individuals. On a few occasions before 1876, the Benchers exercised disciplinary powers over barristers, their view apparently being that the Law Society was to be "exactly similar" to the Inns of Court, so that the powers of "degradation and expulsion" held by the latter were also held by the former.[37] However, the exercise of the disciplinary power over barristers between 1797 and 1876 was minimal.

[40] Until 1876, the Law Society appears to have been of the view, even during the periods during which attorneys and solicitors were required to be members of the Law Society, that it did not have disciplinary powers over attorneys and solicitors. The courts were the attorneys' and solicitors' disciplinary authorities.

[41] S.O. 1875-76, ss.1 and 2, went some way towards clarifying the extent of the Benchers' disciplinary powers. It conferred on the Benchers powers to make rules and regulations about admissions and related matters and also about "all other matters relating to the interior discipline and honour of the members of the Bar" and "all other matters relating to the interior discipline and practice of such attorneys, solicitors and articled clerks", though sec. 6 preserved "the present practice of the Courts as to the admission of attorneys or solicitors" and "their jurisdiction over them as officers of such Courts".

---

[36] Riddell 1928 p.98. See S.U.C. 1857, c.63, s.6.

[37] See generally on this subject Cole 1987, at 227-33.

[42] Presumably there was still some doubt as to whether the section authorized the Benchers to suspend or strike off, as the preamble to S.O. 1881, c. 17, referred to doubts about the powers conferred by the 1875-1876 Act and said that those doubts ought to be removed.[38] The 1881 amendment went on to give the Benchers a specific power to disbar barristers and provided that on disbarment, all of the disbarred barrister's "rights and privileges as a barrister at law shall thenceforth cease and determine": disbarment was entirely a matter for the Benchers. The situation with respect to attorneys and solicitors was somewhat different. Sec. 1 of the amendment gave the Benchers power to "resolve that any such attorney or solicitor is unworthy to practise as such attorney", and sec. 3 provided that a copy of the resolution was to be sent to the superior courts, "and thereupon, without any formal motion, an order of the said respective courts may be drawn up, striking such attorney or solicitor off the Rolls; provided that such attorney or solicitor may at any time afterwards apply to any of the said courts to be restored to practice, as heretofore".

[43] It appears likely that the reason for the distinction between the Benchers' greater jurisdiction over barristers, on the one hand, and their lesser jurisdiction over attorneys and solicitors, on the other, was that the formal enrolment of attorneys and solicitors was still carried out, and the original rolls were still maintained, by the superior courts,[39] so that it was necessary for each superior court to which the attorney or solicitor had been admitted to strike the name from that court's rolls. It is not entirely clear from the wording of the statute whether or not the courts retained a discretion to refuse to order the name of an attorney or solicitor to be struck from the rolls on the production of a Law Society resolution of unworthiness, without more. Sec. 3 of the 1881 Act, as quoted above, is in discretionary terms – an order **may** be drawn up – but there seems to be a strong implication, if not a mandatory requirement, that the courts should act on the resolution. This implication is

---

[38] According to Cole 1987, at 242-43, the doubts were those of the Benchers and were based on the reservation of the powers of the courts in the Act following the 1875-76 amendment.

[39] See the *Attorneys-at-Law Act,* R.S.O. 1877, c. 140, ss. 10,11,13. The secretary of the Law Society kept a copy of the rolls. (Note that the courts were obliged to accept the Law Society's certificate that the applicant had complied with all requirements and was duly qualified, (id., s. 9), so that the substantive control over admission was in the Law Society).

strengthened by sec. 4 of the 1881 Act, which went on to provide that any powers which the visitors might have in the matters of discipline were vested in the Benchers, thus, according to Justice Riddell, making the visitors "in law as they had long been in fact *rois faineants*"[40] in discipline matters, though the courts retained their own jurisdiction over solicitors until 1970.[41] On both points – the requirement of a court order to strike off and the statutory power of the courts over solicitors – the situation remained unchanged until 1970, when a new *Law Society Act* gave the Benchers power to strike from the roll of solicitors[42] and an amendment to the *Solicitors Act* deleted the statutory power of the courts over solicitors.[43]

[44] In summary, the Law Society of Upper Canada had from the beginning significant powers over the education and admission of both barristers and attorneys (and later solicitors as well), except for the period from 1822 to 1857 when attorneys and solicitors did not have to be members of the Law Society. The Law Society also claimed from the beginning, though for a long time it rarely exercised it, the power of discipline over barristers. It did not claim disciplinary powers over solicitors. The Acts of 1875-76 and 1881 clarified the Society's power of discipline over barristers and conferred power over solicitors. By that time, the Society had extensive powers of self-regulation in the discipline area. The Acts of 1970 removed from the courts the remaining vestiges of statutory control over solicitors. The *Law Society Act Amendment Act*, S.O. 1998, c. 21, clarified and added to the self-regulatory powers of the Law Society.

---

[40] Riddell 1928, 112.

[41] Cole was of the view that the 1881 Act left the courts with a discretion to refuse to strike from the rolls, but he noted that the judges followed the Benchers' recommendation on every occasion: Cole 1987, at 244-45. The courts continued to have their own jurisdiction over solicitors under the *Solicitors Act* until the relevant sections were repealed by a 1970 amendment to the *Solicitors Act*, though, according to Cole, they exercised those powers only occasionally until 1923 and not at all thereafter: Cole 1987, at 245 to 254.

[42] SO 1970 c. 19 s. 34.

[43] SO 1970 c. 20.

b. Nova Scotia

[45] The Nova Scotia Barristers' Society was founded in 1825. However, although it appears to have engaged in its early years in some informal screening of students admitted to articles, it was not incorporated until 1858, and even then did not have any legislated powers[44]. S.N.S. 1872, c.19, sec. 2 conferred powers on the Council of the Society to make rules and regulations for examinations, including content and the appointment of examiners, and s. 5 made the sequential passing of annual examinations a prerequisite of admission to practice as a barrister or attorney. These provisions, together with a provision in sec. 14 of R.S.N.S. 1884 c. 108 that "the admission of every student duly qualified for admission to the bar shall be moved for by the president" or the vice-president of the Society, appear to have given the Barristers' Society control over the qualifications for admission to practice.

[46] S.N.S. 1885, c. 20, sec. 4 conferred on the Council power to make rules and regulations "for preserving and enforcing the honour and discipline of the Bar", which, when confirmed by the "Governor-in-Council" and gazetted, would have the force of law (though the "Lieutenant-Governor-in-Council" could revoke any such rule or regulation). S. 6 required all complaints to be filed with the Society and required the Council to investigate them. It gave the Council power to punish a lawyer by "censure, suspension or expulsion from the Barristers' Society". It then went on to provide for an application to the Supreme Court to strike the lawyer from the rolls as a barrister, a solicitor, or both. The section appears to have allowed a situation in which a lawyer had been expelled from the Society but remained on the rolls and able to practise; membership in the Society was not a prerequisite to practice. S.N.S. 1899, c.27, sec.27 required barristers and solicitors to obtain annual certificates from the Society and provided for the payment of fees; and sec. 7 provided that all barristers and solicitors must be members of the Society. S.N.S. 1939, c. 9, ss. 26-28 completed the vesting of discipline

---

[44] To this point, this account is based entirely on Girard 1991, at 161-64. The remainder of the discussion, though guided by Girard, is based on a reading of the statutes referred to. Note that Girard at 164-165 says that the Society was "an elite social club" until 1885, when 1885 S.N.S. c. 20 s. 8, which provided that "...every person admitted as a Barrister of the Supreme Court of Nova Scotia, may become a member of the Nova Scotia Barristers' Society..." upon paying the fees and subscribing to the constitution and bylaws, transformed the Society "...into its modern form, as an organization which all lawyers are entitled to join on being called to the bar".

powers by giving the Council power to suspend from practice and strike from the roll.

c. New Brunswick

[47] A Law Society was established informally in New Brunswick in 1825. It did not have any regulatory powers. An 1846 statute incorporated "The Barristers' Society of New Brunswick" (its name having been changed in 1986 to Law Society of New Brunswick)[45], with the intention of "establishing order and good conduct" and "securing to the Province and the Profession a learned and honourable Body" of practitioners. Its membership was confined to barristers. While in Bell's view, it was by no means clear that the statute intended to give the Society control over admission to practice, regulations drafted by the Society and approved by the judges did so: "[b]y this indirect manner a law society with a purely voluntary membership was given a virtual monopoly over professions admission".[46] By 1903, the statute was clear: the Society had power to make rules, regulations or by-laws respecting admission to the study of law and the call or admission of barristers and attorneys to practice.[47] It also made membership a prerequisite to practice: "...all Barristers and Attorneys of the Supreme Court of New Brunswick entitled to practice in the same Court, shall be members of the said Society". It also contained provisions like those contained in the Nova Scotia statute of 1885 mentioned above, which seemed to give the Barristers' Society a power to suspend or strike from membership but which then went on to permit the Society (but not, as in the Nova Scotia provision, the complainant) to apply (on a show-cause basis, unlike the Nova Scotia provision) for an order making absolute a Council resolution that the barrister or attorney should be suspended or is unworthy to practice.[48] By 1973, the Council itself could suspend or disbar.[49]

---

[45] S.N.B. 1986, c.96, ss. 1,3.

[46] The account to this point is based entirely on Bell 1992, at 14-18, 21-22.

[47] R.S.N.B. 1903, c.68, s. 13(1), 13(2) and ancillary provisions.

[48] R.S.N.B. 1903, c.68, ss. 16,18,19. These provisions say that the Society can expel from membership and that membership is a prerequisite for practice, but they also provide for an application to the court for an order striking from the rolls.

[49] S.N.B. 1973, c.80, s.24. I think it most likely that the ultimate power was conferred in 1931

(continued...)

d. Quebec

[48] According to Mre. Ernest Kimmel[50], a clerk executed notarial deeds as early as 1621, and the first formal appointment of a notary was made by the Sovereign Council in 1663, but other legal advisers were not allowed into New France until after the Conquest. It was not until 1847 that one statute[51] created Boards of Notaries[52] and it was not until 1849 that another statute created the Bar of Quebec.[53] The 1861 version of each statute[54] conferred on the respective governing bodies extensive powers over admission and qualifications and also conferred disciplines power on them, including the power to strike from the roll. Each Act, in effect, required an entrant to the branch of the profession governed by it to have a liberal education and have served under articles.

[49] The Notarial Act contained two unusual provisions. Sec. 9 conferred on the Boards power and authority "to prevent or reconcile all differences between Notaries and all complaints and claims by third persons against Notaries concerning their functions".[55] Sec. 12 authorized the Boards to

---

(...continued)
but the statute is not available to me.

[50] Kimmel, 1984, at 110.

[51] *An Act for the organization of the Notarial Profession in that part of this Province called Lower Canada*, Stats. Prov. Can. 1847 c. 21. The statute is unavailable to me, and the statement is based on Brierly and Macdonald 1993, at 60.

[52] There were at first a number of Boards of Notaries for different areas of the province. Later, one Board was established. The English version of the present Act says that the corporation is "called the 'Corporation professionnelle des notaries du Quebec' or 'Ordre des notaires du Quebec' or 'Chambre des notaires du Quebec': R.S.Q. 1977, c. N-2, s. 71. I will use the term "Chamber of Notaries", except where "Board" is specifically used. I will use the term "Bureau" to denote the governing body, as this is used in the Act.

[53] *An Act to incorporate the Bar of Lower-Canada* Stats. Prov. Can. 1849 c. 46. 3. This Act is also unavailable to me. The English version of the present Act says that The Order of Advocates is a professional order called the "Barreau du Québec", but it uses the defined term 'Bar', and I will do the same. The Act covered all advocates, barristers, attorneys, solicitors and proctors, and admission to practice included all of these.

[54] Consolidated Statutes Lower Canada, 1861, c. 73 (An act respecting the Notarial Profession) and c. 72 (An Act respecting the Bar of Lower Canada) respectively.

[55] In the 1970s, Mtre. Julien Mackay advised a meeting of the Federation of Law Societies that, where partnerships of notaries broke up on other than an amicable basis, the president

(continued...)

appoint Notaries who were to "visit the offices, records, minutes, repertories and indexes of inculpated Notaries" to obtain information and report.[56] These provisions suggest that the Boards were expected to be more active in self-regulation than was usual at the time, possibly because of the public functions which they performed.

[50] From their inception, both the Boards of Notaries (and later the single Board) and the Bar therefore had strong regulatory powers over admissions and discipline.

e. British Columbia

[51] A series of statutes enacted between 1874 and 1884 established and incorporated the Law Society of British Columbia and conferred on it self-regulatory powers over admission to practice and discipline, including the power to strike from the roll. A new and comprehensive statute of 1895 completed the work and extended membership of the society to all barristers and solicitors.[57]

f. Manitoba

[52] According to Gibson[58], an 1871 statute provided for the establishment of a Bar Society for Manitoba, which was fully constituted when its proposed rules were approved by the Executive Council in September 1872; those rules gave the Benchers of the Society the power to make rules for admission to study and practice. Then, S.M. 1877, c. 14 incorporated the Law Society of Manitoba with power to make bylaws dealing with admission to practice, legal education, and discipline, including suspension and disbarment.

(...continued)
would attend upon the parties and bring about a resolution of difficulties. (Personal recollection.)

[56] Mtre. Claude Seguin advised the 1978 Conference on Quality of Legal Services that for at least 30 years the notaries had conducted inspections of notaries' offices to see that the offices were well-conducted, and that since enactment of the Code of the Professions they had looked into files. These inspections did not depend on prior inculpation. See Hurlburt 1979, at 58-59.

[57] S.B.C. 1874, c. 18; S.B.C. 1877, c. 24, which is included in R.S.B.C. 1877 as c. 136; SBC 1884, c. 18; 1890 S.B.C., c. 26; S.B.C. 1893, c. 25; and S.B.C. 1895, c. 29. For a more complete account, see Watts 1984, at 50-51.

[58] The account of statutes up to 1877 in the text is based upon Gibson 1977, the statutes being unavailable to me. The summaries of statutory provisions after 1877 are my own.

[53] The statute as it appears in the 1880-81 Consolidated Statutes[59] gave the Benchers power to make bylaws for regulating the qualifications and examinations for admission as students, barristers and attorneys-at-law. It went on to require a new entrant to conform himself to the rules of the Law Society, and to require an incomer to submit to examinations prescribed by the Law Society. The Benchers' powers over qualification and admission were complete.

[54] The history of the delegation of discipline powers is more complex:

1. While the effect of the 1880-81 Consolidation is not entirely clear, it appears that the only disciplinary powers it gave the Benchers were powers to strike barristers and attorneys from the rolls for non-payment of Law Society fees and to strike attorneys who acted as agents for, or otherwise connived at practice by, unauthorized persons, the power to deal with complaints against lawyers being reserved to the Court of Queen's Bench;[60]

2. S.M. 1915, c.37, s. 9 added new provisions to the Law Society Act as it stood in the 1913 Revised Statutes: the benchers could suspend or disbar a barrister, with the consequence that the barrister's rights and privileges as a barrister "shall thenceforth cease and determine"; but they could only "resolve that any such solicitor is unworthy to practise as a solicitor or that he should be suspended...", the sanction for such a resolution being that

---

[59] The legislation about the legal profession appears in this consolidation as Division 8 of c. 9, *"An respecting the incorporation of companies and their powers"* (obviously, the word "Act" was inadvertently omitted). Presumably Division 8 is included in this Act because it continues the incorporation of the Law Society. (Note that the Benchers were to be elected by "members of the bar".)

[60] S. CCCXXIII(5) gave the Benchers power to make rules and bylaws "for the striking off the roll of any barrister, and suspension from practice of any attorney for non-payment of fees due to the society, with power to said benchers to reinstate such barrister or attorney upon such terms as such benchers shall see fit". The placement of the commas suggests that the Benchers could strike a barrister from the roll for any cause provided for in a rule or bylaw but could suspend (not strike) an attorney only for non-payment of fees. This interpretation would, however, lay a heavy burden on the comma, and Gibson, correctly I think, summarizes the provision as dealing only with payment of fees: Gibson 1977, at 49. S. CCCXLII deals with striking attorneys from the roll for the other reasons mentioned in the text, and s. CCCXLIV deals with the determination of complaints by the Court.

> "thereupon, without any formal motion, an order of the Court of King's Bench may be taken out on praecipe" striking or suspending the solicitor. If the order could be "taken out on praecipe", presumably it would issue without any adjudication by the Court. The 1915 section specifically preserved the powers of the Court (under R.S.M. 1913, c. 111, sec. 82) to deal with complaints against barristers, solicitors and attorneys, including suspension or striking off;

3. The 1915 Act gave the Court power to order the reinstatement of a disbarred barrister or solicitor. SM 1926 c. 26 provided that the application for reinstatement must be made to the Benchers, though with an appeal from their decision.

4. S.M. 1956, c.39, sec. 44(1) gave the Benchers power to strike from the roll the name of a solicitor whom they found unworthy to practise, without an order of the Court, though subject to appeal under sec. 45;

5. Finally, S.M. 1964, c.25, sec. 5 gave the Benchers power to impose the lesser sanctions of a reprimand and a fine.

g. Alberta[61]

[55] In 1898, an ordinance of the North-West Territories, which then included the area that is now Alberta,[62] established and incorporated The Law Society of the North-West Territories. All "advocates" had to belong to the Society – the term "advocate" was not defined, but sec. 5 provided that no one but presently enrolled advocates and future members of the Society

> shall be admitted to act as advocates in the Territories and to practise at the bar in the Supreme or any other court of civil jurisdiction in the Territories or to advise for fee or reward in matters pertaining to the law or sue out any writ or process or commence, carry on, solicit or defend any action or proceeding in any such court,

---

[61] The following account of the early regulatory history of the law societies of the North-West Territory and Alberta is guided by Sibenik 1984.

[62] *The Legal Profession Ordinance*, C.O.N.W.T. 1898, c. 51.

so that the term appears to include lawyers acting not only as barristers but also as solicitors giving legal advice or carrying on litigation.

[56] The Ordinance gave the Law Society standing in relation to admissions to practice: a new applicant for admission, though a British subject of the age of 21 years who had been admitted as a student in the Law Society and who been on the books of the Society for 5 years (3 years for arts or law graduates), must have "conformed himself to the rules of the said society". Likewise, applicants who were qualified barristers, attorneys, advocates or solicitors must demonstrate their qualification to the satisfaction of the benchers and comply "with such rules as the law society of the Territories or the benchers thereof may make under the provisions of this Ordinance".[63] The benchers undertook the examining function.[64]

[57] On the discipline side, the benchers could apply to the Supreme Court for the suspension or disbarment of an advocate for professional misconduct; for conduct unbecoming an advocate; for default in payment of moneys received as an advocate; for "such misconduct as would in England be sufficient to bring a solicitor under the punitive powers of the Supreme Court of Judicature"; or for a breach of the Ordinance or of any rule or bylaw passed under the Ordinance. Provision was made for notice of any application to be given to the secretary of the Law Society and for the appearance of the secretary on the application, though the section left a discretion to the court.[65]

[58] Alberta was created in 1905. A provincial statute of 1907[66] incorporated the Law Society of Alberta and substituted it for the Law Society of the North-West Territories with much the same regulatory powers, though, on the one hand, the Benchers could only suspend – not disbar – for non-payment of Law Society fees, while, on the other hand, they were given power to disbar upon a lawyer's conviction for a serious

---

[63] *Ibid.* s. 1. Certain additional hurdles were erected on a reciprocal basis.

[64] See Sibenik 1984, at 119-20.

[65] *Supra, note* 62 at ss. 39,40.

[66] S.A. 1907, c.20, s. 2.

criminal offence. Sec. 3 of the statute provided that the members of the Society were to be designated both by the title of barrister and that of solicitor.

[59] The Benchers were required to enroll as members of the Society students-at-law who had been on the books of the Society for five years (or three years for the holders of some university degrees), but they had the power to prescribe the qualifications of students, and applicants for membership had to comply with the rules and regulations of the Society. The Law Society, first by itself, but later (after the establishment of a faculty of law at the University in 1912) in conjunction with the University of Alberta, provided lectures at Edmonton and Calgary. Lawyers from other provinces and from England and Scotland were entitled to be enrolled, but the Society could impose on such incoming lawyers examination and residence conditions which the jurisdiction in which the lawyer was qualified to practise would impose on Alberta lawyers seeking admission to practice there. The Benchers had a discretionary power to admit lawyers from other countries who were British subjects. The Benchers' powers over admission to practice were therefore substantial.

[60] The five or three year articling system remained the only way to gain entrance to the profession in Alberta until 1921. In that year, the Law Society and the University reached agreement on a proposal for a legal education consisting of a 3-year LL.B. course (or a combined Arts and Law course), followed by one year under articles and an examination on Alberta statutes.[67] The Legal Profession Act was then amended[68] to require the Law Society to enroll as a member of the Society "any person who is a British subject and has shown himself to be of good character and reputation" and who had a University law degree, or Bachelor of Arts degree plus a law degree, and "has complied with the rules and

---

[67] The groundwork for this agreement was laid by S.A. 1910 (2d. sess.), c. 7, ss. 41.21, 41.22, which conferred on the Senate of the University the power to make arrangements for prescribing examinations for professional bodies and also conferred power to authorize and conduct courses of instruction in such branches of learning as might be deemed advisable. By 1913, the University had established a Faculty of Law and established a curriculum leading to a Bachelor of Laws degree, though teaching and study became full-time only in 1921: Johns 1980, 3-4.

[68] S.A. 1921, c.5., s. 7.

regulations of the Law Society as to service under articles for a continuous period of one year". Thus, where an prospective entrant followed the new system, the powers of the Law Society in relation to admission to practice were reduced to regulating a one-year period of service under articles: the legal education and pre-legal education of entrants from within the province were thenceforth under the control of the University and the statute. This amounted to a significant surrender of the Law Society's regulatory power over admissions.[69] Although the statute continued to authorize the five and three year articling system until 1954,[70] the new system quickly superseded it.

[61] On the discipline side the Law Society obtained greater regulatory powers. S.A. 1921 c. 5 sec. 7 gave Law Society's discipline committee power to investigate complaints, and the Benchers could reprimand, fine, suspend or strike from the rolls, and order the payment of costs. Statutes of 1924, 1925 and 1928 rounded out the Law Society's discipline powers.[71]

h. Saskatchewan

[62] The territory which became Saskatchewan was also part of the North-West Territories until the creation of the province in 1905, so that the 1898 Ordinance applied to it as well as to the territory which became Alberta. Saskatchewan therefore also inherited the Law Society of the North-West Territories. Like Alberta, it speedily created its own statutory law society, the Law Society of Saskatchewan.[72] The 1907 statute gave the Benchers powers over admission to practice that were in general like those of the Benchers of the Law Society of Alberta. It did not give the Benchers substantial powers over discipline, but S.S. 1923 c. 49 sec. 49 conferred the powers of suspension and striking off.

---

[69] Sibenik says it was agreed that examinations would be set by a joint board and that the Law Society's education committee's advice would be sought on changes affecting the Faculty: Sibenik 1984, at 125-126. However, these provisions were not included in the statute.

[70] R.S.A 1942, c. 294, s. 61, which continued to provide for admission after service under articles, was repealed by S.A. 1954, c. 54, s. 5.

[71] S.A. 1924, c. 19; S.A. 1925, c. 13; S.A. 1928, c.19.

[72] S.S. 1907, c. 19. References here are to the statute as it appeared as R.S.S. 1909, c. 104.

i. Newfoundland

[63] By 1916,[73] the Law Society of Newfoundland had regulatory powers over admission to practice and had the power to disbar barristers and disqualify solicitors and students for unprofessional or improper conduct. By that date, it therefore had substantial powers of self-regulation.

j. Prince Edward Island

[64] By 1930,[74] the Law Society of Prince Edward Island, which had been incorporated by S.P.E.I. 1876 c. 24, had substantial control over admission to practice. It also controlled the investigation and disposition of complaints against members. Sec. 48(9) provided that the Council "may resolve that the person complained of is unworthy to practice and should be struck off the rolls, or should be suspended from practising for such period as the Council thinks proper, or may censure the person complained of, or may suspend or expel him from the Society". Sec. 4 of the 1930 Act provided that all barristers and attorneys "...shall, so long as they reside and are engaged in the practice of law in the Province of Prince Edward Island, be members of the Society", a provision which, by itself seems to make expulsion from membership tantamount to expulsion from practice. However, sec. 49 provided that a resolution that a barrister or attorney was unworthy to practice was to be communicated to the Supreme Court, where, "without any formal motion, an order of that Court **may** be drawn up striking off the rolls such Attorney or Barrister", so that there remain questions as to whether the Council could effectively terminate a lawyer's right to practise, and, if not, whether the Court had a discretion to refuse a striking-off order upon presentation of the Council's resolution.[75] In 1974, the power to suspend or strike from the rolls was vested in the Council.[76]

---

[73] *The Law Society Act*, Consolidated Statutes of Newfoundland 1916, c. 87. (I do not have access to earlier statutes.)

[74] See S.P.E.I. 1930, c.14. I do not have access to earlier statutes.

[75] The Ontario provision of 1881 appears to have been followed, perhaps uncritically, by the PEI provision of 1930, as well as by the Nova Scotia provision of 1885 and the New Brunswick provision of 1903.

[76] S.P.E.I. 1974, c. 75, s. 28.

k. Northwest Territories

[65] The Law Society of the Northwest Territories was established by c.4 of the 1976 Ordinances, with control over admission to practice and over discipline.

l. Yukon

[66] The Law Society of Yukon was established by S.Y. 1984, c. 17 with control over admission to practice and over discipline.

4. Restrictions on Powers of Self-regulation

a. Introduction

[67] Over time, as has been seen, the regulatory institutions of the legal profession in Canada obtained significant powers of self-regulation. Their self-regulatory powers, however, have never been unlimited or uncontrolled. Nor have the powers, or the restrictions on the powers, been static. Formal inquiries into the legal profession, either as a sole subject or as one of a number of professional and occupational groups, have taken place in the last 35 years in Ontario, Quebec and Alberta,[77] and a number of less formal pressures have led to such measures as the appointment of lay benchers; discontinuance by the law societies of tariffs of fees; a considerable relaxation of controls on advertising by lawyers; and the opening up of disciplinary proceedings to the public.

[68] The structure of controls over the exercise of the self-regulatory powers of the legal profession is now almost as complex as the regime created by the delegation and exercise of those powers. Courts exercise supervisory powers over disciplinary actions and qualification decisions that affect individual members of the profession. In some cases, regulations cannot be promulgated without the approval of an organ of government or through a structure of legislatively-recognized authorities, or regulations may even be initiated or induced by such an organ or structure. Some members of governing bodies are appointed by organs of

---

[77] In Ontario, see McRuer 1968; *Regulation of the Practice of Law in Ontario,* Professional Organizations Committee, Ministry of the Attorney General, 1977; *The Professions and Society,* The Commission of Inquiry on Health and Social Welfare, Quebec Official Publisher, 1970; *Report on Professions and Occupations* and *Report II on Professions and Occupations*, Select Committee of the Legislative Assembly on Professions and Occupations of the Province of Alberta.

government. A legislature may reserve to itself a specific power to override a governing body's regulations, and it always preserves, and sometimes exercises, the power to legislate against activities of which it does not approve.

b. Restrictions on self-regulatory powers

i. Membership of governing bodies

[69] Some provisions have long been made for membership of outside functionaries on the governing bodies, who most commonly include the provincial Attorney General, but who may include also the federal Minister of Justice (and even the Solicitor General). In Ontario, the provincial Attorney General is given special status: they are to serve as guardian of the public interest. Mere membership in the governing body, while the rights of that membership may be infrequently exercised, enables an Attorney General to check Benchers' or a Council's minutes and see what they are up to. In some provinces, one or more academics are ex officio members of the governing bodies, usually the deans of law schools. In New Brunswick there are two student representatives as well.[78]

[70] More recently, it has become customary for the provincial statutes to provide for the appointment of non-lawyers, usually a small number varying from two to five, to the governing bodies. The numbers are not usually enough to constitute a significant dilution of the control of the professionals on the governing bodies, but their presence does mean that other views will be heard and that the governing bodies must be seen to be acting in the public interest, on pain of their deficiencies in that respect being brought to the attention of their governments and publics.[79]

ii. Controls on the making of rules and regulations

[71] The self-regulatory powers of the Canadian law societies depend on statute. Sometimes a power is spelled out in some detail in a statute; the

---

[78] *Law Society Act*, S.N.B. 1973, c.80, s. 6(k) as amended by S.N.B. 1980, c.57; *Barristers and Solicitors Act,* R.S.N.S c.30, s. 19; *Law Society Act* R.S.O. 1990, c.L.8,s.23(1); *Legal Profession Act*, S.S. 1990-91, c.L-10, s.6.

[79] *Legal Profession* Act, S.A. 1990, c.L-9.1, s.10; *Law Society Act*, S.N.B. 1973, c.80, *s.5; Barristers and Solicitors Act,* R.S.N.S c.30, s.19; *Law Society Act* R.S.O. 1990, C.L.8, s. 23(1); *Legal Profession Act*, S.S. 1990-91, c.L-10, s. 6; *Professional Code*, R.S.Q. 1977, c.26, s. 78 (amendments not material).

discipline power is usually conferred with some specificity, though a governing body is likely to be given power to fill in details by rules or regulations. Sometimes a statute confers on a governing body power to make rules or regulations about a subject such as admission to membership, or about the details of a statutory power.

[72] The power to make rules or regulations is often unrestricted. But it is not always unrestricted. For example:

1. In Ontario, regulations of the Law Society of Upper Canada covering important matters such as education and admissions, ethics, conduct, discipline and accounts are subject to approval by the Lieutenant Governor in Council; [80]

2. In Quebec, the Bar and the Board of Notaries are not only empowered but required to make regulations exercising their self-regulatory powers. These must be approved by the "Gouvernment" after they have been published.[81] But there is a supervising authority, l'Office des professions du Quebec, which is required to ensure that the self-regulatory bodies adopt the regulations they are required to adopt; which has power to make regulations if the self-regulatory body fails to do so; and which has the power to recommend that a self-regulatory body amend its regulations and the power to adopt a recommended amendment if the self-regulatory body fails to do so.[82] It will be seen that, at least theoretically, these provisions have a significant potential for control of the self-regulatory powers of the Bar and of the Chamber of Notaries by a government agency.

3. In Saskatchewan, amendments to rules must be tabled in the Legislative Assembly, and a rule or amendment that is found by the Assembly "to be beyond the powers delegated by the Legislature or in any way prejudicial to the public interest" "ceases to have effect and is deemed to have been revoked."

---

[80] *Law Society Act* R.S.O. 1990, C.L.8, s. 63.

[81] *Professional Code*, R.S.Q. 1977, c.26, s. 95 (amendments not material).

[82] *Professional Code*, R.S.Q. 1977, c.26, s.12 (amendments not material).

iii. Control over education, training and admissions

[73] The Law Society of Alberta has little discretionary control over education, training and admission to practice.[83] It is required to accept into membership entrants who have the qualifications prescribed by the statute. Academic law and pre-law educational qualifications obtained in the province are under the control of the universities, and a university organism, the Universities Co-ordinating Council, has the power to assess academic qualifications obtained elsewhere. Legal authority over the bar admission course and the bar admission examination are vested in the Universities Co-ordinating Council, though that authority is delegated to the Law Society and subdelegated by it to the Legal Education Society of Alberta. The Law Society administers the articling programme, which of course requires the involvement of members as principals, and has a discretion to determine whether an applicant is of good character and reputation.

[74] In the other provinces, the law societies generally have the power to prescribe the educational and training requirements for entrants into the profession through rules or regulations which may or may not require Government approval. That is the legal situation. In practice, however, the law societies require local entrants[84] to have a law degree and have turned over to the university law faculties control of the academic component of legal education and training, subject to a residual power in law societies to refuse to approve the degrees granted by a university and some consequent influence over curricula.[85] The vocational component,

---

[83] *Legal Profession* Act, S.A. 1990, c.L-9.1, ss. 35-45. A new member must swear oaths of allegiance and office before a judge of the Queen's Bench, but this is a formality.

[84] The law societies generally accept law degrees from all recognized Canadian universities. A Joint Committee on Accreditation of the Federation of Law Societies and the law deans rules on foreign degrees.

[85] Two somewhat different perceptions of the degree of control exercised by the professional bodies are of interest. It appeared to a practitioner heavily involved in the self-regulatory process that, "[s]hortly after the Second World War, the education of persons seeking entry into the legal profession was largely turned over by the law societies to the university faculties of law..."(Severide 1987, 833.) However, to a prominent academic, the remaining legal standing of most of the law societies translated into significant influence on university law faculties, through formal means such as participation on law faculty councils and professional ideological influence within the curriculum (Arthurs 1987, 159-160). In addition to the powers of the law societies, the profession, as differentiated from the law societies, has influence over academic legal education because lawyers are the principal market for the students graduated

(continued...)

including service under articles[86] and bar admission courses and examinations, remains under the control of the law societies, who also supervise, to the extent that it is supervised, the good character of entrants and their compliance with requirements, where applicable, of citizenship or permanent residence.

[75] The statutes do not generally give rights of appeal to individuals affected by the exercise of the law societies' powers over education, training and admissions. While a specific decision by a law society on a question of admission may be subject to judicial review, that review will not usually include a review of the validity of the regulations of the law society.

iv. Control of the discipline process

[76] In Quebec, the discipline power is exercised by a committee of the Bar or Board of Notaries, each committee consisting of two members appointed by the Council or Bureau plus one judge, who is the chair, designated by the Lieutenant Governor in Council. The committee hears complaints, which may be put forward by the syndic[87] or a complainant. An appeal lies to the Professions Tribunal, which consists of judges of the Provincial Court,[88] and can be brought either by the person who brings the complaint or by the person against whom a sanction is imposed.

[77] In the other provinces, some of the disciplinary functions are performed by the governing body itself, and the governing bodies appoint any other disciplinary tribunals. A member against whom a sanction is imposed customarily has an appeal to a court. Formerly hearings were

---

[85] (...continued)
by the universities.

[86] Except for the Board of Notaries, which does not have an articling requirement.

[87] The syndic is appointed under *Professional Code*, R.S.Q. 1977, c.26, ss. 121,122, to inquire into information to the effect that a professional is guilty of an offence the Code, the act governing the professional body, or a regulation, and must decide whether or not to lodge a complaint before the discipline committee.

[88] *Professional Code*, R.S.Q. 1977, s.78, s.162 (amendments not material)..

held in private, but openness is increasingly coming to be desired and required.[89]

v. Conclusion

[78] It will be seen that no aspect of the vital powers of self-regulation in Canada is free from some sort of external influence or control. The substance of self-regulation, however, is there, subject to checks and balances to ensure that it is exercised in the public interest.

C. The Legal Profession in England

1. Structure of the Governing Bodies

[79] The Inns of Court and the Bar Council are unique among the regulatory institutions of the legal profession in England and Canada in that they arose informally and did not derive their powers from legislation (though the *Courts and Legal Services Act 1990* now gives statutory recognition to the Inns and the Bar Council in connection with entitlement to rights of audience and also gives statutory recognition to the Bar Council in connection with rules of conduct in the exercise of rights of audience). The Inns are also unique in the two countries in that their Benchers are not elected. They are similar to the other institutions in that it is the Benchers and not the membership who exercise the powers of the Inns. The General Council of the Bar is in part elected by the Bar in general (though only by those who subscribe to the Bar Council) and in part nominated by the profession's constituent bodies.[90]

[80] The Law Society was established by Royal Charter, not by statute as were the Canadian law societies. However, the Law Society's structure is similar to that of most of the Canadian law societies, as its regulatory powers are exercised by a council which is elected by the members of the Society. There is one important difference, however: not all solicitors are members of the Law Society, but the regulatory powers of the Law Society apply to members and non-members alike.

---

[89] E.g., Quebec *Professional Code* s. 142 as amended by SQ 1986 c. 95, s. 72; and the Alberta *Legal Profession Act* s. 75 as amended provide for open hearings subject to a discretion to hold them in private. The Ontario *Law Society Act* still provides that disciplinary proceedings are closed to the public unless the lawyer whose conduct is being investigated requests a public hearing and the hearing committee agrees. Other statutes are silent.

[90] This wording is taken from Thornton 1995, at 54.

2. Evolution of the Governing Institutions and Self-regulation

a. The Bar

i. The Inns of Court

[81] The first edition of Halsbury said this:

> The right of practising as counsel in England is reserved to barristers, that is, to those who have been "called to the bar" by one or other of the four Inns of Court. The Inns of Court are the societies of Lincoln's Inn, the Inner Temple, the Middle Temple and Gray's Inn; they are voluntary unincorporated societies of equal rank and status, independent of the State, which have each a similar constitution, and are bound by the same rules; they are outside the jurisdiction of the courts, but are subject to the visitatorial jurisdiction of the judges. These societies have existed from very ancient times...[91]

As this passage notes, the Inns are of great antiquity.[92] The higher courts long ago refused to hear any advocate who was not a member of one of the Inns. This refusal effectively delegated to the Benchers of the Inns collectively the power to determine who had a right of audience in those courts, as it was the Benchers who had the power to admit members to the Inns and to terminate membership.[93] The discretionary power to admit effectively includes the power to decide what qualifications an applicant for admission must have, so that the Inns could control the legal education of barristers. The power to terminate membership

---

[91] 2 Halsbury, *The Laws of England* (1st ed.) para. 604 and more particularly 606. Note, however, that solicitors have long had the right to appear as advocates in many courts, and can now, if properly qualified, acquire rights of audience in the High Court and the Court of Appeal. See also 3(1) Halsbury (4th ed. reissue) 353,363.

[92] ""The original institution of the Inns of Court nowhere precisely appears": per Lord Mansfield, *R. v. Grey's Inn* 99 ER 227, cited 3 Halsbury (4th ed.) 1101 note 1). "[The Inns of Court and Inns of Chancery] had their beginning in an ordinance and Commission issued by King Edward I. in 1290...": per Mathew L.J., *Smith v. Kerr* [1902] 1 Ch. 774 at 782. But "[h]istorians no longer believe that the inns of court originated in the royal writ of 1292 touching the apprentices who followed the king's court, but lawyers may once have believed it..": Baker 1986, at 59.

[93] Halsbury , though referring to a 1547 royal proclamation which said that only barristers and students of 8 years' standing in an Inn could practice in the royal courts and a Privy Council Order of 1574, which also imposed restrictions on practice at the bar, points out that "[i]t is the established general practice of the Court of Appeal and of the High Court when sitting in open court, that only English barristers may appear as advocates": 3(1) Halsbury (4th ed. reissue) 356, 400) According to Professor David Sugarman (Sugarman 1996, at 85), "By the end of the sixteenth century membership of an inn became an essential for the upper branch of the profession". Sir William Boulton said in the 1957 edition of *Conduct and Etiquette at the Bar* that "[a]ll the powers of the Inns are said to be delegated to them from the judges", citing *R.* v. *Gray's Inn* (1780), 1 Doug. K.B. 353 and *Re Antigua Justices* (1830), 1 Knapp 267.

effectively includes the power to decide what conduct on the part of a member is grounds for termination.[94] The Inns thus had extensive regulatory powers over both the qualifications and the conduct of barristers.[95]

[82] Being informal organizations, the Inns were largely free of state intervention[96] until the enactment of the *Courts and Legal Services Act 1990*, and even now their powers depend little on statute. They are thus unique among the governing institutions examined in this book. Their regulatory powers were exercised without reference to statute or regulation. Those powers did, however, depend upon another form of public power -- the power of the courts to determine who could appear as advocates before them and the courts' refusal to hear advocates who were not members of the Inns.

[83] The Inns' functions in the fields of ethics, discipline and the regulation of legal education and training are now exercised through the Inns' Council.[97] The Council has the power to amend the Consolidated Regulations of the Inns and the power to appoint Disciplinary Tribunals (which is done by the President of the Council), whose sentences must be implemented by the Inns.[98]

ii. The General Council of the Bar

[84] The General Council of the Bar was established in 1894 in substitution for a Bar Committee that had been established in 1883. It is for the most part an elected body and derives its authority from general

---

[94] See Baker, 1986, at 60: "It is only in relatively recent times that the inns have used their powers in order to regulate professional conduct at the bar, as opposed to domestic discipline". Footnote 49 states that the authority is recognized in the Report of Inns of Court Inquiry, 14 and *Seymour* v. *Butterworth* (1862) 3 F. & F. 372, at pp. 381-382. It was also recognized in *Hudson* v. *Slade* (1862) 3 F. & F. 390.

[95] Note, however, that the Sergeants had the exclusive right to practice in the Common Pleas until 1846 and thereafter shared it with the bar generally (see 9&10 Vict. c. 54) until the Order of Sergeants disappeared, the last appointment (except for qualification as a judge) having been made in 1868: see (3(1) Halsbury (4th ed. reissue) 353.

[96] Though Baker 1986, at 60 says that in or soon after the 1450s both the discipline and the education in the Inns came under the direct supervision of the king's council.

[97] See Constitution of the Council of the Inns of Court.

[98] The *Disciplinary Tribunals Regulations* 1993 s. 24.

meetings of subscribing members of the Bar. The Council itself is not a disciplinary body, but its Professional Conduct Committee is. The PCC investigates complaints against barristers. It has power to dismiss complaints, to admonish barristers, and to prefer and prosecute charges against barristers before Disciplinary Tribunals.

[85] For many years, the Bar Council prescribed rules which were considered rules of etiquette. Since 1980, it has promulgated the Code of Conduct, which is "authoritative and official".[99] In1987, the power to amend the Code was taken away from general meetings of the Bar and vested in the Bar Council, which thus became "the Parliament of the Bar".[100] The *Courts and Legal Services Act 1990* has given legislative support to the position of the Bar Council as the "authorised body" in relation to the rules of conduct of barristers.[101]

[86] The Bar Council is now the governing body of the Bar to a much greater extent than the Inns. Its Constitution says so and goes on to give it the function of laying down and implementing general policy, maintaining the standards, honour and independence of the Bar and representing the Bar externally.[102] Essentially, the Inns have agreed to accept and implement the Bar Council's powers, though they retain the right to resile from their agreement and they are not obliged to accept a Bar Council policy which is contrary to any property trust or other legal obligation of an Inn.

b. The Law Society

[87] The second branch of the legal profession in England is now collectively referred to as "solicitors". Before 1873, "solicitors" practised in the Court of Chancery; "attorneys" (or "attorneys-at-law") practised in the Common Law Courts; and "proctors" practised in the Court of Probate, the Court for Divorce and Matrimonial Causes, the High Court of Admiralty, and the ecclesiastical courts of the Established Church. In

---

[99] Thornton, 1995, 58.

[100] *Ibid*.

[101] See the description of the system in Thornton 1995, at 59-64.

[102] Constitution of the General Council of the Bar, Part II, s. 1.

1873, however, solicitors, attorneys and proctors were all made "Solicitors of the Supreme Court".[103]

[88] According to Abel-Smith and Stevens,[104] attorneys had made their appearance as a branch of the legal profession in the common-law courts by the 13th century, and, at least by the 16th century, solicitors were doing parallel work in Chancery. The courts undertook the regulation of their activities, though Professor David Sugarman says that

> until the mid-sixteenth century the inns of court and inns of chancery in London acted as the associations for would-be barristers and attorneys. A degree of self-regulation existed with respect to the lower branch in that juries of attorneys were summoned to codify good practice and adjudicate on unprofessional conduct.[105]

He goes on to say that "[f]rom the mid-sixteenth century onwards, the judges and benchers passed orders designed to expel practising attorneys and solicitors from the inns of court", though Abel-Smith and Stevens give the date of final exclusion as 1794.[106] The Inns of Chancery, in which attorneys and solicitors participated, ceased to exist. The Inns therefore did not constitute an effective regulatory body for attorneys and solicitors. As a result, according to Holdsworth, both the courts and Parliament made strong efforts to regulate the two groups, which efforts were intensified in the early part of the 18th century.[107]

[89] In 1739,[108] a group of attorneys and solicitors formed "The Society of Gentlemen Practisers in the Courts of Law and Equity".[109] Abel-Smith

---

[103] *Supreme Court of Judicature* Act (U.K.), 36&37 Vict., c. 66, s.87.

[104] Except as noted, this and the following paragraphs are based on Abel-Smith and Stevens, 1967, at 14-17 and 21-24.

[105] Sugarman 1996, at 85.

[106] Abel-Smith and Stevens 1967, at 16 note 2.

[107] Holdsworth 1938, v. 12, at 54.

[108] Holdsworth 1938, v. 12, at 63.

[109] Law societies were formed in the provinces but do not appear to have had regulatory functions. See, e.g., Sugarman 1996, at 88-89. Note that Sugarman, at 91-92 refers to "the gradual abandonment from about 1800 onwards of the title "attorney" for that of "solicitor", which connoted a higher social position".

and Stevens saw this as a reaction to the Act of 1729[110] which, as part of a "comprehensive Act for the regulation of attorneys and solicitors", recognized the system of training by apprenticeship and defined the lower branch's monopoly of initiating litigation. The Society did not have any regulatory powers. One of its activities, however, was to try to obtain the removal from the rolls of lawyers who had been found guilty of misconduct, though it appears that it was not entirely successful in this endeavour because applications had to be made to a number of different courts to achieve the complete exclusion of a wrongdoer from the profession.[111] Professor Michael Burrage[112] has suggested that the Society, in essence, offered to assume responsibility for eliminating malpractice in return for Parliamentary support and respect, but that they were unable to make good the offer, at least until the offer was accepted by the state through the incorporation of the Law Society in 1831.

[90] By 1823, the Gentlemen Practisers' record had come under criticism and the Society had become inactive.[113] In that year, a new body was promoted, which essentially took over the earlier society in 1831. The new body received royal charters in 1831 and 1845 (the latter of which incorporated the society and became its effective constitution) under the name of "The Society of Attorneys, Solicitors, Proctors, and others not being Barristers, practising in the Courts of Law and Equity of the United Kingdom", which name was, perhaps understandably, changed to "The Law Society" by Supplemental Charter, in 1903.[114]

---

[110] 2 George II, c. 23.

[111] Abel-Smith and Stevens, at 24 note 2, cite A. Harding, *A Social History of English Law* (London 1965) Chapter 11 for this proposition. See also Sugarman 1996, at 88.

[112] Burrage 1996, at 49-50. Holdsworth's view of the Society was more positive: the regulation by statute and courts was ineffective for lack of an organized body to see that the statute was enforced and the courts activated, and the Gentlemen Practitioners, and their successor, the Law Society met the need, so that the interests of this branch of the legal profession were met; its status was raised; and it was rescued from its previous stigma of inferiority: Holdsworth 1938, v. 12, at 62.

[113] This paragraph is based on Sugarman 1996, at 90-92.

[114] 41 Halsbury (4th ed.) 2. In intervening years, the Society was often referred to as "the Incorporated Law Society," and it has been said that that name had been was substituted for the original name (see. e.g., Sugarman 1996, at 92) However, s. 1 of the Solicitors Act, 1860,

(continued...)

[91] At its inception, the new Law Society[115] did not have regulatory powers. It acquired these by stages. First, it soon began to provide lectures for articled clerks "which marked the beginning of modern professional education and also helped to lay the foundations for the Society's claim to be recognised, like the inns, as the examining authority for the solicitors' profession",[116] which claim had been made good by the time of the Solicitors Act 1888, under which an applicant for admission to practice was required to present to the Master of the Rolls a certificate from the Law Society that the applicant had passed the Society's final examination, whereupon the Master of the Rolls was obliged to admit the applicant unless cause was shown.[117]

[92] The *Solicitors Act 1843* delegated the keeping of the register of solicitors to the Law Society.[118] The *Attorneys and Solicitors Act 1874* gave the Law Society standing in applications to a court to strike the name of an attorney or solicitor from the roll: the Society, as registrar, was to be given notice of such applications and was entitled to appear by counsel and make recommendations to the court.[119] The *Solicitors Act 1888* went further: applications to strike solicitors' names from the rolls were to be made in the first instance to a committee of members of the

---

(...continued)
said that "In the construction of this act,....the expression "the incorporated law society" shall mean "the incorporated society of attorneys, solicitors, proctors and others not being barristers practicing in the courts of law and equity of the united kingdom". S. 3 of the *Attorneys and Solicitors Act 1874*, carried forward the meanings of the 1860 act, and s. 1 of the *Solicitors Act 1877*, repeated the 1860 statutory definition. S. 4 of the *Solicitors Act 1888*, said that "The incorporated law society" or "the society" means the society referred to under that title in the *Solicitors Act 1843*, s. 21 of which referred to "the incorporated "society of attorneys"", etc., being the original name. Therefore, "incorporated law society" was shorthand for the original name, which remained as the legal name until 1903.

[115] I will refer to the Law Society under its present name.

[116] Sugarman 1996, at 92.

[117] *Solicitors Act*, *1888* (U.K.), 51 & 52 Vict. c. 65, s.10.

[118] *Solicitors Act*, *1843* (U.K.), 6 & 7 Vict. c. 73, s. 21, as set out in Chitty's Statutes, 1895, at 7-8, though for a long time a discretion was given to various judicial functionaries to appoint a different registrar: see, e.g, the *Solicitors Act, 1932,* s. 1. That discretion does not appear in the *Solicitors Act 1974*: see s. 6. It appears from the preamble to the *Solicitors Act 1888*, that up to that time custody of the roll had been entrusted to the clerk of the petty bag, whose office had been recently abolished. S. 5 transferred custody to the "incorporated law society" as registrar.

[119] *Attorneys and Solicitors Act*, *1874* (U.K.), 37 & 38 Vict. c. 68, ss. 7, 10.

Law Society's Council appointed by the Master of the Rolls, and the committee could either dismiss an application or report to the court, which was to treat the report in the same way as it would treat a report of a Master.[120] The *Solicitors Act 1919* went on to give the committee (which under the Act could include present or past members of the Society's Council) the power to strike or suspend. The power was subject to appeal, and the Master of the Rolls and the judges continued to have powers over solicitors.[121]

[93] In 1933, the Law Society acquired important new powers. The first was the power (which was accompanied by a duty) to make rules with respect to the keeping by solicitors of accounts for money held on behalf of others and rules enabling the Council to ascertain whether or not those rules were being complied with. The second was the power to "make rules for regulating in respect of any other matter the professional practice, conduct and discipline of solicitors".[122] Although rules in both categories required the approval of the Master of the Rolls, the Law Society had by 1933 acquired extensive powers of regulation of the solicitors' branch of the profession.

[94] Solicitors are not compelled by law to be members of the Law Society, and not all solicitors are members. Nevertheless, the Law Society's regulatory powers apply to all solicitors. Those powers are all statutory in origin.

3. Restrictions on Powers of Self-regulation

a. Solicitors

[95] While the Law Society had, by 1933, acquired extensive powers of self-regulation, these have never been unlimited or uncontrolled. The present regulatory system which applies to the solicitors' branch is complex. I will give a compressed account of its principal aspects.

---

[120] *Solicitors Act*, *1888* (U.K.), 51 & 52 Vict. c. 65, s.13.

[121] *Solicitors Act, 1919* (U.K.), 9 & 10 Geo. 5 c. 56, ss. 3,4,8,10.

[122] *Solicitors Act*, *1933* (U.K.), 23 & 24 Geo. 5. c. 24, s. 1.

i. Admission to practice and rules of conduct

[96] The following provisions of the *Solicitors Act 1974* deal with admission to practice and rules of conduct:

(i) under sec. 2, the Law Society can make "training regulations", which cover the education and training of solicitors before admission to practice. It cannot do so on its own, however, as its regulations are subject to the concurrence of the Lord Chancellor, the Lord Chief Justice and the Master of the Rolls, who also have the power to make regulations about "admission as a solicitor".

(ii) under sec. 3, a certificate of the Law Society that an applicant for admission has complied with the training regulations and that it "is satisfied as to his character and his suitability to be a solicitor" is a necessary condition for admission to practice, so that the Law Society has power to decide these matters. The Master of the Rolls is required to admit the applicant "unless cause to the contrary is shown to his satisfaction", so that the Master of the Rolls has a residuary discretion to refuse admission. Under sec. 7, admission by the Master of the Rolls requires the Law Society to enter the applicant's name on the roll of solicitors, subject to payment of fees.

(iii) under sec. 1, a solicitor is not qualified to act as such unless they have a practising certificate from the Law Society. Under secs. 10 to 16, the Law Society is required, on payment of the appropriate fee, to issue a practising certificate to a solicitor whose name is on the roll and who has not been suspended, subject to complex discretionary provisions, most of which have to do with applicable training conditions and with the disciplinary process. Under sec. 28, the Master of the Rolls, with the concurrence of the Lord Chancellor and the Lord Chief Justice, has power to make regulations about "practising certificates and applications for them". Under sec. 13, what is in effect an appeal lies from the Law Society to the Master of the Rolls.

(iv) Under sec. 31, the Council has power to make rules for regulating "the professional practice, conduct and discipline of solicitors". It can do so, however, only with the concurrence of the Master of the Rolls.

On the face of it, the *Solicitors Act 1974* gives the Law Society extensive powers to

(a) prescribe the education and training which prospective solicitors must undergo, and ensure that applicants for admission have undergone it successfully, and
(b) establish rules of conduct for solicitors.

However, the exercise of these powers is, in effect, subject to the supervision of the Master of the Rolls either alone or in conjunction with the Lord Chancellor and the Lord Chief Justice, so that the powers are circumscribed.

[97] But the *Courts and Legal Services Act 1990* established an additional set of hurdles that had to be surmounted by the Law Society in the exercise of some of its powers, though there was a partial duplication with the hurdles erected by the *Solicitors Act 1974*.[123] The powers involved are the power to make "qualification regulations" and the power to make rules of conduct in relation to the exercise of rights of audience and rights to conduct litigation.

[98] Although the *Access to Justice Act 1999*, which was assented to on July 27, 1999, has made important changes in the *CLSA*, it may be useful to give an account of the *CLSA* as it stood before those changes, so that the evolution of the legislation may be understood. I will therefore give an account of the effect of the *CLSA* as it stood before the amendments, though it is not easy to do so. That account is as follows: [124]

1. **The statutory objective** [125]
   The "statutory objective" of the part of the *CLSA* dealing with regulation of the provision of legal services is

   > "the development of legal services in England and Wales (and in particular the development of advocacy, litigation, conveyancing and probate services) by making provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice".

2. **The general principle**
   There is, however, a statutory "general principle", which is that the question whether a person should be granted a "right of audience" or a "right to conduct litigation in relation to any court or proceedings" "should be determined *only*[126] by reference to" certain specified criteria, which include appropriate education and training and membership in a body which has appropriate rules of conduct

---

[123] The partial duplication is that the "designated judges" whose approval was necessary under the *Court and Legal Services Act 1990* include the judges whose concurrence is necessary under the *Solicitors Act 1974.*

[124] This account of the *CLSA* and the *Access to Justice Act 1999* applies to the Bar as well as to the Law Society.

[125] The statutory objective and the general principle appear in *CLSA* s.17.

[126] Emphasis added.

and effectively enforces them and which, in the case of advocacy services, requires the person not to discriminate among cases, except between those for which a proper fee is offered and those for which it is not. So, the "general principle" requires that practitioners be subject to appropriate rules of conduct and to a disciplinary system for advocacy and litigation services, though not for other legal services.

It is not clear to me whether, if the granting or refusal of a right of audience or a right to conduct litigation would advance the "statutory objective" but violate the "general principle", or vice versa, it is the "general objective" or the "general principle" which would prevail, but Anthony Thornton Q.C. has said that "[t]he general principle limits the application of the statutory objective where appropriate".[127]

3. **Rights of audience and rights to conduct litigation**

Under secs. 27 and 28 of the *CLSA*, a person has a "right of audience" before a court, tribunal or statutory inquiry, or a "right to conduct litigation"[128] in a court, tribunal or statutory inquiry, only if granted that right by an "authorised body" whose qualification regulations and rules of conduct have been approved.[129] Sec. 27(9) deems the Bar Council and the Law Society to be "authorised bodies" for the granting of rights of audience, though the rights of

---

[127] Thornton 1995, 61.

[128] Under CLSA s. 119, "right of audience" includes only appearing before and addressing a "court" (which includes a tribunal or statutory inquiry) including calling and examining witnesses. "Right to conduct litigation" includes commencing proceedings before a "court" and performing "any ancillary functions in relation to proceedings (such as entering appearances to actions" ("proceedings" being defined as "proceedings in any court"). Anthony Thornton Q.C. (Thornton 1995, 63) has pointed out that the definition of right of audience is unsatisfactory as it is not certain that it includes the preparation of documents for use in trials, written arguments and other litigation activities conducted on paper, so that "[t]he Bar Council may well have to apply for at least limited rights to grant barristers limited rights to conduct litigation". (The *Access to Justice Act 1999*, while it has amended the definitions does not appear to have made any significant difference to them.)

[129] The CLSA continues solicitors' rights of audience as they were before and, in addition, contemplates that solicitors will be able to qualify for rights of audience in the higher courts, theretofore the exclusive rights of barristers, and a Law Society application to provide for this was approved by the Lord Chancellor and the designated judges in 1993 after receiving supporting advice from ACLEC: see ACLEC's Annual Report for 1993-1994 and Appendix B thereto. This subject is beyond the scope of this book.

audience as a barrister can be conferred only on persons who have subsisting calls to the bar by one of the Inns. Sec. 28(5) deems the Law Society to be an "authorised body" for the granting of rights to conduct litigation. Secs. 31, 32 and 33 deem the respective qualification regulations[130] and rules of conduct of the Bar Council and the Law Society to have been approved insofar as (and no farther than) they relate to rights of audience and rights to conduct litigation. [131] Essentially, the *CLSA* confirmed the qualification regulations and the rules of conduct of both the Law Society and the Bar.

CLSA ss. 29 and 53, however, raise the possibility that other bodies might be authorised to grant rights of audience and rights to conduct litigation, and, indeed, the "statutory objective" almost suggests that such bodies should be created. A body which wishes to become an authorised body may apply to the Lord Chancellor. As the *CLSA* stood until 1999, if the application survived a procedure which is virtually identical with that which is described below in relation to the approval of changes in qualification regulations and rules of conduct, plus a requirement of an order in council, the applicant body could become authorised to grant such rights. This was and remains at least a theoretical potential derogation from the exclusivity of the rights of barristers and solicitors to provide legal services before and in courts, tribunals and statutory inquiries. Indeed, in November 1997 the Lord Chancellor's Department announced that the Institute of Legal Executives "would be authorised to grant extended advocacy rights in certain types of

---

[130] The Consolidated Regulations of the Inns of Court appear to be considered qualification regulations of the Bar Council for this purpose: see e.g., the discussion in Thornton 1995 p. 63-64. The Constitution of the General Council of the Bar, while s. 1(c) gives as one of the functions of the Bar Council "to consider, lay down and implement general policy with regard to all matters affecting the Bar", does not give the Bar Council direct control over the Consolidated Regulations: s. 1(g) gives it the function of consulting with the Inns' Council concerning the Consolidated Regulations and a veto power, but that is all. No doubt the linkage exists.

[131] The "deeming" of approval of regulations and rules is not conclusive: CLSA ss. 31(3), 32(3), and 33(3) provide for the subsequent revocation of the "deeming" with respect to any specific qualification regulation or rule of conduct so that there is an additional theoretical trenching on self-regulation.

proceedings to suitably qualified and experienced Fellows of the Institute". [132]

4. **Changes in qualification regulations and rules of conduct**
The *CLSA* imposed a severe restriction on the power of the Bar Council and the Law Society to change either their "qualification regulations" – "regulations (however they may be described) as to the education and training which members of that body must receive in order to be entitled to" any right of audience or right to conduct litigation[133] – or rules of conduct relating to the exercise of a right of audience or right to conduct litigation (which include "most, if not all, of the Code of Conduct",[134] but presumably do not include the Law Society's *Guide to the Professional Conduct of Solicitors* insofar as the *Guide* applies to work outside the courts).

[99] Essentially, under the *CLSA* as enacted in 1990:

1. any change in the qualification regulations or rules of conduct had to be approved by all of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Family Division of the High Court and the Vice-Chancellor:[135] a refusal of approval by any of them meant that the change could not be made.[136]

2. before the Lord Chancellor and the designated judges considered the change,
   (a) the applicant authorised body had to have obtained the advice of the Lord Chancellor's Advisory Committee on Legal Education and Conduct as to whether the proposed change should be amended to "further the statutory objective; or... comply with the general principle", and
   (b) the Lord Chancellor had to have obtained the advice of

---

[132] ACLEC 1997-1998

[133] *CLSA* s. 27(9), 28(5).

[134] Thornton 1995, 64.

[135] These are the "designated judges" under CLSA s. 29: see s. 119(1).

[136] *CLSA* s. 29(3) and Part II of Schedule 4.

(i) ACLEC; and
(ii) the Director General of Fair Trading (as to whether the proposed change would, or would be likely to, have the effect of restricting, distorting or preventing competition to any significant extent).

3. Each of the Lord Chancellor and the designated judges was required to consider whether the proposed change "is incompatible with the statutory objective or the general principle", and, if it is incompatible with either, to refuse approval.

[100] The self-regulatory bodies therefore could not of their own motion change their educational and training requirements or their rules of professional conduct insofar as these related to the exercise of rights of audience and rights to conduct litigation. The approval process included ACLEC, a majority of whose members could not be members of the profession involved, the Director General of Fair Trading, who might coincidentally be, but is not necessarily, a barrister or solicitor, and the Lord Chancellor and four senior judicial functionaries.

[101] The "rules of conduct", to changes in which this elaborate procedure applied, are defined in *CLSA* sec. 27(9), "in relation to an authorised body", to mean "rules...as to the conduct required of members of that body[137] in relation to any act done in the exercise of a right of audience". That is to say, if a rule was not a rule of conduct "in the exercise of a right of audience", the procedure did not apply. Mr. Anthony Thornton's view, which certainly appears reasonable, is that, although the *CLSA* made a clear demarcation between those exercising "rights of audience" and those "exercising rights to conduct litigation", there was no workable definition of the two functions, and there were extensive areas that cannot confidently be assigned to one or the other. He also expressed the view that "most, if not all, of the Code of Conduct [is] subject to the Act". He further pointed out that the amendment procedure was slow and, his

[137] The section, interpreted literally, refers to the members of the "authorised body", but it cannot be intended to be restricted to members of the Bar Council and to members of the Law Society. Rather, in this context, it must refer to all members of the Inns and all solicitors on the Solicitors' Roll who exercise rights of audience.

view was that it "creates a serious impediment to change" in a Code which is subject to many pressures for amendment. [138]

[102] In the result: after the CLSA, the *Code of Conduct* was the Bar Council's *Code* and the *Guide to the Conduct of Solicitors* was the Law Society's *Guide.* Insofar as the *Code* and the *Guide* prescribed rules of conduct in relation to the exercise of rights of audience and rights to conduct litigation, no one could change either without the process being initiated by the Bar Council or the Law Society; but the power of the Bar Council to change the *Code* and the power of the Law Society to change the *Guide* were trammelled by the advisory powers of ACLEC and the Director General of Fair Training and the veto powers of each of the Lord Chancellor and the Heads of Courts. In the result, however, in Mr. Thornton's view,

> Although the CLSA has made significant statutory inroads into the independence of the Bar from outside influences, the profession retains its vitality without any significant statutory foundation".[139]

[103] Two qualifications must be made to the statement that no one could change a rule of conduct in relation to rights of audience and rights to conduct litigation. The first is that under sec. 29(5) of the CLSA, either the Lord Chancellor or any of the designated judges could advise the self-regulatory body to alter either the regulations or the rules, and the body was then required to consider whether to make the recommended alteration. As well, sec. 5 of Schedule 2 gave ACLEC power to make recommendations and give advice, and the body was required "to have regard to" the advice and recommendations. These provisions fell short of giving the designated judges and ACLEC power to initiate changes, but the positions of these functionaries in the whole scheme of the Act would give any such recommendation or advice a good deal of weight. The second qualification was that, under ss. 31(8), 32(8) and 33(8) of the CLSA, an existing qualification regulation or rule of conduct could, by the designated judges, be found not to be deemed to approved after all, and thus to be of no effect.

---

[138] Thornton 1995, 53 at 63-64. See generally pp. 59-64.

[139] Thornton 1995, 53 at 53-54.

[104] Things are different under the *Access to Justice Act 1999.* The Lord Chancellor now has the sole power to approve or reject a change in an authorised body's qualification rules and rules of conduct. Even more striking, the Lord Chancellor has a new power to change by unilateral order a qualification regulation or rule of conduct which the Lord Chancellor considers may unduly restrict a right of audience, a right to conduct litigation or the exercise of such a right. Before exercising either the approval power or the power to change a regulation or rule the Lord Chancellor must consult the four designated judges, and before exercising a unilateral power to change a regulation or rule the Lord Chancellor must also consult the Legal Services Consultative Panel, which has replaced ACLEC, and the Director of Fair Trading, but the Lord Chancellor is not bound by the results of the consultation. The ultimate decision is that of the Lord Chancellor, who may follow advice but who does not have to follow it.

ii. Discipline

(a) Powers of the Law Society and the Office for the Supervision of Solicitors

[105] The Law Society

(a) under sec. 31(1) of the *Solicitors Act 1974*, has the power, with the concurrence of the Master of the Rolls, to make rules in respect of the discipline of solicitors, supported by powers under sec. 44B to examine documents relating to complaints, and by powers of "intervention" under sec. Sec. 35 and Part II of Schedule I.

(b) under sec. 37A, has a number of powers in relation to inadequate professional service, including disallowance of costs, a direction to pay compensation up to 1000 pounds, and a direction to rectify an error or take other action in the interests of the client.

[106] The Law Society has, however, felt itself obliged to delegate these powers,[140] originally to the Solicitors' Complaints Bureau, and more recently to the Office for the Supervision of Solicitors.

[107] The OSS performs a number of functions. One department carries out inspections to investigate complaints received concerning suspected dishonesty or financial malpractice (a total of 1,288 in 1997 and 1998) and to ensure compliance with the accounts and business investment rules (2,036 in 1997 and 1998). Another deals with complaints of professional misconduct and with failures to comply with regulatory requirements. Another deals with "interventions" – closures of firms". Another operates the Law Society's Compensation Fund. Yet another refers complaints to the Solicitors Disciplinary Tribunal. Finally, the Office for Client Relations of the OSS is responsible for dealing with complaints of poor service and minor cases of professional misconduct.

[108] The structure of the Office for the Supervision of Solicitors is described in a briefing document[141] prepared by the Office as follows:

1. The Office is supervised by a Compliance & Supervision Committee, which is a standing committee of the Law Society and has responsibility for policy and corporate planning matters. The Committee membership of 28 includes 10 members of the Law Society Council. It also includes seven solicitors who are not members of the Council and 11 non-solicitor members, all of whom are appointed by the Master of the Rolls.

2. A subcommittee of the Compliance & Supervision Committee with a non-solicitor majority deals with "that which directly concerns the level of professional service...". A subcommittee with a solicitor majority deals with "that which relates to the regulation of solicitors and serious professional misconduct".

---

[140] S. 79 provides for the delegation of Council powers to committees and sub-committees of Council and to individuals.

[141] Office for the Supervision of Solicitors, Briefing Document, received from the Office July 1999.

3. The OSS is – or was until August 1999 – managed by a Director, who has full independence in relation to the investigation of complaints and regulatory breaches, and who is accountable to the Committee in relation to the implementation of Committee decisions, and who is a member of the Law Society's Management Team and reports to the Law Society's Secretary General on management issues. Since August 1999, following the suspension and subsequent resignation of the Director, the Secretary-General of the Law Society has responsibility, presumably on a temporary basis, for the administration of the OSS.

4. The Law Society Council has guaranteed that the adjudication process, whether performed by the Committee or by staff under powers delegated by the Committee, is independent of the Council.

[109] Where decisions are made by the Director or staff, there is an appeal to the Committee. Sec. 5(1) of Schedule 1A to the Solicitors Act 1974 provides that if a solicitor fails to comply with a direction, any person may make a complaint to the Solicitors Disciplinary Tribunal, but "no other proceedings whatever shall be brought in respect of it".

[110] The original delegation of disciplinary functions to the Solicitors Complaints Bureau appears to have been a response to outside criticisms of a system under which the professional body dealt with complaints against its own members, particularly consumers' complaints of inadequate service. The reorganization of the SCB into the Office for the Supervision of Solicitors appears to have been a response to outside criticisms of the SCB's operations, exacerbated by some cases which received much public attention. The criticism included a 1994 report of the National Consumers Council, which went so far as to recommend that the handling of complaints be taken over by an organism entirely independent of the solicitors' profession.[142]

[111] The OSS has been under pressure since its establishment in 1996, primarily from the overwhelming number of complaints about poor service and minor misconduct of solicitors, which may be classified as

---

[142] Legal Services Ombudsman 1996, 8.

primarily consumer complaints rather than instances of professional misconduct deserving of discipline. Its 1997-1998 annual report says that 41,380 complaints were received during 1998 and the last four months of 1997 (p.50); according to the Legal Services Ombudsman the 1998 number by itself was 30,988 (p.27). On the other hand, the President of the Law Society is reported to have said recently that the number of complaints reported was wrong because of a faulty computer and that the complaints are actually running at (the still enormous number of) 19,000 per year, the rate of increase having averaged 14% during the last two years.[143] The OSS's annual report estimated that "there is likely to be a shortfall of 8,000 complaints between the estimated complaints the OSS will receive and its capacity to deal with them" (p.20). The backlog of complaints not dealt with was variously said to be 17,000[144] and 25,000[145] in July and August, 1999 respectively.

[112] In 1998, the OSS began to require that complaints be made first to the solicitor or firm involved, so that complaints would come to the OSS only after a solicitor's client-care process, which is mandated by Practice Rule 15, had failed. This measure does not seem to have reduced the number of complaints, and it appears that solicitors' client-care-procedures are not working as well as they should. The Law Society Council has approved a consultants' report which recommended an injection of resources and improvement in procedures with a view to reducing the backlog by December 31, 2000,[146] and an announcement on its website on August 4, 1944, said that the Society was on track "in its 10 million pound plan to eradicate the backlog of complaints and turn the OSS into an efficient complaints handling organisation. [147] In the meantime, it appears that in July 1999 the OSS sent letters to new complainants saying that the OSS would not be able to deal with new

---

[143] *One of the biggest threats to solicitors' reputation is the record on complaints handling. A new strategy to tackle this problem has been agreed*, Law Society Gazette, July 2, 1999.

[144] *Society suspends OSS director Ross*, Law Society Gazette, July 26, 1999.

[145] *Law Society chief quits over 'witch-hunt'*, The Lawyer, August 2, 1999.

[146] *Law Society Commits To Faster Complaints Handling*, Law Society Website, August 4, 1999.

[147] *Law Society on track for better complaints handling system*, Law Society Website, August 4, 1999.

matters for up to a year. That resulted in the assumption of responsibility for the OSS by the Secretary General of the Law Society which has been referred to above. The Secretary General is assisted by management consultants.[148] The chairman of the Compliance and Supervision Committee resigned as chairman and as Law Society Councillor, taking the view that the treatment of the Director was a "witch hunt" [149]

[113] External pressures have added to the difficulties of the OSS and the Law Society. First, the Legal Services Ombudsman, in her most recent annual report, savaged the work of the OSS and declared that "in the absence of radical change, the next twelve months can promise only ever-deepening anger, frustration and disillusionment".[150] Second, sec. 49 of the *Access to Justice Act 1999* has given the Legal Services Ombudsman power to make binding orders instead of merely making recommendations. More important, sec. 52 allows the Lord Chancellor, if they think that a professional body is not handling complaints effectively and efficiently, to require a Legal Services Complaints Commissioner who is to be appointed under sec. 51 to consider exercising a number of powers, which include requiring information about the handling of complaints, investigating the handling of complaints, making recommendations, setting targets and requiring the submitting of plans for handling complaints. In default of the submission of such a plan or the failure to handle complaints in accordance with a plan, the Commissioner may require the professional body to pay a penalty up to the maximum specified by the Lord Chancellor under statutory instrument. It seems that the Government resiled from actually taking over the complaints-handling system in favour of the power to penalize bodies which do not measure up to its expectations. The Lord Chancellor has said that he expected the OSS to meet specified targets as to backlog and time of disposition of complaints by December 2000 and that failure

---

[148] *Society suspends OSS director Ross*, Law Society Gazette July 26, 1999; *Interim management at OSS to stay for now after Ross resigns*, Law Society Gazette August 27, 1999.

[149] '*Law Soc chief quits over 'witch hunt'*, The Lawyer, August 2, 1999.

[150] Legal Services Ombudsman 1998-1999, 14.

to meet the targets "would lead to acceleration of the government's plans to transfer control of regulation to the independent commissioner".[151]

(b) The Solicitors' Disciplinary Tribunal

[114] Under sec. 47 of the *Solicitors Act 1974*, the Solicitors' Disciplinary Tribunal exercises the discipline power in serious cases. Its powers include striking from the roll and reinstatement, suspension, fines, and exclusion from legal aid practice. Under sec. 46, the Master of the Rolls appoints the Tribunal, which must sit with at least one non-lawyer member and with a majority of solicitor-members. The Office for the Supervision of Solicitors sends complaints to the Tribunal and prosecutes the complaints before the Tribunal. The Law Society has no other function in the Tribunal or its processes. Under sec. 49, there is an appeal from the Tribunal to either a High Court judge or to the Master of the Rolls, depending on the nature of the subject-matter, though it is only the solicitor who has the right of appeal if the order appealed from relates to striking off, suspension, reinstatement or fine.

[115] The Tribunal's process is independent of the Law Society, and, except for the participation of the Office for the Supervision of Solicitors (which is itself supposed to be independent of the Law Society for this purpose) as complainant and prosecutor, the Law Society has no powers in relation to it. Subject to the right of appeal, the profession itself does make the decisions, though through solicitors appointed by the Master of the Rolls, and subject to the participation of lay members.

(c) The Legal Services Ombudsman

[116] The CLSA[152] established another yet another functionary, the Legal Services Ombudsman, who is the successor to the Lay Observer and supervises the professional disciplinary processes of both branches of the profession. The proceedings of the Solicitors Disciplinary Tribunal and the Disciplinary Tribunal of the Council of the Inns of Court are, however, excluded,[153] presumably either because the complaints dealt with by these tribunals are not considered consumers' complaints or

---

[151] *Society suspends OSS director Ross*, Law Society's Gazette, July 26, 1999.

[152] CLSA s. 21-25.

[153] CLSA s. 22(7)(a).

because of the quasi-judicial nature of the tribunals. The Ombudsman is appointed by the Lord Chancellor.[154]

[117] The Ombudsman must not be a member of one of the self-regulatory bodies. Their basic function is to investigate complaints about the way in which one of those bodies has dealt with a complaint against one of its members,[155] including unreasonable delay in undertaking or carrying out an investigation.[156] Under the CLSA as it stood before 1999, the Ombudsman could recommend to the self-regulatory body that it reconsider a complaint or consider exercising its discipline powers with respect to a person complained of; and could recommend either that a person complained of pay compensation to the complainant, or that the self-regulatory body itself pay compensation for inconvenience or distress caused to the complainant by the way in which the complaint was handled or for the cost of making the complaint. Any "person" to whom the recommendation is sent was required to have regard to the Ombudsman's conclusions and recommendations and to either notify the Ombudsman of the action taken or proposed or publicise the failure to do so. If the "person" did not publicise the "failure", the Ombudsman might do so.[157] Sec. 82 of the *Access to Justice Act 1999* goes further: the Ombudsman now has power, instead of making a mere recommendation, to make an order requiring persons and bodies to take the recommended action.

[118] The Legal Services Ombudsman may also make recommendations about a professional body's complaint-investigation arrangements, and the professional body must have regard to those recommendations.

[119] There is an important exception to the Ombudsman's jurisdiction. *CLSA* 22(7)(b) says that the Ombudsman is not to investigate "any

---

[154] CLSA s. 21(1).

[155] The Ombudsman's jurisdiction arises only after the completion of a professional body's investigation: CLSA s. 22(5)(a),(b).

[156] CLSA s. 22(6). The Lord Chancellor has given a direction (under paragraph 1 of Schedule 3) which essentially says that there is unreasonable delay if the investigation of a complain is not started within 6 weeks and finished within 4 months: See *General Directions of the Lord Chancellor*, in Legal Services Ombudsman 1996, 39.

[157] It seems likely that "person" is intended to include a "professional body".

allegation relating to a complaint against any person which concerns an aspect of his conduct in relation to which he has immunity from any action in negligence or contract". Under the common law, both barristers and solicitors are immune from action in negligence or contract for things done as advocate in court and for some things ancillary to advocacy as well.[158]

[120] The cumulative effect of these provisions is to give the Ombudsman a significant supervisory control over the disciplinary functions of both branches of the profession.

(d) Disciplinary powers of the High Court

[121] Under sec. 50 of the *Solicitors Act 1974*, solicitors are officers of the Supreme Court, and the High Court, The Crown Court and the Court of Appeal continue to have "the same jurisdiction in respect of solicitors as any one of the superior courts of law or equity from which the Supreme Court was constituted might have exercised immediately before" the *Judicature Acts* were passed, specifically including, under sec. 53, the power to make an order, which the Law Society must carry out, to strike the name of a solicitor from the roll. The Law Society is entitled to appear on an application to strike a solicitor from the roll and to make applications and to take out orders. Since the Law Society acquired its own disciplinary powers in 1919 the courts have not exercised a general disciplinary jurisdiction, as differentiated from the disciplinary jurisdiction of a court over those who appear in it, but the general disciplinary jurisdiction remains on the statute book as a full-fledged jurisdiction co-existent with the professional disciplinary process described above.

iii. Accounts

[122] Under sec. 32 of the *Solicitors Act 1974*, the Law Society has the duty to make rules about solicitors' accounts and about action to be taken to ascertain whether or not the rules are being complied with, though the rules must be made with the concurrence of the Master of the Rolls. Under these rules, the Law Society makes monitoring visits to inspect

---

[158] 3(1) Halsbury (4th ed. Reissue) paras 528,529, pages 428,429.

solicitors' accounts, sometimes at random and sometimes to follow up information received.[159]

iv. "Compensation" and "indemnity" funds

[123] Sec. 36 of the *Solicitors Act 1974* says that a fund known as the Compensation Fund "shall be maintained" – which sounds mandatory – from which the Law Society "may make a grant" – which sounds discretionary – to relieve against loss or hardship arising from a solicitor's dishonesty or failure to account for money. As the Compensation Fund was administered by the SCB and is being administered by the OSS,[160] decision-making with respect to it is independent of the Law Society, though the money in the fund is provided by solicitors.

[124] Sec. 37 gives the Law Society power , with the concurrence of the Master of the Rolls, to make rules concerning indemnity against loss arising from claims in respect of civil liability incurred by a solicitor or a solicitor's employee, including rules for the maintenance of a fund by the Society or the maintenance of insurance either by the Society or by individual solicitors. A fund is maintained and is administered by a company set up by the Society for those purpose.[161] The Society is in control of the indemnity scheme, subject to the need for the concurrence of the Master of the Rolls to changes in the rules relating to it.

v. Areas of practice

[125] Sec. 22 of the *Solicitors Act 1974* effectively reserved to solicitors the right to engage in conveyancing (though not the preparation of wills)[162], though barristers and "certificated notaries" were exempted

---

[159] Law Society *Guide 1996 s. 28.33,* p. 601.

[160] *Self-Regulation in Practice*, the SCB Annual Report 1995, 4; *This is the Office for the Supervision of Solicitors*, OSS 1996.

[161] Law Society *Guide 1996*, p. 650.

[162] The reserved area is broadly defined, including the preparation of instruments of transfer or charge, registering documents at the Land Registry, and drawing or preparing "any other instrument relating to real or personal estate, or any legal proceeding". The section also exempted registered patent and trade mark agents with respect to drawing instruments in those areas. The practice reservation originated in an 1804 Act, 44 Geo. III, c.98, *An Act to Repeal the several Duties under the Commissioners for managing the duties upon stamped*

(continued...)

from its application. The *Administration of Justice Act 1985* created a new class of "licenced conveyancers" as a self-regulating body, and secs. 11(4) and 34 of that Act effectively authorise them to carry on conveyancing practices.[163] This development does not affect the regulation of the solicitors' branch as such, but it is relevant to the general approach to and effect of self-regulation.

[126] As yet, under sec. 20 of the *Solicitors Act 1974*, solicitors retain the sole right to act as solicitors in the courts and to prosecute and defend actions.[164] They also have rights of audience in many courts which they share with barristers, and, if qualified, can obtain rights of audience in the Court of Appeal and in contested matters in the High Court from which they have been excluded until now.

b. Barristers

[127] Before the enactment of the *Courts and Legal Services Act 1990*, the institutions of the Bar, among them, had undisturbed control of the admission process, including education and training, through the Consolidated Regulations of the Inns of Court, and of the rules of conduct, through the *Code of Conduct*.

[128] The scheme for making changes in qualification regulations and rules of conduct in relation to the exercise of rights of audience as it stands after the enactment of the *Access to Justice Act 1999*, however, applies to the Bar as well as to the Law Society. That scheme has already been discussed, and the discussion will not be repeated here, other than

---

[162] (...continued)
Vellum, Parchment and Paper, in Great Britain, and to grant new and additional Duties in lieu thereof, which imposed a penalty of 50 pounds upon any person not included in the statutory list who, for a fee, prepared a conveyance of real property or any proceedings in law or equity. The prohibition did not extend to unsealed documents, wills and powers of attorney.

[163] *CLSA* ss. 33-40 provide for yet another group of "authorised practitioners" to give conveyancing services. However, while the sections establishing a regulatory board were brought into force, the operative sections (which replace some previously unproclaimed provisions in the Building Societies Act) have not, according to the 1998 edition of *Is it in Force?* (Butterworths).

[164] ACLEC's Annual Report for 1993-1994 recorded the receipt of a number of applications for the right to conduct certain classes of litigation or rights of audience in certain classes of litigation, or both.

to point out that under the *Access to Justice Act 1999* the Bar Council can make changes to qualification regulations and rules of conduct in relation to rights of audience only with the approval of the Lord Chancellor, and the Lord Chancellor has a unilateral power to change a regulation or rule. These are significant derogations from the powers of self-regulation previously enjoyed.

[129] The institutions of the Bar also had almost undisturbed control over the disciplinary process. There was, however, and there remains, an appeal from Disciplinary Tribunals to the judges of the High Court as Visitors of the Inns[165]. The Judges confirmed the exercise of disciplinary powers by the Disciplinary Tribunals appointed by the Inns, and changes in composition or powers require the consent of the Lord Chief Justice.[166]

[130] The Legal Services Ombudsman established by the *CLSA* has the same functions in relation to the disciplinary functions of the Bar as they do in relation to the disciplinary functions of the solicitor's branch. As noted above, these constitute a significant supervisory control on the disciplinary system. However, the exclusion from the Ombudsman's jurisdiction of conduct in relation to which the person complained of "has immunity from any action in negligence or contract"[167] takes away everything done as an advocate in court and some related matters, which includes much of a practising barrister's work.

[131] The Bar's exclusive area of practice has also been affected by a recent development, that is, the approval of the Law Society's proposal that solicitors who satisfy experience and educational requirements be allowed to obtain rights of audience in the higher courts.

c. Summary

[132] The interrelationship between the self-regulatory powers of the Law Society and the restrictions on those powers that has been disclosed by this account is complex. A summary of the restrictions may be useful:

---

[165] See the *Hearings before the Visitors Rules 1991*, Annexe O to the *Code of Conduct.*

[166] *Constitution of the Council of the Inns of Court*, s. 15.

[167] CLSA s. 22(7)(b).

1. The Law Society cannot change its regulations about
   (a) the education and training of solicitors,
   (b) rules of conduct
   in relation to the exercise of rights of audience and rights to litigate without the approval of the Lord Chancellor, who must consult the four designated judges and who may consult the Legal Services Consultative Panel, but who has the power to make the ultimate decision.

2. In addition, the Lord Chancellor has a new power to change by unilateral order a qualification regulation or rule of conduct which the Lord Chancellor considers may unduly restrict a right of audience or a right to conduct litigation or the exercise of such a right. Before making the unilateral order, the Lord Chancellor must consult the four designated judges, the Legal Services Consultative Panel and the Director of Fair Trading, but, again, has the ultimate power to decide.

3. The Law Society's control of admissions is limited to certifying as to
   (a) compliance with the training regulations, and
   (b) character and suitability,
   and is subject to
   (c) the power of three designated judges to make regulations about admissions, and
   (d) a discretion in the Master of the Rolls to refuse admission for cause.

4. The Law Society's powers to refuse practising certificates
   (a) can be exercised only on specific grounds,
   (b) are subject to appeal, and
   (c) are subject to a regulation-making power by three designated judges.

5. The Law Society's powers in relation to
   (a) the investigation of complaints,
   (b) the disposition of complaints in respect of inadequate services,
   (c) the disposition of certain minor complaints, and

(d) the preferment and prosecution of allegations of serious misconduct

have been delegated to a body which, while formally a committee of the Law Society's Council

(e) has been declared by the Council to exercise its powers independently of the Council,

(f) is composed of

(i) a majority of non-members of the Council, and

(ii) a strong minority of lay members, and

(g) exercises its powers in relation to inadequate service through a subcommittee consisting of a majority of lay members.

6. The power to impose severe disciplinary sanctions is exercised by a body which

(a) is appointed by an independent functionary, the Master of the Rolls,

(b) must include a lay member in every panel which deals with a discipline matter, and

(c) is subject to appeals to the Master of the Rolls or the High Court.

7. The disciplinary function, though not the Solicitors' Disciplinary Tribunal, is subject to supervision by the Legal Services Ombudsman, who has acquired a new power to make binding directions.

8. The High Court has what appears to be an independent and at least equal power to discipline solicitors.

[133] The self-regulatory powers of the institutions of the Bar are less circumscribed. However,

1. changes in regulations about the education and training of barristers and the making of rules of conduct for barristers are subject to the same requirement of the Lord Chancellor as are those of the Law Society, and the Lord Chancellor's power to change regulations and rules applies to the Bar as well as the Law Society.

2. decisions of Disciplinary Tribunals are subject to appeal to a judge of the High Court acting as Visitor, and

3. the Legal Services Ombudsman's jurisdiction extends to the Bar's disciplinary processes, though not to the Disciplinary Tribunals and not to the great areas of practice in which barristers are immune from action for negligence.

D. Overview: Canada and England

[134] The Inns of Court evolved informally over centuries, and their self-regulatory powers flowed from the refusal of the higher courts to hear advocates other than members of the Inns. The Law Society, the regulatory institution of the attorneys, proctors and solicitors -- now consolidated into the solicitors' branch of the profession -- was created by Royal Charter, and its powers to regulate the whole solicitors' branch have always depended entirely on statute. The existence and example of the Inns, however, encouraged the solicitors, attorneys and proctors to seek the establishment of their own self-regulatory institution.

[135] The Canadian law societies have also been created by statute and are dependent on statutes for their self-regulatory powers. However, the existence of the Inns of Court served as the inspiration for the Law Society of Upper Canada and the founders of that Society designed it on the pattern of the Inns. The pattern established by the Law Society of Upper Canada, in turn, has been the pattern adopted for the other Canadian law societies, though most of them have always elected their governing bodies and all now do so. So the Inns have had a pervasive influence in the establishment of self-regulatory bodies in the two countries.

[136] Except in Quebec, the organization of the legal professions in Canada has taken as its starting point the division of the legal profession in England into barristers, on the one hand, and solicitors (and sometimes attorneys) on the other. The 1797 statute which created the Law Society of Upper Canada recognized barristers and attorneys, the latter being later subsumed into the solicitors' branch. The other common-law provincial statutes have always recognized the distinction between barristers and solicitors. However, it has always been possible

for one practitioner to be both a barrister and a solicitor or attorney, and the Canadian profession is in effect fused, as members of the law societies are styled "barrister and solicitor" and are entitled to practise as both. In Quebec, the advocates and notaries are organized as separate branches of the profession, but their history of self-regulation has been similar to that in the common-law provinces.

[137] Because of their dependence on statute, the Law Society of England and Wales and the Canadian law societies have evolved differently from the institutions of the Bar and at different times, and their powers of self-regulation have also evolved differently. However, there are some broad similarities.

[138] In Canada, legislatures from Ontario to the west coast created law societies at times when their territorial areas were in early stages of settlement and there were few lawyers. Legislatures in the Atlantic provinces did so at later stages in their development, but had done so by the middle of the 19th century. The Bar of Quebec and the Board of Notaries were established only in the late 1840s, after the two Canadas had been united, but the respective statutes conferred on them both control of admission to practice and powers of discipline. In England, in contrast, the delegations to the Law Society took place late in a long history of parliamentary government. But in both countries, Parliament and the Legislatures continued to delegate new self-regulatory powers to the English and Canadian law societies until the middle of the 20th century.

[139] Different legislatures delegated the self-regulatory powers at different times and places, under different circumstances and for different reasons. The process is one of incremental delegations, presumably in the light of the use made of previously-delegated powers either in the delegating jurisdiction or in other jurisdictions whose experience was available to the delegating legislatures. Speaking generally, these delegations occurred during the 19th century and the first half of the 20th century (though the powers of the Manitoba and Prince Edward Law Societies were not rounded off until a few years later). During this period, institutions of the legal profession moved from

a state of virtual inaction to a significant degree of self-regulation in the areas of practice qualifications and regulation of conduct.

[140] The history of the last half of the 20th century has been different. New delegations of self-regulatory powers have been rare, though many of the Canadian statutes have been extensively revised and even replaced so as to improve the interstitial detail of the delegated powers. Over the last three decades, checks and limitations have been imposed on old delegations. In England, the powers of the Bar and the Law Society to change qualification rules and rules of conduct have been severely impaired. The Law Society has delegated control over the discipline process to a body which, though it is still largely a professional body, has a significant non-solicitor element. The Legal Services Ombudsman has been given the power to recommend and impose different solutions in specific cases than the solutions determined by the Office for the Supervision of Solicitors. In British Columbia, the Law Society is subject to the jurisdiction of the Ombudsman under the *Ombudsman Act*. Quebec has given supervisory powers to l'Office des Professions. Several provinces appoint "lay benchers". In some cases, law society regulations can be made only with government approval.

[141] Except for the English Bar, self-regulation of the legal professions has emerged in England and in the Canadian provinces under similar statutes and during similar time frames; and the exercise of the Bar's powers has become systematic during the same time. Tendencies to limit the profession's powers of self-regulation have arisen during a later time-period, that is, the last three decades. It is not easy to give a sufficient explanation of these phenomena, but it seems likely that similar factors have been at work in the two countries.

[142] The explanation given by Professor Richard Abel for the growth of self-regulation is that the legal profession has had a professional project which has been carried out by self-regulation. That project is the maximization of the income and status of the profession by control of the producers and production of legal services. In Chapter IV I give reasons for disagreeing with this view of professionalism. Here I will point out that, except for the English Bar, it was Governments, Parliaments and Legislatures which effected the delegations in England and Canada. While it is possible that the influence of the legal profession is so

powerful and ubiquitous that it has been able to bend Governments, Parliaments and Legislatures of the two countries to their wills over two centuries, I submit that that is not the most likely explanation and that there is no significant evidence that that is what has happened.

[143] It is, in my submission, more likely that the Governments, Parliaments and Legislatures have delegated powers to the legal professions for a number of different reasons which have had different weight at different times.

[144] A perceived need for some form of regulation of a legal profession is likely to have been a factor. In a new province like Ontario in the 1790s or in the Northwest Territories of the 1890s an unregulated legal profession is likely to have been seen as something to be avoided. A government licensing scheme was likely to be unattractive to a small government with inconsiderable financial and managerial resources.

[145] Example, custom and experiences are possible reasons. In England, the Inns of Court were an example to which the other branches of the English legal profession appealed, and in Ontario they were a persuasive example. The sequential establishment of law societies in other provinces provided further examples. As law societies came to be perceived as performing useful functions, no doubt it seemed sensible to give them additional functions and the powers necessary to perform them.

[146] The restrictions and limitations which have been imposed on self-regulation in recent years could be seen as evidence of the decline of the power and influence of the legal profession and thus of its ability to maintain the "professional project" in its most anti-social form, if such a project had existed. It is more likely to be traceable to a number of changes in the times. In England, for example, the Thatcherite government was ideologically inclined to untrammelled competition and Labour is ideologically inclined to view apparent privilege with scepticism or hostility. In both countries, consumerism has become influential, and there have been significant public complaints about the perceived imperfections of self-regulation.

[147] I will suggest later in this book that, whatever the situation may have been in the past, the present foundation of the self-regulation of the legal professions is a form of social contract based on the public interest. To this point, substantial, though by no means unrestricted, self-regulation has been considered to be in the public interest.[168]

[168] Professor Burrage suggests that what the Law Society now has is "self-government during 'good behaviour': Burrage 1996.

CHAPTER III - REGULATORY SYSTEMS AND DEVICES OF THE LEGAL PROFESSIONS IN CANADA AND ENGLAND

A. Introduction to Chapter III

[148] Chapter II has given an historical account of the acquisition by the governing institutions of the legal profession of powers of self-regulation with primary emphasis on their control over qualifications and admissions and over the discipline of their members.

[149] As noted in Chapter I, the immediate goal of self-regulation is to do whatever is practicable to ensure that, within limits prescribed by law, ethics and the public interest, legal services will be rendered to clients competently, faithfully and confidentially. To the extent that these immediate goals are achieved or approximated, clients and society are protected.

[150] This chapter will describe the devices of self-regulation that the law societies of Canada and England have adopted in trying to achieve the goals of self-regulation. These devices have been developed over many years. Not all of them are employed by every law society, and the use of some of them is usually controlled in whole or in part by agencies other than a law society.

[151] The devices of self-regulation and the pattern of devices will be described as they now exist. This does not imply that history has come to an end or that the categories of self-regulatory devices are closed: old devices will be altered; new ones will no doubt be developed; some may be abandoned, or the authority to employ them may be terminated.

[152] The devices employed by the law societies to promote the competence and ethical motivation of lawyers (the uplift side) are as follows:

1. Influence on or control of the pre-legal and legal education of incoming lawyers.

2. Apprenticeship or supervision (articling, pupillage, and training contracts).
3. Vocational training (vocational courses, bar admission courses, and bar admission examinations).
4. Requirements of good character.
5. Promulgation and promotion of ethical standards (general).
6. Promulgation and promotion of ethical standards (duty of competence).
7. Practice advisory services.
8. Certification of specialists.
9. Encouragement of continuing legal education or the establishment of mandatory continuing legal education..

[153] The devices on the policing and punishment side are as follows:

1. Discipline and sanctions (general).
2. Discipline and sanctions (competence).

[154] Devices which have both uplift and policing aspects and which therefore occupy a middle ground between the promotion of standards, on the one hand, and discipline and sanctions, on the other, are as follows:

1. Practice review.
2. Remedial continuing legal education.
3. Supervision.
4. Restrictions on practice.

[155] A fourth element, devices which do not directly affect professional standards but which are part of a system for the protection of the public, are as follows:

1. Schemes for the compensation of clients for dishonesty and misappropriation of funds.
2. Schemes for the compensation of clients for negligent or incompetent service.

[156] The discussion which follows will cover all the devices referred to above, but, for greater clarity of exposition, will be organized somewhat

differently. The prescription of ethics and the discipline functions of the law societies are interrelated and will be discussed together. Pre-legal and legal education, apprenticeship and vocational training constitute one process and will be discussed together. The post-call measures designed to promote the quality of service through ethics and discipline, audit requirements, voluntary and mandatory continuing legal education, practice advisory services and the certification of specialists will be grouped together for discussion. Finally, the schemes to compensate clients through compensation or assurance funds and errors and omissions insurance will be grouped together.

B. Regulatory Devices to Control the Quality of Legal Services

1. Qualifications Required for Admission to Practice

a. Pre-admission education and training

i. Canada

(a) Evolution of pre-admission education and training

[157]

> "In very general terms, we can say that the path of legal education in Canada has led from the law office to the law faculty.[1]

That is the generalization of the Consultative Group on Research and Education in Law. Professor Blaine Baker has questioned the generalization on the grounds that, with the possible exception of 1797-1832 in Upper Canada, neither law office training or law faculty education has existed in discrete or exclusive form, and the transition, if any, was not strictly sequential. Indeed, in his view,

> From the beginning the Law Society of Upper Canada conceived of itself as, and tried to act like, an educational institution with the training of aspiring lawyers and their admission to practice as its main responsibilities.

And:

> A second sub-theme [of this essay] is that the form of law training which evolved in Upper Canada between 1785 and 1889 was more intensive and more

[1] Consultative Group on Research and Education in Law (H.W. Arthurs, Chair) 1983.

> sophisticated than that which existed in England, in most American jurisdictions, or in other British colonies.[2]

[158] It might also be said that the end of the path–at least temporarily–is not just the law faculty but is rather a multi-room structure in which the law faculty shares space with undergraduate programmes, lawyer principals,[3] law societies and bar admission courses and examinations. However, the generalization is useful so long as it is recognized to be only a generalization: there has indeed been a clear shift from complete or primary reliance on apprenticeship for the legal training of prospective lawyers to a complex series of academic and practice-oriented requirements, in which obtaining a law degree is generally recognized as the most important step in the individual's path to the practice of law.

[159] Some description of the path from a system based on apprenticeship to the more complex present systems which have followed will be useful.

[160] As always in a discussion of the self-regulation of the legal profession in Canada, it is best to start with Ontario, which has been one of the more important influences on legal education and training.[4]

[161] A 1785 ordinance required that a person seeking to practice law in Quebec serve a 5-year apprenticeship, and, after the division of Quebec into Upper and Lower Canada, the requirement was continued in Upper Canada.[5] Licensing was by the Executive. Then the 1797 *Law Society Act* gave control over legal education and training to the new Law Society of Upper Canada and required entrant barristers to be on the books of the Law Society for 5 years and required entrant attorneys to serve 3 years under articles. In 1799, according to Professor Baker,[6] the Law Society

---

[2] These references to Profession Baker come from Baker 1981, 49 at 51,79.

[3] Except for the Notaries, as the Board of Notaries does not have an articling requirement.

[4] The summary of the evolution of legal education in Ontario is based primarily on McLaren 1987, 111 at 116-118 and Baker 1983, 49 at 69-105.

[5] Baker 1981, 49 at 49-50, 67-68, 79.

[6] Baker 1981, 68. With respect to barristers, the 1797 Act merely said that admission as a barrister alone required 5 years on the Law Society's books, but Baker, at 61, says that Law

(continued...)

framed rules "which remained cornerstones of legal education until the mid-twentieth century" and which "fused training for the profession and required all law students to complete an apprenticeship".

[162] Over time, various devices were adopted to make up for the perceived deficiencies of apprenticeship. These included entrance examinations, whether in law or in less law-specific subjects such as the Latin language and Latin and English composition; 'keeping terms', from 1828 to 1871, at Osgoode hall and the courts; lectures in legal subjects, which might be voluntary or compulsory; and bar admission examinations[7]. The Law Society also made some short-lived attempts to establish and maintain a law school, which culminated in 1889 with the establishment of a permanent law school at Osgoode Hall.

[163] From 1889 to 1949, local entrants were required to spend 5 years under articles, or 3 if they had a prior university degree. During their time under articles, they were also required to attend Osgoode Hall lectures, which were arranged so that students could spend most of the day in offices. A law degree did not relieve a student from attending the Osgoode Hall lectures. During this period, the focus was on the kind of legal education which the profession, through the Benchers of the Law Society, considered to be practical rather than academic in nature, though dissenting views were held by some and these had some influence on curriculum.[8]

[164] In 1949, a major controversy arose over legal education in Ontario. Dean C.A. Wright of the Osgoode Hall Law School and others argued that Osgoode should be a full-time law school so that legal education would effectively be sequential and students would not have to cope with both office work and academic work at the same time. The controversy led to the departure from Osgoode Hall of Dean Wright and almost all of the faculty and the transfer of himself and three others to the University of

---

[6] (...continued)
Society rules of 1800 provided for a five-year apprenticeship, so that it appears that from 1800 on apprenticeship was required of barristers as well as attorneys.

[7] McLaren 1987, 116-118, Baker 1983, 69-105

[8] Kyer and Bickenbach 1987 at 30-32.

Toronto. In the same year, the Law Society agreed to give 2 years' credit for the 3-year law degree of the University of Toronto, but this still left University graduates with a one-year disadvantage. Osgoode Hall was still the pre-eminent vehicle for the academic education of law students, with a four-year program "in which the student spent two years in academic instruction, one in articles, and one in a concurrent program of lectures and clerkship".[9]

[165] In 1957, a major change was made. The Law Society and the Ontario universities came to an agreement under which admission to practice would require the following:[10]

(1) either two or three years of university education depending on whether the student had completed senior or junior matriculation, or a university degree;
(2) a 3-year law school course entitling the student to a degree, which would include 23 basic compulsory courses;
(3) a Bar Admission course, which would consist of 15 months under articles and not more than 6 months of practical and clinical training at Osgoode Hall.

The Osgoode Hall Law School thus came into competition with the University law faculties, which quickly increased in number. In 1968, the Law Society gave up its control over Osgoode, which affiliated with and moved to York University.

[166] A further step was taken in 1968-69. The Ontario Law Deans and the Law Society entered into a further agreement which reduced the number of compulsory courses from 23 to 7.[11] From that time, although the Law Society has retained legal control over the legal education

---

[9] Kyer and Bickenbach 1987, 265. This reference to the events of 1949 and subsequent years to 1957 is largely based on Chapters 9 and 10 of their book.

[10] The proposal which Kyer and Bickenbach say was approved by the Benchers appears at pp. 260-262 of Kyer and Bickenbach 1987.

[11] The proposal of the Deans, which Lederman says was approved in that form by the Law Society on March 21, 1969, appears as Appendix A to Lederman 1971 at 155-159.

required of entrants to the profession,[12] the law faculties have had effective control in fact over the academic part of that education. The Law Society still administers the Bar Admission Course, which includes both the time that students must spend under articles and the lectures which they must attend and upon which they must be examined.

[167] A different, and ultimately an influential, course was followed in Nova Scotia. After 1872, the Barristers' Society controlled the requirements for admission to practice. According to Willis,[13] the only way to become admitted to practice at that time was to undergo a 3-year apprenticeship in a law office. However, after the opening of the Dalhousie Law School in 1883, it soon became possible for student apprentices to absent themselves from their offices to spend their full time at the Law School. This, in Willis' view, was the genesis of the present Canadian system under which full-time academic studies and time spent under articles are consecutive (though the time spent under articles might be divided into segments between academic sessions).

[168] There have been variations on this history in the other provinces that have law schools. Before a law society was created, lawyers might be licensed by the executive or admitted to practice as solicitors by the courts. Service under articles might be required. After a law society acquired control over admission to practice, service under articles was the earliest form of qualification required. Examinations came to be required, often including examinations in liberal arts subjects not directly related to law. Lectures came to be provided, usually by the law societies by themselves or, after the establishment of university faculties, in conjunction with the universities. A university degree often entitled the holder to qualify after a shorter period under articles.

---

[12] Under s. 63 of the *Law Society Act*, R.S.O. 1990, c. L.8, s.63, the Benchers have power to make regulations "respecting legal education, including the Bar Admission Course". However, the regulations are subject to the approval of the Lieutenant Governor in Council. *Regulation 708*, R.R.O. 1990, s. 23(9) provides that a degree from a law school in Canada approved by Convocation is the qualification for entrants to the bar admission course from within Canada.

[13] Willis 1979 at 131.

[169] A 1919 report of the Canadian Bar Association's Committee on Legal Education[14] gives a useful snapshot of the educational and training requirements which were in force at that time. Some provinces required, as a condition of admission to study, either a preliminary examination covering a broad range of liberal arts and mathematical subjects, a specified university degree, or matriculation into a university plus a specified quantity of study at a university.[15] All of the provinces which reported required service under articles,[16] either 4 years[17] or 5 years,[18] but accepted a reduced period for the holders of specified university degrees, usually 3 years. Manitoba required 5 years under articles from non-graduates and 4 years from graduates, but reduced either period by one year for a student who attended the Manitoba Law School throughout their term under articles and passed its examinations; it also required a separate examination for admission to the bar about 6 months later. In two provinces, attendance at law school lectures was required, at least of students near a university centre,[19] and Ontario required attendance at lectures at Osgoode Hall for 3 years. All reporting provinces required students, during their studentship, to pass either two or three examinations which covered significant numbers of legal subjects. British Columbia, Manitoba and Ontario made some distinctions between the qualifications of barristers and solicitors, but these distinctions did not detract from the essential fusion of the profession. So, by 1919, legal education in Canada had already become a complex and demanding process, which still centred on apprenticeship but had significant substantive law components and gave recognition to preliminary university education.

---

[14] CBA Committee on Legal Education 1919.

[15] British Columbia, Nova Scotia, New Brunswick, the Quebec Bar. New Brunswick would accept a grammar school or superior class license granted by Board of Education of New Brunswick.

[16] Sometimes "enrolment" or "attendance at Chambers" for a specified period was the requirement for barristers.

[17] New Brunswick, Nova Scotia and Quebec.

[18] Alberta, British Columbia, Saskatchewan, Manitoba and Ontario.

[19] Manitoba and Saskatchewan

[170] Since 1919, there have been 3 major changes. First, preliminary university education, which in 1919 was encouraged but not required, is now mandatory, usually to the extent of a degree, but sometimes to the extent of 2 years of study. Second, the emphasis has shifted from apprenticeship, which is reduced to a comparatively small quantitative component in legal education, to the academic study of law, which is now the centrepiece. Third, bar admission courses and examinations have been introduced (though these may be regarded as substitutes for some of the lectures previously given).

[171] The cumulative result of these changes has been the system of legal education and training which I will now describe.

(b) Present requirements of pre-admission education and training

[172] Education and training requirements for local entrants to the practice of law are quite similar in the common-law provinces where law faculties are located.[20] There are differences, but the similarities are more important.

[173] The following educational and training requirements are commonly present:

1. **Preliminary university education**

   In all the provinces under consideration, law faculties will admit only students who have a university degree or, in some cases, students who have successfully completed two years of undergraduate study that would be accepted as leading to a university degree. (In Quebec, the requirement is completion of a program at a CEGEP.) It is not required that the degree or the undergraduate study be in any specified field or fields of study. Most entrants to law faculties have degrees.[21] The law societies do not exert any control over the content of the preliminary university education.

---

[20] These include all provinces except Newfoundland and Prince Edward Island.

[21] See Stager and Arthurs 1990, 98-99.

The pre-law requirement presumably serves an academic purpose in the view of university authorities. It may in some way either broaden law students or increase their maturity. It is difficult, however, to see any demonstrable connection between the pre-law requirement and the qualities or qualifications desirable in the practice of law. Viewed as part of the regulation of the legal profession, its purpose is not clear. Nothing is done to see that any relevant self-regulatory purpose is achieved.[22]

2. Academic legal education

In all the provinces under consideration, a degree in law from a recognized university is required. This involves full-time study in a law faculty for three academic years.

While many of the law societies formally retain the power of approval or disapproval of a university for the purpose of determining whether or not an entrant's qualifications are acceptable,[23] the law faculties in fact control the academic stage of legal education, subject, in some of the provinces, to a requirement that a number of courses be included in the course of study.[24]

There is a constant tension between those – frequently but not exclusively practitioners – who hold the view that the primary purpose of university education leading to a law degree is to give law students substantive knowledge and legal skills that will enable them to practise law to a good standard, and those -- frequently but not exclusively academics -- who hold the view that the purpose of university education leading to a law degree should be to give

---

[22] See Taylor 1987, 573 at 575-578.

[23] Note that in Alberta, the Law Society is obliged to accept an Alberta law degree, or a non-Alberta law degree accepted by the Universities Co-ordinating Council as the academic legal qualification for admission as a student-at-law or enrolment as a member, and the evaluation of academic qualifications of, and the examination of, applicants for admission or enrolment is under the control of the Co-ordinating Council: *Legal Profession Act* RSA 1980 ss. 36,39.

[24] To a prominent academic, the remaining legal standing of most of the law societies translated into significant influence on university law faculties, through formal means such as participation on law faculty councils and through professional ideological influence on the curriculum (Arthurs 1987, 157 at 159-161). The profession, as differentiated from the law societies, has influence because it is the principal market for the students graduated by the universities.

students a much broader understanding of law and its place in society.

3. Articling

Entrants to the profession are required to spend time as students-at-law under articles of clerkship with practising lawyers. In the common-law provinces as of 1988, the time varied from 10 to 12 months; in Quebec, the Bar required 6 months, but the Chamber of Notaries did not require any time under articles, relying on its vocational training.[25] The articling experience is controlled by the governing bodies to the extent that it is controlled at all.

In the early days of all the provinces, as noted above, service under articles was the only path to admission to practice for local entrants. But service under articles came to be perceived as an inadequate training for lawyers, and nowadays, it is only one component of the legal education and training required of entrants.

It is generally understood that the period under articles is intended to give students exposure to and practical experience in the practice of law, and to give them opportunities to develop not only the skills needed by lawyers but also professional attitudes. However, service under articles is not closely supervised and there is always a perception that the experience is very varied, so that not all students receive the full amount of the assumed benefits of the articling system.

4. Bar admission and professional training courses

In all of the provinces under discussion, entrants are required to attend "bar admission" courses, which are commonly concerned mainly with knowledge of substantive law and procedures, or "professional legal training" courses, which give more prominence to imparting legal skills. These vary considerably in length – from 8 months in Quebec and 6 months in Ontario to a few weeks in other provinces – and, in different provinces, may be undergone either concurrently with articles or before or after the articling period.

---

[25] Stager and Arthurs 1990, 127.

They are generally conducted by the law societies or by educational institutions associated with the law societies, though in Quebec the law faculties conduct them[26].

These courses are thought to perform a variety of functions. One is to fill in gaps in knowledge of substantive law, though that is generally regarded as the law schools' function. Another is to smooth out the articling experience, so that students will be exposed to practical instruction in practice areas that they have not been exposed to under articles. Another is to impart skills.

5. Bar admission examinations

Entrants are required to pass bar admission examinations.[27] These are usually conducted by the authority which conducts the bar admission course, though in Alberta, where the Legal Education Society of Alberta conducts both the bar admission course and the bar admission examination on behalf of the Law Society, the ultimate authority over the examination is vested in an organ of the universities, the Universities Co-ordinating Council. The failure rates are low, so that they do not perform a significant screening function.[28]

[174] It will be seen that the education and training of entrants into the legal profession in Canada has become a complex and necessarily time-consuming process[29] with a number of actors involved: universities or

---

[26] See Stager and Arthurs 1990, 127, 132.

[27] It appears that the Law Society of British Columbia is considering requiring entrants to the articling program to take examinations on 10 substantive legal areas: *B.C.'s Black Letter Exams worry Students, Academics*, Lawyers Weekly, October 15, 1999.

[28] Stager and Arthurs 1990, 133. Note that Stagers and Arthurs say that in Quebec, unlike the other provinces, the initial failure rate is about 15% on the first try but is reduced to about 7% by further tries. They also refer to the 1972 results in which 58% of students failed, causing much criticism.

[29] I remember Dean Gerald le Dain, as he then was, making this point very graphically in 1970. He remarked that in Ontario 22 years would elapse between the day a mother waved goodbye to her child on the child's first day of school and the day on which she saw her child admitted to the practice of law. Presumably this included 13 years of school; 4 years in an undergraduate program; 3 years in law school; and 2 years between the articling and instructional parts of the bar admission course. This is probably the longest period of

(continued...)

CEGEPs for pre-law; universities for the law degree; individual lawyers and the law societies for the articling period; and law societies or educational institutions for the bar admission course and examination.

ii. England

(a) Evolution of pre-admission education and training

(1) Barristers

[175] Although the Inns of Court had earlier performed an educational function, by the 18th century they no longer did so: 5 years had to elapse between a prospective barrister's admission to an Inn and their call to the Bar, but the prospective barrister was not required to undergo either academic education or pupillage during the 5 years,[30] dining in the prospective barrister's Inn being the only formal requirement (and one which still continues). The 5 years was reduced to 3 years for Oxford and Cambridge graduates in 1762 and for Trinity College Dublin graduates in 1793:[31] according to Professor Abel, whether because of this dispensation or for class reasons, by 1785, 41% of entrant barristers were graduates. The proportion rose to 75% by the 1950s. By the 1970s two-thirds of those called were **law** graduates.[32] In the early part of the 19th century, according to Professor Gower,[33] "...the *de jure* qualification consisted of the ability to eat and drink and to sign one's name, *de facto* it involved...'going into a pleaders' office for two or three years'...". In 1854, the Inner Temple examined for Latin, Greek and History applicants who had not matriculated at a university, and from 1888 all the Inns did the same. [34]

---

[29] (...continued)
preparation: in Alberta at that time, the 13 years would have been 12, the pre-law time could have been 2 years, and the articling plus bar admission would be something over one year.

[30] According to Abel 1988, 142, applicants for admission to the Inner Temple were obliged to show competence in Latin and Greek.

[31] Abel-Smith and Stevens 1967, 28.

[32] Abel 1988, 47-49.

[33] Gower 1950, 137 at 139.

[34] Abel 1988, 41.

[176] In response to an adversely critical report made by a Select Committee of the House of Commons in 1846, the Inns established the Council of Education in 1852, and, after additional pressures, established examinations, first for admission to the Inns, and then, in 1872, for admission to the Bar,[35] preparation for which came to be done in part through lectures under the Council of Education but in greater part through crammers. This system lasted until 1958 or 1959.

[177] In 1950, Professor L.C.B. Gower summarized the required training for barristers' as follows:[36]

> For call to the Bar it is necessary to join an Inn of Court after matriculating and to 'keep terms' by eating dinners normally during three years. During that time the student must pass the two parts of the Bar Examination, as preparation for which he can, if he wishes, attend the lectures and classes of the Council of Legal Education. He may also, if he wishes, spend a few months in a solicitor's office (most do not) and may become a pupil and read in the chambers of a practising barrister (which most do, although not until after they are called). The only essential requirement therefore is the ability to pass an examination.

[178] In 1958 or 1959,[37] pupillage was made a compulsory pre-requisite for practice at the Bar, first through an undertaking and then through a rule.[38] Since 1975, the Inns have required for admission to the bar a law degree, or a non-law degree followed by a conversion course, or a 2-year course for exceptionally accepted mature students leading to the Common Professional Examination.[39]

(2) Solicitors

[179] The 18th-century qualification for the admission of solicitors and attorneys, imposed by an Act of 1729, was service under articles for 5 years (reduced to 3 years in 1821 for holders of university degrees and similarly reduced in 1860 for managing clerks with 10 years'

---

[35] Abel-Smith and Stevens 1967, 68-76, give an account of efforts to establish a system of legal education in the 1850s to the 1870s, including efforts to establish a common legal education for barristers and solicitors. They discuss 20th century developments at 349-375.

[36] Gower 1950, 137 at 148.

[37] Abel-Smith and Stevens 1967 suggest 1958; Abel 1988, at 53, suggests 1959.

[38] Abel 1988, 53 refers to estimates of the number of barristers who underwent pupillage in the 1950s from 1/5 to 2/5.

[39] ACLEC 1996, 143.

experience),[40] followed by an examination by a judge, which was usually cursory.

[180] The Law Society introduced a professional examination in 1836[41], which according to Abel was not of a high standard and allowed very high pass rates. In 1861, the Law Society went on to introduce preliminary examinations which appear to have included Latin, French, English, history, geography and arithmetic,[42] and an intermediate law examination, the latter being the predecessor of the common professional examination.[43]. In 1922, the Law Society introduced compulsory attendance at a law school for a year,[44] though law graduates were exempted.

[181] In 1950, Professor Gower's summary of solicitors' training was as follows:[45]

> Here too, the student must have matriculated, or passed the Law Society's Preliminary Examination in lieu. He must then be articled (*i.e.*, apprenticed) to a solicitor normally for five years...Prior to admission to practice he must pass the Law Society's Intermediate and Final Examination and, unless he has previously taken a law degree, attend an approved Law School for at least a year commencing within fifteen months from the beginning of articles.

Holding a university degree (whether in law or not) reduced the period under articles to 3 years and exempted the student from the Solicitors Intermediate Examination.

[182] Since that time the emphasis has shifted. A law degree is accepted as sufficient qualification into the vocational stage and is the normal qualification. Qualification without a university degree is exceptional,

---

[40] Burrage 1996, 45 at 52; Abel 1988, at 149.

[41] Gower 1950, 137 at 140. According to Abel 1988, 156, there were at first separate examinations for attorneys and solicitors, but these were combined in 1853.

[42] This list was discussed in 1857, according to Abel, and was presumably what was instituted in 1861.

[43] See Abel 157-159.

[44] Gower 1950, 137 at 145.

[45] Gower 1950, 137 at 149.

though it is still possible. Time spent under articles has been converted into 2 years under a training contract. Both the academic stage and the vocational training stage are full-time, as differentiated from earlier times when they could be pursued during the articling period.

[183] These developments have led to the systems of pre-admission and training which I will now describe.

(b) Present system of pre-admission education and training

[184] The qualifications for entrance to solicitors' practice are governed by Law Society regulations. The qualifications for admission to the Bar are governed by the *Consolidated Regulations of the Inns of Court.*

[185] The *Courts and Legal Services Act 1990* gave the Lord Chancellor's Advisory Committee on Education and Conduct an important advisory function, under which the authorised bodies must "have regard" to ACLEC's advice and recommendations about legal education., and ACLEC's *First Report on Legal Education and Training* [46] made significant recommendations for changes in the academic and vocational stages of legal education and training for both barristers and solicitors.
[186] This book describes what exists now. The ACLEC recommendations, if implemented, would make significant changes, but the academic and vocational phases would still exist. It may be that the abolition of ACLEC by the *Access to Justice Act 1999* will make its recommendations less influential.

(1) The academic stage

[187] For both barristers and solicitors, [47]the usual route to admission to practice starts with a law degree, which is usually an undergraduate degree; there is no pre-law university requirement such as those which prevail in Canada. Although the university law faculties control their own programmes, the Law Society and the Bar's Council of Legal Education reserve the right to refuse to recognize degrees if they do not approve of course content or means of assessment, and they have

---

[46] ACLEC 1996.

[47] This description of the present arrangement for the education and training of barristers and solicitors in England is based on ACLEC 1996, App. E., p. 143 and following.

prescribed standards which must be met:[48] seven "foundations of legal knowledge"[49] must be covered (apparently in such a way that students will "receive a coherent introduction to the fundamental concepts and the social context which shapes the way in which law develops and is practised"), and "[i]n addition students should receive a sound grounding in the basic techniques of legal research, statute and case law analysis and the development of written and oral communication skills in a legal context".[50] The professional bodies therefore have a significant influence on the university programmes.

[188] A qualifying law degree is not, however, the only way to satisfy the academic requirements for admission to either the solicitors' Legal Practice Course or the Barristers' Vocational Course and ultimately for admission to practice. Instead, the holder of another university degree may take a "conversion course" in law leading to the Common Professional Examination, or may obtain a Diploma in Law approved by the Common Professional Examination Board. In addition, on the solicitors' side, a Fellow of the Institute of Legal Executives who has been employed within the legal profession for 5 years and has passed the Institute's examinations in the 7 foundations of legal knowledge, may be admitted to the solicitors' vocational stage, and a Justices' Clerk's Assistant who has served 5 years in the Magistrates' Court Service may complete a Diploma in Magisterial Law and obtain admission to the Common Professional Examination. On the barristers' side "...graduates without a qualifying law degree and non -graduate mature students exceptionally accepted by the Four Inns of Court" may satisfy the academic stage by undertaking the CPE or obtaining a Diploma in Law.[51]

---

[48] See the *Announcement on Full-Time Qualifying Law Degrees* issued jointly by the Law Society and the Council of Legal Education, January 1995, which appears as Appendix D to ACLEC 1996, 137. According to ACLEC 1996, 3, the *Joint Announcement* was approved by the Lord Chancellor and the designated judges under the *Courts and Legal Services Act 1990*.

[49] Obligations I (contracts and restitution); Obligations II (tortious liability); Foundations of Criminal Law; Foundations of Equity and the Law of Trusts; Foundations of the Law of the European Union; Foundations of Property Law; and Foundations of Public Law. See ACLEC 1996 at 141-142.

[50] ACLEC 1996, 138.

[51] ACLEC 1996, Appendix E at 145.

(2) The vocational training stage

[189] For both branches, a vocational training stage follows the academic stage.

[190] Solicitors undergo

(a) A "Legal Practice Course", a one-year full-time or two-year part-time course, including conveyancing; wills, probate and administration; business law and practice; litigation and advocacy; and two optional areas.

Professional conduct and the *Financial Services Act* 1986 are "pervasive areas", and skills in research, writing and drafting, interviewing and advising, negotiation and advocacy are developed. The stated intention is to prepare students for practice under a Training Contract and to lay a foundation for subsequent practice.

(b) A "Professional Skills Course" which is normally undertaken during the training contract and is intended to provide formal instruction in practical issues alongside practical experience under the training contract. It includes personal work management; maintaining financial records and interpreting business accounts; advocacy, negotiation and oral communication skills; investment business; and professional conduct.

(c) A two-year "Training Contract", which, according to Professor Burrage "...retain some of the character of articles", but has superseded "[T]he gentlemen's somewhat haphazard, hit and miss form of training by articles".[52]

---

[52] Burrage 1996, 45 at 72, 71.

[191] Barristers undergo

(a) the "Bar Vocational Course",[53] a course which normally lasts for some 30 teaching weeks, which includes three "knowledge areas", civil litigation, criminal litigation and evidence; "skill areas", casework skills, written skills and interpersonal skills; and five "practical background subjects".[54] Assessment for every course is to incorporate a requirement for the proper observance of ethical standards.

The aim of the course is to produce people who are ready to undergo and take full advantage of pupillage, not people capable of competently practising on their own account. It is also intended to give a framework of essential and transferable skills for competent practice in the first few years at the Bar.

Successful completion of the Bar Vocational Course is the basis for a call to the Bar with the title of Barrister at Law.

(b) pupillage, which is service for 12 months in the chambers of a barrister. The entrant barrister is entitled to a provisional practising certificate after the first 6 months and to a final practising certificate after the 12 months. However, under the Code of Conduct the barrister cannot engage in independent practice for a period of 3 years. [55]

(c) such further training as the Bar Council requires, which includes further training in advocacy provided by the Inns or Circuits and a two-day course on "Advice to Counsel" provided by the Council for Legal Education and the Bar Council.

---

[53] The ACLEC summary (see ACLEC 1996, Appendix E, 245, 149-152) on which this description is based is in turn based on a statement of course specification guidelines issued to institutions which were to offer the Bar Vocational Course from September 1997; up to this point the course had been offered only by the Inns of Court School of Law.

[54] Revenue Law, European Union Law; Accounts, Business Associations and Social Security Law.

[55] ACLEC 1996, 146; *Code of Conduct*, 1994, s. 301(d).

iii. Summary of the historical development of legal education and training in Canada and England

[192] The purpose of legal education and training is to raise the level of quality of legal services. In both Canada and England, the regulatory requirements of the governing bodies for legal education and training have developed from either virtually no requirements (in the case of the English Bar) or apprenticeship requirements (in the case of English solicitors and Canadian lawyers generally) to much more complex systems. In Canada, these include preliminary university education through an undergraduate degree or work that can lead to an undergraduate degree; academic legal education ending with a law degree; vocational training through bar admission or legal practice courses (which varies from a few weeks to the 6 months required in Ontario and the year required in Quebec); and service under articles, usually a year or somewhat less (with the exception of the Quebec Notaries). In England, the systems include, as normal, a law degree, followed by a year's vocational training, and by 2 years under training contracts (for solicitors) or one year's pupillage (for barristers intending to practise independently). In all cases, the stages are kept separate, except that in some Canadian provinces bar admission courses are taken during the period under articles, so that, subject to some blurring, academic education is one thing, vocational education is a second thing, and vocational training is a third.

b. Good character

[193] The Canadian statutes, or rules or regulations made under them, generally require a candidate for admission to a law society to be of "good character", "good character and reputation", "good character and repute", or to be "of good character and a fit and proper person to be admitted", or they may allow the governing body to inquire into "the character and habits of the applicant".[56] Before a solicitor is admitted to practice in England, the Law Society must be "satisfied as to his character and his

---

[56] See e.g., *Legal Profession Act*, R.S.A c. L-9.1 s. 39(1); *Legal Profession Act,* S.B.C 1987 c. 25 s. 27,28; *Rules of Law Society of Manitoba* s. 83(2); *Rules of Law Society of New Brunswick* s. 20(4); *Nova Scotia Barristers' Society Regulations* s. 16; *Law Society Act,* R.S.O. 1990 c. L.8 s. 27(2); *An Act Respecting the Barreau du Quebec,* L.R.Q. 1977 c. B-1 s. 45(2); *Rules of the Law Society of Saskatchewan*, s. 150.

suitability to be a solicitor".[57] The Benchers of the Inns require evidence of good character before admitting a student.[58]

> "The purposes of the good character requirement are the same as the purposes of professional discipline: to protect the public, to maintain high ethical standards, to maintain public confidence in the legal profession and its ability to regulate itself, and to deal fairly with persons whose livelihood and reputation are affected".[59]

That is, the requirement is a regulatory device to maintain standards of conduct.

[194] The statutes and regulations do not define "good character". Justice Mary Southin, then a Bencher, said this in 1977 about the term as used in the British Columbia Act – and while stringent, her statement does give guidance about the meaning of the various formulations:[60]

> "I think in the context "good character" means those qualities which might reasonably be considered in the eyes of reasonable men and women to be relevant to the practice of law in British Columbia at the time of application.
>
> Character within the Act comprises in my opinion at least these qualities:
>
> 1. An appreciation of the difference between right and wrong;
>
> 2. The moral fibre to do that which is right, no matter how uncomfortable the doing may be and not to do that which is wrong no matter what the consequences may be to oneself;
>
> 3. A belief that the law at least so far as it forbids things which are **malum in se** must be upheld and the courage to see that it is upheld."

Some of the governing bodies require statements about an applicant's character from referees, but the qualifications of referees to determine whether the applicant has qualities such as those listed by Justice Southin may be dubious. It is doubtful that referees require an applicant

---

[57] *Solicitors Act* (U.K.) 1974, c. 47, s. 3(1)(b).

[58] 3(1) Halsbury (4th ed.) para. 375 refers to the relevant Consolidated Regulations.

[59] MacKenzie 1993, 23-2. References in the text come from MacKenzie 23-2 to 23-16. As the text of this book gives short shrift to the requirement of good character, the reader who is interested in the subject should read MacKenzie's well-researched and analysed account of the application of the requirement in Canada and the United States.

[60] Southin 1976-1977 129.

to put forward real and positive evidence that the applicant has these qualities, and, indeed it is difficult to see how a governing body with less than godlike characteristics could ever be satisfied that an applicant has them without actually seeing the applicant put to the test under actual circumstances.

[195] While conclusive positive evidence of good character is hard to come by, negative evidence discrediting an applicant's character sometimes appears. Under the British Columbia provision, the Law Society, under the influence of the times, held in 1950 that an applicant was barred from admission to the Law Society because he was a Marxist Communist, and the Court of Appeal upheld that decision in highly emotive language.[61] The most common reason for an inquiry and for refusal of admission on grounds of character has been a past conviction for a crime of moral turpitude, but the use of the refusal power has been inconsistent, as convicted persons have on occasion been found to be rehabilitated and to be of good character.[62]

[196] Given the practical difficulties, the requirement of good character and the variants mentioned above have not constituted significant safeguards for the maintenance of professional standards, and no further attention will be paid to them in this book.

c. Citizenship and residence

[197] At one time, Canadian citizenship was a statutory requirement for admission to practice in most of the Canadian provinces. As late as 1970, a committee of the Conference of Governing Bodies of the Legal Profession in Canada recommended that citizenship be a requirement for

---

[61] *Martin* v. *Law Society of British Columbia* (1950) 3 DLR 173 (BCCA). According to MacKenzie 1993, 23-5, the United States Supreme Court held that past attendance at meetings of the Communist Party did not afford evidence that the applicant was not of good character (though it later held that admission was properly denied because the applicant "...had not answered questions concerning membership in the party, thus preventing a full investigation of his qualifications)." *See Konigsberg* v. *State Bar of California*, (1957) 366 U.S. 36.

[62] In addition to a number of Canadian and United States cases, MacKenzie 1993 refers to an English case in which the Law Society admitted a convicted murderer as a student: see Evlynn Gilvarry, *"Society Enrols Rehabilitated Murderer as Student"* (May 1991) The Law Society's Gazette 4. Note that Justice Southin (Southin 1976-1977, 135) would generally refuse admission to anyone who has been guilty of an offence against the Criminal Code since majority.

a lawyer who wished to transfer to another province and that a lawyer coming into Canada be required to acquire citizenship before admission, though not before commencing to meet other requirements.[63] However, while a citizenship requirement was defended on the grounds that a lawyer should have demonstrated at least that much attachment to Canadian institutions, it came to be seen as a discriminatory restriction. Nowadays, at least one provincial statute does not set up any requirement [64], while others require an applicant for admission to be either a Canadian citizen or a permanent resident[65], or require an applicant to be lawfully entitled to be employed in Canada.[66]

2. Post-admission devices for the maintenance and improvement of quality of service

a. Continuing legal education and training

[198] As has been seen, Canadian governing bodies and legislatures have erected a complex structure of compulsory pre-admission education and training which must be undergone before a prospective lawyer can gain entrance to the profession. There is no such compulsory post-call requirement in Canada: a lawyer who stays on the active practising list of his law society and outside the ambit of its disciplinary arm is not required to undergo further education or training during his lifetime.

[199] Most lawyers do, of course, engage in continuing legal education after admission, formal and informal. Formal legal education is provided by the law societies, either directly or through continuing legal education organizations in which they participate; by the Canadian Bar Association and to a lesser extent the Federation of Law Societies; and by private providers. The law societies regard it as part of their function to encourage lawyers to engage in continuing legal education.

---

[63] Conference of the Governing Bodies of the Legal Profession in Canada 1970 at 30.

[64] E.g., *Legal Profession Act,* S.B.C. 1998, c.9.

[65] E.g., *Legal Profession Act,* R.S.A. 1990, c. L-9.1, s. 39(2), the *New Brunswick Law Society Regulations,* 1986, s.35(1), the *Ontario Law Society Act,* R.S.O. 1990, c. L.8, s. 38(c), and the *Legal Profession Act,* S.S. 1990, c. L-10.1, s. 24(1).

[66] E.g, the *Nova Scotia Barristers' Society Regulations, 1979,* s. 16(a).

[200] The question whether continuing legal education should be made mandatory has long been under discussion. The 1978 Conference on Quality of Legal Services considered mandatory continuing legal education and resolved that it should not be instituted "at this time", apparently because the majority thought that benefits to be realized from mandatory continuing legal education were not worth the costs that would be incurred.[67]Arguments in favour were: that it would improve competence and quality of service, or at least ensure that lawyers are exposed to a minimum of education; that it would improve the protection of the public and lessen the criticisms made by consumers and the public; that accreditation of providers of continuing legal education would assure good courses; and that continuing legal education would help to guard against the imposition of external regulation. Arguments against were: perceived ineffectiveness, including lack of testing; lack of focus; misleading appearance of up-to-date-ness of lawyers; the ignoring of other methods of self-education; and that it would impose a burden on the many competent lawyers in order to get at a relatively few incompetent ones.[68]

[201] The subject was not laid to rest. Mandatory continuing legal education has been the subject of discussion in Canada ever since. The Law Society of Upper Canada has recently had a proposal under active consideration,[69] though in the event it was not proceeded with. A committee of the Law Society of Alberta has also considered the subject recently.

[202] In England, a barrister is not required to undergo education or training after the completion of pupillage and admission to independent practice. The Bar is developing a New Practitioners Programme under which barristers will be required to undertake 42 hours of continuing professional development within 3 years of entering independent practice.[70]

---

[67] Hurlburt 1979, 30.

[68] Anderson 1979, 145 at 170-72.

[69] LSUC 1996 at 20.

[70] See Rules of the Continuing Education Scheme to be Adopted by the General Council of the

(continued...)

[203] The Law Society requires solicitors to undertake "continuing professional development".[71] The requirement initially applied to solicitors admitted after 1982, but in 1998 it applied to all solicitors in legal practice or employment. Apart from transitional provisions, each solicitor engaged full-time is required to undertake 48 hours of continuing professional development in each 3-year period, or an average of 16 hours per year. "Continuing professional development" means a course, lecture, seminar or other programme or method of study (whether requiring attendance or not) that is relevant to the needs and professional standards of solicitors and complies with guidance issued from time to time by the Society". 25% of the required hours must be by attendance at authorised courses; 25% may be by legal writing and research; 50% may be by "distance learning" that meets certain requirements, with increased allowance for participation and further increased allowance where assessment or production of a dissertation is involved; increased allowance is made for workshops and other means of development of practical skills through participation; and increased allowance is made for preparing and delivering training courses.[72]

[204] In addition the Law Society requires solicitors, in the first 3 years following admission, to "attend such continuing professional development courses as the Society may prescribe". At present, the prescribed courses are a course covering communication and work management and a practice management course.[73]

[205] In 1997, the Lord Chancellor's Advisory Committee on Legal Education and Conduct issued a report entitled *Continuing Professional Development for Solicitors and Barristers*. In the report, ACLEC expressed its belief that "the public interest requires a greater

---

[70] (...continued)
Bar (subject to approval by the Lord Chancellor and designated judges), in ACLEC 1997, p. 78, Annex 2.

[71] See *Law Society Guide 1996,* Annex 2E & 2F at 43-46, where extracts from the Training Regulations 1990 appear, together with a code of practice for compliance.

[72] See *Law Society Guide 1996,* Annex 2F, at 45-46.

[73] *Law Society Guide 1996* at 43, para. 35; ACLEC 1996 144-45.

commitment by the legal profession as a whole to adequate levels of CPD as a means of maintaining and enhancing standards of legal services;[74] that formal schemes for CPD should be organized and centrally administered by the Law Society and the Bar Council;[75] and that compulsion to engage in CPD is not objectionable and is required.[76] The report spoke approvingly of the Law Society's CPD plan and its extension to all solicitors, and it went on to recommend that the Bar Council should reconsider its current views on CPD and should consider a staged extension of its formal scheme to include all barristers.[77]

[206] Both the Bar and the Law Society impose restrictions on practice for 3 years after admission to independent practice: for 3 years after pupillage barristers must practice in a chambers of which at least one member has practised independently for 5 years,[78] and a solicitor "cannot normally practise as a sole principal until he or she has been admitted for three years".[79]

b. Advisory services

[207] Practice and management advisory services are of comparatively recent origin in Canada. At the time of the 1978 National Conference on Quality of Legal Services, the Law Society of Upper Canada had decided to establish the first practice advisory service, and the Conference recommended that the organizations of the legal profession be encouraged to provide such services.[80] By the time of the follow-up National Workshop in 1980, the Ontario service was in operation and

---

[74] ACLEC 1997, at 3, para. 4.

[75] ACLEC 1997, at 3, para. 3.

[76] ACLEC 1997, at 3, paras. 5-6. The report leaves open the possibility that a voluntary scheme might be made sufficiently effective, but it is clear that ACLEC did not think that this is likely. Following the abolition of ACLEC, the weight which its views will carry remains to be seen.

[77] ACLEC 1997, at 42,43.

[78] *Code of Conduct,* 1994, s.301(d).

[79] *Law Society Guide* at 20, rule 2.06. See also p. 48, rule 3.02.

[80] Hurlburt 1979, 33.

other provinces had either started services or proposed to do so,[81] and the Workshop made additional concrete recommendations.[82]

[208] The larger Canadian law societies now provide substantial advisory services to lawyer-members. They include answers to a lawyer's specific questions in relation to both ethical and practical matters arising in the lawyer's practice. They include advice about the management of practices and of time, so as to improve a lawyer's competence in these areas and thus improve the quality of services delivered. They include the provision of start-up kits and manuals. They are a significant contribution to the quality of legal practice.

c. Certification of specialists

[209] It may be efficient for a lawyer to concentrate on one or a few areas of practice: greater familiarity with the subject-matter may enable the lawyer to grapple with problems more effectively, more quickly and with less research. A specialist lawyer may be able to keep abreast of developments in the law more effectively. The result may be a better quality of legal service at lesser cost. On the other hand, the fragmentation of the legal profession into a number of narrow specialties may make lawyers less able to relate problems to a broader context.

[210] Whatever the merits of specialization, it has occurred in fact to a significant extent. Many lawyers concentrate on one or a few areas of practice. There has been an ongoing debate for many years as to whether the law societies should either allow lawyers to advertise themselves as specialists, or whether the law societies should go even further and provide schemes for the qualification and certification of specialists.

[211] This subject has for several years been on the agendas of the Canadian law societies. The 1978 National Conference made tentative favourable recommendations, but the 1980 National Workshop declined to do so, although the Law Society of Upper Canada had tentatively

---

[81] See Hurlburt, W.H., Workshop Paper 6, "The Law Societies and the Provision of Advice and Assistance", in Hurlburt 1981, 319.

[82] Hurlburt 1981 at 36-38.

approved the idea.[83] Except for Ontario, the Canadian law societies have not instituted specialization programmes.

[212] In 1986, the Law Society of Upper Canada established a Specialist Certification Program which is supervised by a Specialist Certification Board, which is a committee of the Benchers, the actual evaluations being done by Specialty Committees. It now covers 9 areas of law.[84] Applicants for certification are required to have 7 years of experience in the full-time practice of law in Ontario, and must, during 5 recent years, have devoted at least 50% of professional time to the specialty area.[85] They must satisfy the Specialty Committee and the Board that they are "fit to be certified to the public as having a special ability to practise in the area of specialty applied for". Recertification is required every 5 years.

3. Prescription of Standards and Rules of Conduct

a. Nature of standards

[213] What the special standards of conduct for a profession should be is not self-evident. The profession must develop them in some way. It can leave them to be developed by individual professionals either by deduction from *a priori* propositions or by accretion to their value systems from day-to-day professional activities. Or the profession may collectively develop standards, again either by deduction or by incremental steps. As the standards are developed, they may be allowed to dwell in the collective mind, without more. Alternatively, they may be put into written texts that are accepted by the profession. They may be formulated at a high level of generality, or, to the extent that the subject-matter permits, they may be reduced to specific rules.

---

[83] Hurlburt 1979 at 32, and Hurlburt 1981 at 36-37. See two papers prepared for the Conference and Workshop respectively by Professor Alvin Esau, Esau 1979 and Esau 1981, which show the state of play at that time.

[84] Bankruptcy & Insolvency, Civil Litigation, Criminal law, Environmental Law, Family Law, Immigration Law, Intellectual Property (Patent/Trademark/Copyright) Law, Labour Law, and Workers' Compensation Law. See *General Information for Specialist Applicants,* The Law Society of Upper Canada Specialist Certification Program, 1997.

[85] Under the Specialist Certification Program, a second specialty can be applied for without 50% involvement but subject to a "substantial involvement" requirement.

[214] Sometimes it is not easy to determine whether or not a rule laid down by a law society is an ethical rule, a matter of etiquette, or a procedural regulation. A rule, for example, that a lawyer will observe the trust conditions on which the lawyer receives trust money is an ethical rule. A rule that a lawyer will file with the law society every year an accountant's certificate that the lawyer's trust account is in order is regulatory: it is part of a scheme to minimize the ethical breaches involved in defalcations, but, if a lawyer can properly account for all trust money it is difficult to see as a breach of ethics a failure to send along to their governing body a piece of paper in proper form. In between ethical rules and rules of procedure are rules of etiquette, such as the rule that in most circumstances an English barrister must not accept instructions from a lay client. This book is concerned with rules that require lawyers to act in certain ways in order to carry out their duties to clients and to society, and it will not always make distinctions between ethical rules, rules of etiquette and rules of procedure.

[215] Some rules of ethics are also, or derive from, rules of law. For example, a lawyer has duties under law as well as under ethics to honour trusts and observe client confidentiality. This book is concerned with all rules of ethics whether or not they are also rules of law.

b. Development of written codes of conduct

i. England

(a) The Bar

[216] Before the 20th century, the formulation of standards of conduct by the English Bar was almost entirely informal and based on the opinion of the profession at a given time. Cocks[86], for example, speaking of the Bar in the 1830s, said that

> [t]here is an obvious interest in professional rectitude and a hint of vagueness about what was correct behaviour. Above all there is no authority to appeal to other than the contrasting opinions of what the profession as a whole believed in.

And later:

> It was all very vague and disorganised. Rules were discussed, but what they were, and how they were to be enforced, was a very different matter.

---

[86] Cocks 1983, at 20-21.

It was 1875, he said[87], before a published account of the Bar's etiquette was available generally, and that was not an official account , nor did it pretend to be a comprehensive statement of ethical standards and rules,. Towards the end of the 19th century, the Bar Committee, and later the General Council of the Bar, began publishing annual statements which, after a time, were collected in the Yearly Practice and the Annual Practice.[88]

[217] The views of the English bench and senior Bar as they were in 1919 are epitomized in a paper written in that year by Justice William R. Riddell of Ontario and in the letters from several of the great legal functionaries of the United Kingdom that are attached to the paper.[89] Those functionaries were unanimous in stating that at that time there was no formal code of conduct for barristers in the United Kingdom, and those of them who expressed an opinion were unanimous that there was no need for such a code.

[218] Sir Claud Schuster, on behalf of the Lord Chancellor, gave the most comprehensive description of the situation with respect to the Bar of England and Wales.[90]

---

[87] Id., at 157.

[88] The Bar Committee was established by resolution of the Bar in December, 1883, and continued to be active until 1894. In 1892, it prepared rules about retainers which were approved by the Attorney General and the Council of the Law Society. In 1894, the General Council of the Bar was established in the place of the Bar Committee to "deal with all matters affecting the profession and to take such action thereon as may be deemed expedient" and it laid down rules of etiquette and practice. (See 2 Halsbury, 1st ed., 1908, para. 615.) The retainer rules as they then existed are described at 2 Halsbury, 1st ed., 1908, paras. 675-684. The first version of the rules of etiquette prescribed by the General Council of the Bar that is available to me appears at p. 668 of the Annual Practice 1905 and is entitled "Professional Etiquette, Conduct and Practice".

[89] See "A Code of Legal Ethics", (1919) 4 Proceedings of the Canadian Bar Association pages 129 -143. The attached letters were written by or on behalf of the Lord Chancellor, the Lord Chief Justice of England, the Attorney General of England, the Chairman of the General Council of the Bar, the Lord Chancellor of Ireland, the Attorney General for Ireland, the Chairman of the Incorporated Law Society of Ireland, the Lord Justice General of Scotland, the Lord Justice Clerk, and the Lord Advocate.

[90] Id., 144-145.

> There is not in England any written code regulating the etiquette and practice of the Bar. The General Council of the Bar from time to time deals with cases submitted to it for decision or advice with reference to practice and etiquette, and the answers to these questions are published in the annual statement issued by the Council. The Bar Council has, however, no disciplinary powers.

He referred to the Bar Committee's rules about retainers, and went on to say that the decisions and opinions of the General Council of the Bar were printed in the Yearly Supreme Court Practice, 1916, at p. 2054 and then described the discipline powers of the Benchers of the Inns and the appellate powers of the High Court. He then went on:

> In addition, there is, as is no doubt well known to you, a considerable floating body of practice and tradition in these matters, which for the most part, is not committed to writing.

[219] One of the General Council's published rules, regulations and decisions referred to by Sir Claud Schuster provided that a barrister "should (whilst acting with all due courtesy to the tribunal before which he is appearing) fearlessly uphold the interests of his client without regard to any unpleasant consequences either to himself or to any other person". Another was the "cab-rank" rule: in the absence of special circumstances, a barrister was obliged to accept a brief in a court in which he practised, at a proper professional fee. Another was the rule against accepting instructions from a lay client except in specified circumstances, which also said that, in the absence of exceptional circumstances, "it is contrary to etiquette and improper for a barrister to attend conferences at a solicitor's office". Another prohibited a King's Counsel from appearing in the higher courts without a junior, and referred to the "long-established and well-settled custom" (though not a rigid rule) under which the junior would not accept a fee less than two-thirds of the leader's fee. Others prohibited advertising, touting, fee-splitting and specific activities leading to publicity. Several rules dealt with a barrister appearing where he held one of a number of specified offices. Several rules dealt with fees and retainers. Thus, some of the rules were wholly or partly ethical in nature; others had to do with etiquette; and some were regulatory. Together they covered a substantial number of areas, but they did not purport to lay down comprehensive rules of conduct for barristers.

[220] A statement made by the Lord Advocate in his letter,[91] though descriptive of Scottish practice, is consistent with the mind set of the English Bar as well:

> I held office as Dean [of the Faculty of Advocates] for several years; and in accordance with the practice of my predecessors, I referred all cases of professional conduct which were referred to me, to solution in accordance with the simple rules of honour. Our tradition has always been that the more difficult the point is, the more strictly should the test of honourable conduct be applied. And it is obvious that the application of the rules of strictly honourable conduct consorts very ill with any attempt to reduce the rules of honour to a written code.

[221] So, at the end of the second decade of the 20th century, the Bar had developed a number of rules of ethics, etiquette and procedure, but it continued to depend for further ethical guidance on a notion of honour or gentlemanliness.

[222] That situation has changed. "There was," Anthony Thornton Q.C. has said,[92]

> an obvious gap created by the profession's oral tradition since no official rule book existed which could be readily consulted when a barrister's required conduct on any particular point was sought.

Although resolutions and rulings were circulated, they were not generally available. Boulton's *Conduct and Etiquette at the Bar* was created as an informal code in 1953, and a formal Code of Conduct was approved by a general meeting of the Bar in 1980 and came into effect in 1981. In 1987, the Bar Council was given the exclusive authority to amend the Code. The present Code was adopted by the Bar Council on January 27, 1990, with effect from March 31 of that year, and incorporates amendments made between 1991 and 1994.

(b) The Law Society

[223] Although the Law Society had a progressively increasing disciplinary function from 1877 to the fourth decade of the 20th century, it did not formulate rules of conduct before 1933. Professor Burrage has

---

[91] Id., p. 148. Anthony Thornton Q.C. has summarized the English view as follows: "Thus, conduct was, in reality, that to be expected of professional gentlemen whose working environment was the subject of intense peer-group pressure." (Thornton 1995 53 at 56) The account in the text of the adoption of the Bar's Code of Conduct is based on pages 57 to 59.

[92] Thornton 1995, 53 at 57.

suggested that this may have been because the discipline power over solicitors was still held by the courts (though by 1919 the Society was the principal disciplinary authority). Professor Burrage has also suggested that [93]"...their informal mechanisms probably did not work so well, indeed could not work so well [as those of the barristers], since solicitors were often out of sight and earshot of their colleagues. They also, of course, had many more temptations than barristers, since they handled clients' funds".

[224] In 1933, the *Solicitors Act* was amended to give the Law Society important new powers. The first was a power (accompanied by a duty) to make rules respecting solicitors' accounts. The second was a power to make rules "for regulating in respect of any other matter the professional practice, conduct, and discipline of solicitors", though the rules required the approval of the Master of the Rolls.[94] The Society issued its first Accounts Rules in 1934 and its first Practice Rule in 1936.[95] By 1960, the informal *Guide to the Professional Conduct and Etiquette of Solicitors* by Sir Thomas Lund ran to 173 pages. The present *The Guide to the Professional Conduct of Solicitors*[96] contains 698 pages, exclusive of Foreword and Introduction but including an account of the Solicitors Complaints Bureau. It includes wide-ranging statements of ethical standards and much specific regulatory material.

ii. Canada

[225] Before 1920, no Canadian law society had attempted to formulate standards or rules of conduct in written texts. Today, all Canadian law societies have written codes of conduct, that is to say, a combination of ethical precepts and rules of conduct, that are promulgated by the law

---

[93] Burrage 1996, 45, at 57.

[94] *Solicitors Act, 1933* (U.K.) 23 & 24 Geo. 5, c.24, s.1. Crawley and Bramall point out that the Law Society's regulatory powers come from the *Solicitors Act 1974*, the *Administration of Justice Act 1985*, the *Financial Services Act 1986*, and the *Courts and Legal Services Act 1990*. See Crawley & Bramall 1995, 99 at 101.

[95] Crawley & Bramall 1995 99 at 102. The first Practice Rule prohibited touting, advertising and the unfair attraction of business. The other historical references in the text are also based on Crawley & Bramall 1995.

[96] *Law Society Guide 1996.*

societies. This is a great change. The Canadian law societies have moved from a state of quiescence to one of extensive regulatory activity.

[226] Justice William Renwick Riddell was of the view that the situation of the legal profession in Canada in the second decade of the 20th century was much the same as that of the Bar in England. The essence of his view is in the following passage:[97]

> When I used to deliver lectures to the students of the Osgoode Hall Law School on Legal Ethics, I devoted most of my time and efforts to showing that the profession of law is a liberal as well as a learned profession, that there is and can be nothing in the practice of law inconsistent with the highest type of scholar, gentleman, and Christian. With that as a text all else follows -- the lawyer, a gentleman, will act as such, he will treat all, whether professional brethren or laymen, as he would be treated in like case -- that, it seems to me, is the whole of the law and the prophets.

But, despite Justice Riddell's views and over his objections, the Canadian Bar Association adopted "*Canons of Ethics*" in 1920. These were adopted by the law societies of all provinces from Ontario to British Columbia,[98] though often supplemented by rulings of a governing body.

[227] The 1920 *Canons* were not an exhaustive statement of ethical rules. They were approved as a correct, though not exhaustive, statement of some of the ethical standards observed by the members of the legal profession. The preamble said that the *Canons*

> should...be construed as a general guide and not as a denial of the existence of other duties equally imperative though not specifically mentioned.[99]

The *Canons* are short: including the preamble they take up 5 pages in the CBA Proceedings. They incorporate the notion that "the profession is a branch of the administration of justice and not a mere money getting trade" and the notion that gentlemanliness is an overriding

---

[97] "A Code of Legal Ethics", (1919) 4 Proceedings of the Canadian Bar Association pages 129 - 143 at 139.

[98] CBA Proceedings 1921, 238 at 239-240.

[99] CBA Proceedings 1921 at 233.

consideration.[100] They reflect some restrictive practices: solicitation of business is unprofessional; adhesion to established tariffs, when possible, is a duty; the acquisition of any interest in the subject matter of litigation being conducted by the lawyer (presumably including acquisition of an interest by way of contingent or conditional fee) is wrong "except as by law expressly sanctioned". The lawyer's position is very much within the established legal order: "the lawyer is more than a mere citizen. He is a minister of justice, an officer of the Courts, his client's advocate and a member of an ancient, honourable and learned profession." It is a lawyer's duty to maintain the integrity of the State and its law; "not to aid, counsel or assist any man to act in any way contrary to those laws"; and to support the bench against unjust criticism. "It is a crime against the State, and therefore, highly non-professional in a lawyer, to stir up strife or litigation by seeking out defects in titles, claims for personal injury or other causes of action for the purpose of securing or endeavouring to secure a retainer to prosecute a claim therefor".

[228] The *Canons* are open to criticism on a number of grounds. They incorporate, as has been noted, some restrictive practices. They do not encourage radical or reforming thought. They are based on an unrealistic view of professional human nature. They are drafted in such general terms that they are often unhelpful in concrete circumstances. But the standards of conduct which they prescribe would result, within ethical limits, in the interests of clients prevailing over the personal interests of lawyers.

[229] In 1974, the Canadian Bar Association adopted a new "*Code of Professional Conduct*". The *Code* set out 17 rules. Each rule was followed by commentaries which interpreted and applied the rule and notes which referred to authorities and sources. The whole occupied some 67 pages of

---

[100] "He should also bear in mind that he can only maintain the high traditions of his profession by being in fact as well as in name a gentleman": Canon 5(7), Ibid., at 237. This notion reads rather quaintly nowadays, but at least it suggests a higher standard of conduct. It cannot have been thought welcoming by the few women (including the present author's mother, who was admitted to practice in Alberta in 1920) then in the profession or contemplating entrance to it. Indeed, the Canons throughout use the masculine pronouns for lawyers; although, except in the passage just quoted, the references could be explained on the basis of the grammatical use of the masculine to include the feminine, the usage probably reflects the cast of thought of the times.

text. It was largely hortatory, but was much closer to being comprehensive than were the 1920 *Canons.*

[230] Following a committee report of the Federation of Law Societies,[101] the 1974 *Code* was widely adopted or used as the basis for provincial codes. The Law Society of Alberta, for example, issued a professional conduct handbook, one part of which was the 1974 *Code* and the other part of which consisted of specific rulings of the Benchers (which raised the total length to 82 pages and some 9800 words).

[231] The 1974 *Code* was revised by the CBA in 1987. The revision, though it made some significant changes, was substantially an updating of the 1974 *Code* in the light of experience. Most of the common-law provinces have adopted codes of professional conduct based on either the 1974 or the 1987 *Code,* supplemented or varied by the provincial law society.

[232] One province, Alberta, has gone further. In 1995 it adopted a different *Code of Professional Conduct*. This code consists of 15 statements of principle, something over 130 rules, and commentaries on some of the principles and all of the rules. It covers 118 pages of text and consists of some 30,000 words.

[233] The Alberta code is based on significantly different premises. The CBA codes are general in their language and are generally aspirational. The Alberta code is stated to be mandatory. It is intended to be more specific. As one of the committee that prepared it has said, it is a "law of lawyering" applicable to lawyers that is superimposed on the general law.[102]

[234] The Canadian law societies thus adopted comprehensive written standards of conduct before their English counterparts, though the Bar had developed important written rules of etiquette since the 1890s. This may be due to differences in conditions – e.g., the Canadian legal

---

[101] Report, Ad Hoc Committee on Uniform Standards of Professional Conduct and Ethics, Hurlburt , W.H. (Chairman), Federation of Law Societies of Canada, November 1974.

[102] Sydney Bercov Q.C., oral address to the Federation of Law Societies, 1991.

profession is much more diffuse than the Bar of England and Wales so that unwritten standards were earlier perceived to be inadequate – or to differences in traditions. There was, however, an important additional factor: the proximity of American examples was influential. The *Canons* of 1921 were influenced by the American Bar Association Code of 1908, and the 1974 *Code of Professional Conduct* was influenced by the ABA's later work.

[235] So the use of written standards or rules of conduct in both Canada and England has moved from zero in the late 19th century to the prescription of comprehensive standards and rules, and, in Alberta, to the prescription of mandatory and more specific rules.

c. Scope of prescribed ethical standards

[236] The Canadian and English codes of conduct impose a wide range of ethical obligations on a lawyer.

[237] A lawyer's principal ethical duties are to the lawyer's client. The codes require a lawyer to be loyal, that is, to provide advice or representation that is devoted to the client's interests and is free of outside influences such as conflicting interests or a wish to avoid adverse consequences to the lawyer, and they require the lawyer to preserve and account for property of the client that is entrusted to the lawyer. They require the lawyer to maintain the confidentiality of the client's information. They require the lawyer to give efficient service, that is, service that is delivered in a competent and conscientious manner. They require the lawyer to charge only reasonable fees.

[238] The codes limit the lawyer's duties to the client by imposing other duties. They require the lawyer to uphold the law personally and in their advice and representation. They prohibit the lawyer from misleading or obstructing a court. They provide that the lawyer must treat other lawyers with courtesy and good faith, and they may go on to prescribe ethical requirements for dealing with others with whom the lawyer comes into professional contact. They require the lawyer to disclose a client's confidential information if disclosure is necessary in order to prevent the commission of a serious crime.

[239] Some codes also impose duties that are not directly related to the provision of services to a client. Some prohibit discrimination, usually but not invariably only in the lawyer's professional milieu, on some or all of the grounds now usual in anti-discrimination legislation, and sometimes on additional grounds. The codes forbid criminal conduct. Sometimes they require the lawyer to act with integrity wherever they go, or to refrain from conduct that will bring the legal profession into disrepute.

[240] The Bar's *Code of Conduct* prescribes some important rules that are peculiar to the Bar. It prescribes the "cab-rank" rule, that is, it requires a barrister to accept a brief offered to them if it is in a court in which the barrister practises and if an appropriate fee is paid. It prohibits partnerships, that is, it requires every barrister in private practice to practise independently, though it permits the sharing of space and facilities through chambers. Subject to some exceptions, it prohibits a barrister from accepting a brief directly from a lay client. None of these rules applies to solicitors in England and Wales or to the fused profession in Canada: they are a reflection of the unique history, organization and ethics of the Bar.

d. Power to prescribe and enforce ethical standards and rules

[241] Any organization can develop and publish standards and rules of conduct for its members. It is not necessary for it to point to a source of authority in the law. The Canadian Bar Association, for example, did not need any authority in law to promulgate the 1920 *Canons of Ethics* or the 1974 and 1987 *Codes of Professional Conduct*. Standards of ethics promulgated without some authority in law are hortatory but cannot be enforced other than through the pressure of professional opinion.

[242] A self-regulatory institution which has the power to discipline its members on grounds which are not clearly established by law may have, and often does, a *de facto* power to prescribe and enforce ethical standards and rules. That is because it can decide to apply a disciplinary sanction for failure to adhere to the ethical standards and rules which it has promulgated; indeed, there is likely to be pressure, as a matter of fairness to those subject to disciplinary sanction for the promulgation of standards and rules by which conduct will be assessed. While the standards and rules do not become law merely because the disciplinary

authorities refers to them, they are indirectly given effect almost as if they were law. Some of the Canadian statutes merely confer on governing bodies the power to impose disciplinary sanctions for "unprofessional" or "unbecoming" conduct;[103] these bodies effectively have the power to promulgate and enforce ethical standards and rules. In England, while the Bar Council does not itself have the power to impose disciplinary sanctions, the ethical standards which it promulgates are enforced through the discipline process.

[243] Some of the Canadian statutes give specific authority to law societies to promulgate ethical standards and rules, and some of those that do go on to give those standards and rules the force of law. English legislation gives the Law Society the power to regulate the conduct of solicitors, so that the *Guide to Professional Conduct* has a basis in legislation as well as in the recognition by the *Courts and Legal Services Act 1990* of its rules of conduct in relation to the exercise of rights of audience and rights to conduct litigation.

[244] So, the Canadian and English governing bodies have and exercise *de facto* and sometimes *de jure* power to promulgate ethical standards and rules.[104]

e. Purpose of prescribing ethical standards and rules

[245] Unless some legal consequence is attached to an ethical prescription, a law society can only exhort its members to adhere to the prescription. Exhortation is often useful: a right-thinking lawyer needs only to see their duty in order to decide to do it. The effect of exhortation to observe ethical prescriptions, however, has its limits. The attachment of some sort of legal consequence to ethical prescriptions is likely to be needed in order to make them effective.

[246] While the prescription of ethical standards appears to have arisen as an adjunct to discipline processes, and while the standards are not always given the formal status of law, the standards play a significant

---

[103] The following do not include a specific power to prescribe ethical standards and rules: *Law Society Act* (Man.); *Barristers and Solicitors Act* (N.S.); *Legal Profession Act* (Yuk.).

[104] These powers are not untrammelled. See the discussion in Chapter II.

part in the determination of when legal sanctions are applied to lawyers under the discipline process.

4. Enforcement of Standards of Conduct: The Discipline Process

a. Development of discipline systems

[247] The extensive exercise of disciplinary powers by the governing bodies of the legal profession is a comparatively recent phenomenon.

[248] In England, the Inns of Court, through the interaction of their power to terminate the membership of barristers and the higher courts' refusal to hear advocates who were not members of the Inns, had from early times the power to discipline barristers. Before the 20th century, they did not exercise that power extensively. Although the Law Society became an important factor in the discipline of solicitors under a statute of 1877, it did not itself have the power to impose disciplinary sanctions until a statute of 1919 gave it that power. In Canada, although the Law Society of Upper Canada had from its inception in 1797 a claim to the power to discipline barristers, it was only in 1876 that this power became express and that it was extended to solicitors; and the other governing bodies did not obtain substantial discipline powers until the mid-to-late 19th century, and, in some cases, well into the 20th century.

[249] Nowadays, the situation is quite different. The discipline of barristers is a major function of the institutions of the Bar and the discipline of solicitors is a major function of the Law Society. Discipline is also a major function of the Canadian law societies. Substantial financial and staff resources go into the disciplinary systems and elaborate structures have been created to administer them.

[250] Some discipline proceedings are commenced on the motion of a governing body or a member or staff member or by an outside event such as the conviction of a lawyer for a crime. However, the Canadian and English discipline systems are primarily complaint-driven, that is, the disciplinary bodies usually take action when a complaint is made about a lawyer by a client, third person, or another lawyer. In their early stages, the governing bodies have typically focussed entirely on the protection of the public by the imposition of sanctions for conduct which is inconsistent with professional standards of conduct. They have tended to use

promulgated ethical standards and rules in determining whether the conduct complained of is "unprofessional", "unbecoming", or "deserving of sanction", depending on the wording of the applicable statute. When the systems have become fully developed, these sanctions have customarily included reprimands, fines, cost assessments, suspensions and striking from the rolls.

[251] In a later stage, the discipline systems have typically been used to regulate not only the ethical conduct of lawyers, as that is generally understood, but also the competence with which lawyers deliver service and the quality of service which they deliver. In Canada, this development began with, or at least was strongly influenced by, the 1974 CBA *Code of Professional Conduct*, which declared that it is an ethical duty not to undertake to provide a service which a lawyer is not competent to provide, and that it is also an ethical duty to provide service of a quality which lawyers generally would consider that a competent lawyer would deliver in like circumstances. The use of the discipline power in connection with incompetence and inadequate service will be discussed later in this chapter. In England, both the Bar's *Code of Conduct* and the Law Society's *Guide* impose similar requirements.

[252] The discipline systems have extended their functions in another direction as well. While deterrent sanctions continue to be the principal disciplinary device, the law societies have moved into remedial sanctions. Governing bodies may impose practice restrictions or require a lawyer to practise under supervision. They may require a lawyer to take continuing legal education courses or some form of retraining. They may require a lawyer who has an alcohol or drug problem to take treatment. Some have "spot audit" systems which, by random investigation of trust accounts, either find that an ethical offence has been committed or serve as an early-warning signal to enable the governing body to take remedial steps so that a lawyer will be able to practise safely.

[253] In England, the Law Society has gone further with its discipline system. It provides a mechanism by which a client can obtain compensation up to 1000 pounds from a solicitor for "shoddy work", that is, for providing substandard legal services. The Bar is also instituting a system under which compensation to lay clients will be available through

the disciplinary system, though not where barristers' immunity from civil action applies, and only for services which are significantly below what might reasonably be expected and cause actual financial loss.[105]

b. Discipline structures

[254] Under the Quebec Professional Code, the discipline power is exercised by discipline committees, the chairman of each committee being a judge appointed by the Lieutenant Governor in Council after consultation with the Bar or the Chamber of Notaries, and the other members being members of the profession appointed by the Bureau, or governing body. Elsewhere in Canada, the discipline function is customarily exercised by committees of the governing body and by the governing body itself. The statutes usually provide for appeals to the courts by members of the society who are convicted of disciplinary offences.

[255] The discipline structures of the Bar of England and Wales are as follows:

1. The Professional Conduct Committee.
   This is a subcommittee of the Bar Council, which includes a minority of lay members also appointed by the Bar Council.[106] Its functions are to "investigate and sift complaints", including complaints initiated by the Bar Council, and to prefer and prosecute charges before a Disciplinary Tribunal. It has the power to dismiss a complaint or to decide that no action shall be taken upon it.[107]

---

[105] I will discuss the consequences of this extension from regulation to adjudication later in this chapter.

[106] *Standing Orders for Committees and Sub-Committees of the Bar Council,* The General Council of the Bar, 1993, s.42.

[107] *The Professional Conduct Committee Rules*, being Annexe M to the *Code of Conduct of the Bar of England and Wales,* The General Council of the Bar, 1990, as amended.

2. **The Disciplinary Tribunal**.

Disciplinary Tribunals are appointed by the Inns' Council under the authority of the Judges, as Visitors.[108] A tribunal is appointed by the President from a panel appointed by the Inns and consists of a judge, a lay representative and three barristers. A Disciplinary Tribunal has powers of advice, admonishment and reprimand, the power of suspension and the power of disbarment.[109]

3. **The Visitors**.

An appeal lies to the Judges as Visitors. According to the seriousness of the conviction, the appeal will be heard by one or three judges of the High Court or the Court of Appeal appointed by the Lord Chief Justice. The tribunal can allow an appeal in whole or in part, vary or confirm and order, or direct a re-hearing. [110]

[256] The discipline system is thus within the control of the institutions of the Bar, subject to appeal to the Judges as Visitors.

[257] The discipline structures of the Law Society are as follows:

1. **The Office for the Supervision of Solicitors and the Compliance & Supervision Committee**

The OSS is the Law Society's complaints handling arm, which acts under powers delegated to the Compliance and Supervision Committee by the Law Society's Council. The OSS investigates and takes action on complaints of professional misconduct – a regulatory function – and on complaints of inadequate professional service -- a consumer-complaint-adjustment function. On a complaint of inadequate service it has significant powers: it can disallow a solicitor's costs or it can order a solicitor to pay compensation up to 1000 pounds or to take action to rectify an error or to take, at the

---

[108] *Constitution of the Council of the Inns of Court*, 1986, s. 12.

[109] *The Disciplinary Tribunals Regulations*, Annexe N, *Code of Conduct of the Bar of England and Wales*. I infer that the members appointed by the President come from the panel appointed by the Council of the Inns. See especially sections 2 and 18.

[110] *The Hearings before the Visitors Rules* made by the Judges of the High Court as Visitors to the Inns of Court, Annexe *O*, *Code of Conduct of the Bar of England and Wales.* See especially sections 10 and 11.

solicitor's own cost, "such other action in the interests of the client as the OSS may specify". If a client requires a solicitor to obtain a "Remuneration Certificate", the OSS provides the certificate, which determines what would be a fair and reasonable charge and, accordingly, the amount payable.

On the discipline side, the OSS may "intervene" in a solicitor's practice under Schedule 1 of the *Solicitors Act 1974*, and take possession of the money and documents held in connection with the practice. It may refuse a practising certificate or attach conditions to one. It has other important powers as well. Finally, it may institute proceedings against solicitors before the Solicitors' Disciplinary Tribunal.

The OSS is supervised by the Compliance & Review Committee which reviews all aspects of policy and procedure both for the handling of matters relating to the regulation of solicitors and for the handling of complaints concerning the quality of service provided by solicitors and recognised bodies. The Committee hears appeals from the OSS on specific matters. One sub-committee with a majority of solicitors deals with matters of professional regulation and another with a majority of members who are not solicitors, deals with consumer-related matters.

The Compliance & Review Committee is a standing committee of the Law Society. The Law Society has, however, given assurances that the adjudicative functions of the Committee and the OSS are exercised independently of the Law Society. These assurances have met with some scepticism, which has probably increased since the Secretary General, upon the suspension and subsequent resignation of the Director in August 1999, took over the administration of the OSS. On the other hand, the majority of non-solicitors on the sub-committee of the Compliance & Review Committee which deals with consumer complaints should be a significant assurance of independence.

2. **The Solicitors Disciplinary Tribunal**.

The Solicitors Disciplinary Tribunal deals with all complaints against solicitors that are too serious to be fully dealt with by the OSS and the Compliance & Review Committee, and it also hears applications by solicitors for restoration to the roll. The Tribunal "is independent of the [Law] Society". It is appointed by the Master of the Rolls. A disciplinary panel consists of two solicitors of 10 years' experience or more and one lay person. It can fine up to 5000 pounds, suspend, exclude from legal aid work and disbar. Matters are usually, but not invariably, brought forward to it by the OSS.

A solicitor can appeal from the Tribunal to the High Court or the Master of the Rolls, depending on the nature of the disciplinary action.[111] The traditional power of the higher courts to discipline solicitors, who are declared to be officers of the Supreme Court, is retained.[112]

[258] While the Law Society's Council appoints and is ultimately responsible for the complaints-handling system through the OSS and the Compliance and Supervision Committee, it has been at pains to emphasize the independence of these bodies, and the latter has a distinct non-solicitor element, which, in dealing with complaints of inadequate service, is in the majority. It will also be seen that, while the disciplinary tribunal retains a majority of solicitors, it requires non-solicitor representation and is appointed by a non-solicitor authority. The self-regulatory powers of the Council of the Law Society have been significantly diminished, though the powers are still exercised by organs of the legal profession.

c. Dealing with consumer complaints[113]

---

[111] *Solicitors Act 1974* (U.K.), 1974, c. 47,s.49.

[112] *Solicitors Act 1974* (U.K.), 1974, c. 47, s.50.

[113] Compensation or assurance funds compensate clients but they deal only with a narrow category of claims for negligence, incompetence, or worse, and with cases in which serious malfeasance has already been established for regulatory reasons. Compulsory errors and omissions insurance schemes, even if administered by a law society, do not constitute consumer-complaints systems as the insurers act as ordinary insurers and do not adjudicate on liability or amount.

[259] The function of the Law Society, the Solicitors Complaints Bureau and the Office of the Supervision of Solicitors which has attracted the bulk of the criticism of self-regulation in practice is the handling of complaints of inadequate professional service, that is, the adjudication and adjustment of specific consumer complaints in relation to specific services. It is this function which has put stress on the regulatory structures and resources of the Law Society to the point where the Government has issued, and to some extent implemented, threats of imposing outside regulation on the legal profession. The Bar is finding itself compelled to move towards adopting a similar function.

[260] What may now be called "traditional" regulation by the institutions of the legal profession was established to maintain and improve the quality of legal services. The sanctions which "traditional" regulators impose do not give relief to clients or to others who suffer loss as a result of legal services rendered unethically, incompetently or negligently. The sanctions – reprimands, remedial orders, fines, suspensions and disbarment – are intended to enable and induce practitioners to give ethical and competent service; to deter practitioners from giving unethical or incompetent service; and, if necessary, to remove an unethical or incompetent practitioner from the practice of law. Except incidentally, the "traditional" regulator does not resolve disputes between clients and solicitors or give any relief to unhappy consumers for things already done.

[261] The objective of a consumer-complaint service is quite different. It is to compensate a consumer for the inadequacy of the goods or services which the consumer has received from a provider or to see that the consumer gets the goods or services contracted for. The OSS's consumer-complaint function is to adjudicate a dispute between a service-provider and a consumer and to make a legally binding directive to the provider to compensate the consumer or to provide other relief to the consumer. The OSS can order a lawyer to pay compensation up to 1000 pounds; it can reduce the amount of the lawyer's account; and it can order the lawyer to take remedial action for the benefit of the client.

[262] A regulatory function under which regulators impose sanctions on lawyers who provide unethical or incompetent legal services is one thing.

An adjudicative and adjustment function under which a consumer-complaint service decides the relative rights of consumers and service-providers and, where appropriate, imposes legal liabilities on service-providers in favour of consumers, is quite another.

[263] The two functions necessarily become blurred in practice. Most complaints made to "traditional" regulators of the legal profession are consumer complaints -- complaints about failures of service which can be serious enough to clients but which often do not involve any failure of competence or ethics. Under a "traditional" regulatory system, the fact that the law society commences an investigation of a consumer complaint will often cause a lawyer to take remedial steps which satisfy the complaint, if not always the complainant, so the disciplinary system does in some cases perform a consumer-satisfaction function. A lawyer may take remedial steps because of embarrassment, because of a desire to get the regulator out of their life, or because of a fear that the law society may consider that the complaint does in fact disclose a failure of ethics or competence which will cause it to take the investigation further. Satisfaction of the complaint under such circumstances is a by-product of regulatory activity rather than the purpose or object of that activity, though the unpleasant experience of having to account to the law society may have the regulatory effect of persuading the lawyer to change their ways in order to avoid future unpleasantness.

[264] If a client legitimately complains to a law society about inadequate service, it is likely to seem appropriate for the law society to see that the client's complaint is satisfied or compensation given, and it is likely to seem efficient to see that compensation or remedial action is taken in the regulatory proceedings. Further, satisfaction of consumer complaints is likely to be seen as good public relations by the regulator and adopted as a cause by a political authority. Presumably it is for reasons such as those that the Law Society engrafted a consumer-complaint service on to its regulatory function, and that the Bar is now doing the same, though to a more limited degree.

[265] The Legal Services Ombudsman has perceived that "traditional" regulatory approaches "sit uncomfortably with an effective complaints-

handling function".[114] This perception is, in my submission, correct, if "complaints-handling function" means the adjustment and adjudication of consumer complaints. However, the LSO characterizes the "traditional" approach as "a recurrent and slightly morbid pre-occupation with professional purity, with discipline, and with keeping the springs of club membership free from contamination", and says that "a tell-tale sign of a modern regulatory system is that it has made the transition from the purely disciplinary model to the fully engaged consumerist model".

[266] I do not think that the pejoratives which the LSO has employed about the "traditional" regulatory approach are appropriate. A pre-occupation with professional purity – that is, a pre-occupation with trying to ensure that lawyers act according to professional standards – is not only appropriate but mandatory to a body the function of which is to regulate professional activities, and it is desirable that the pre-occupation should not be the fancy of a moment or merely occasionally recurrent, but rather should be continuous. Given that the "club" which is involved is the body of those to whom society has seen fit to entrust the right to practise law, it is also appropriate that the regulator should, to the extent possible, keep the springs of membership in that body free from contamination.

[267] If the "fully-engaged consumerist model" means a body engaged in seeing that consumer complaints are efficiently dealt with to the exclusion of, or even to the detriment of, the "traditional" activities, the measure of the success of the model will be the extent to which consumer complaints are satisfied, possibly including consumer complaints which are felt but are not objectively justified. It would not be a function of a fully-engaged consumerist body to maintain and operate a system of self-regulation which is designed to see that standards of ethics and competence and maintained and that the body of the profession be composed of ethical and competent professionals; that is to say, "a fully-engaged consumerist model", however great the amount of happiness it might be able to confer on unhappy individual consumers, would not be likely to achieve the goals of self-regulation.

---

[114] Legal Services Ombudsman 1998/99, at 8.

[268] In England, it is probable that the "fully-engaged consumerist model" die has been irrevocably cast, or at least a mixed model in which the activities of the fully-engaged consumer side will obscure the regulatory function. The creation of the Legal Services Ombudsman and the augmentation of their powers by the *Access to Justice Act 1999* are significant steps in that direction. So are the provisions in the *Access to Justice Act 1999* under which an official appointed by the Lord Chancellor can give directions to the regulatory bodies about the operation of the complaints-handling system and impose fines for failure to comply. So it appears that the Law Society or its organs will have to find a way of dealing with the overwhelming number of consumer complaints that the present system engenders. If the Lord Chancellor's new bludgeon does not work because the Law Society cannot or will not adequately adjudicate upon and adjust consumer complaints, the Government, which has so far resiled from actually seizing the intransigent consumer tiger by its tail, will have to do something different.

[269] Self-regulation in Canada faces a similar problem in that many, indeed most, complaints made to the law societies are about actual or perceived inadequacies in the delivery of specific legal services which do not demonstrate the kinds of shortcomings of ethics or competence which can be efficiently and effectively dealt with under the discipline systems. It is common for the intervention of a law society to result in the complete or partial satisfaction of the complaint, as the lawyer complained of will often be moved by the intervention to do what they should have done without it. However, the Canadian law societies do not have power to impose any sanction that will confer direct personal benefit on a complaining client. If what might be characterized as a consumer complaint goes along the discipline process, the result is likely to be the imposition of one of the less severe penalties, which may have a useful regulatory result by causing the lawyer to mend their ways, but which will not confer any direct benefit on the complaining client.

[270] Occasionally, under the Canadian disciplinary systems, a lawyer will generate a large number of complaints about specific actions or cases of inaction, none of which is in itself sufficient to justify disciplinary action – failing to report, missing appointments, discourtesy and so on.

There may come a time when the number of such complaints raises a possibility that the lawyer is either generally unethical or, more likely, generally incompetent, in the management of their legal affairs, which is strong enough to justify further investigation. This may involve a practice review, which may cause the lawyer to provide more satisfactory service. If there is some underlying cause, then remedial or even punitive sanctions may be imposed. But there is a real difficulty in applying to these circumstances the proposition that "many a mickle makes a muckle:" notions of fairness will stand in the way of imposing heavy sanctions for specific conduct that never of itself amounts to a clearly demonstrated lack of integrity or competence, and if the law societies are not moved by those notions, the courts will allow appeals against their decisions.[115]

[271] Increasingly, the Canadian law societies, or at least those with sufficient resources, are turning to a form of mediation process conducted by staff members or volunteers as a solution to the problem of consumer complaints. This development may tend to draw the law societies into the consumer complaint business, but mediation efforts do seem to achieve satisfaction in many cases and have had the effect of significantly reducing the number of consumer complaints that are brought into the formal discipline systems. There is some risk that satisfying the complainant will become the end to be achieved, rather than ensuring high standards of ethics and competence, with the result that matters are resolved at the mediation stage when they should be carried forward into the formal discipline system, but it should be possible to avoid such a result.

[272] It is entirely understandable that a consumer-complaint system was adopted in England. In retrospect, and with the benefit of hindsight, it seems that that was a mistake which may strike at the roots of the self-regulatory systems of the Law Society and even the Bar. Canadian law societies should take note of this unhappy example and avoid becoming entangled in a function which they are ill-equipped to perform and which,

---

[115] In the 1970s, when I was a bencher, the law societies began to cope with such cases by devices such as invitations to attend on benchers or by benchers attending on the members involved. The problem is still not resolved; see e.g., the Report of the Competency Planning Committee of the Law Society of Alberta, 1998, in which practice reviews and a stronger disciplinary process for incorrigible incompetence are recommended.

despite its apparent public relations advantages, is likely to prove disastrous.

d. Summary of historical development of discipline systems

[273] The purposes of the discipline systems are to protect the public from lawyers' conduct which does not live up to the ethical standards promulgated by the governing bodies and to maintain and to promote high standards of competence and diligence in the delivery of legal services by lawyers. Since the middle of the 19th century, the exercise of the discipline function has moved from the sporadic, embryonic and desultory towards the habitual and the extensive, to the point where, in England, the Bar and the Law Society, and, in Canada all but the smaller law societies, have substantial organizations and resources devoted to it.

[274] The exercise of disciplinary powers by the governing bodies is usually subject to appeals to the courts, and it is sometimes subject to controls by legislatures or government agencies. In some cases, significant aspects of the disciplinary power have been delegated to organs of the profession which are separate from the governing bodies and exercised independently of them. It is still, however, appropriate to consider the profession to be self-regulated in such cases.

[275] Disciplinary structures and processes, exiguous until well into the 20th century, have developed into comprehensive systems of enforcement of ethical standards and rules.

5. Enforcement of standards of quality of service[116]

a. Present situation

i. In Canada

[276] I have described positive measures that are taken by the English and Canadian governing bodies to ensure that lawyers are generally competent to deliver legal services. (See B., Regulatory Devices to Control

---

[116] The distinction between the devices for the enforcement of standards of conduct and devices for the enforcement of standards of quality of service is artificial. First, unethical conduct, e.g., theft of trust money, obviously has a deleterious effect on quality of service. Second, diligence and the maintenance of competence are a reflection of faithfulness. However, it is convenient to distinguish between devices that focus on conduct and devices that focus on output.

the Quality of Legal Services, above.) These primarily have to do with education and training. I now turn to negative measures that are intended to prevent lawyers from providing inadequate legal services. These are based on ethical duties relating to the quality of service and on the associated exercise of the discipline power.

[277] It is first necessary to note that the word "competence" has given rise to semantic difficulties which in turn have given rise to difficulties in the framing of ethical rules relating to competence, in the determination of how the discipline process should determine that there is a lack of competence, and how the discipline process should deal with lack of competence. These difficulties are important, but a discussion of them here would impede exposition, so that I have put the discussion into the Appendix to this book, to which the reader's attention is drawn. Here it is enough to say that in my view the incompetence that is to be subjected to the disciplinary process must be incompetence **in action**, that is incompetence to do that which a lawyer has undertaken to do; a state of incompetence is not, in my view, ethically wrong while the lawyer does not do anything for which they are not competent. The 1978 Conference on Quality of Legal Service said this:

> The Conference accepts the definition of "competence" as the state of having the ability or qualities which are requisite or adequate for performing legal services undertaken...

It then went on:

> A lawyer is competent if he has the demonstrated capacity to provide a quality of legal service at least equal to that which lawyers generally would reasonably expect of a lawyer providing the service in question. The words "demonstrated" and "reasonably" must be liberally interpreted so that any review of competence will take into account all circumstances, especially those of new graduates and of practitioners in smaller centres.[117]

As is noted in the Appendix, these statements have their own difficulties. However, they do, in my opinion, properly say what is the competence that is a matter of ethics – competence to perform duties which are undertaken – and they provide a test to be applied to determine whether

---

[117] Hurlburt (ed.) 1979, 29.

in a particular case a lawyer has failed to meet the ethical standard – what quality of service lawyers generally would expect.

[278] There is still a further distinction which must be made. There are two determinants of the quality of a legal service. The first is the competence which a lawyer brings to the provision of legal services, that is, the lawyer's ability to provide services of an acceptable quality. The second is the way in which the lawyer applies their competence. This includes the extent to which the lawyer's effort is conscientious and efficient, which may be compendiously described as "diligence".[118] If a lawyer who is competent to provide a service diligently applies their competence to providing a service of the appropriate quality, then the quality of the services should be adequate according to whatever standard of quality is applied.[119] It is not always easy to decide whether a given result has occurred through lack of competence or lack of diligence, but the two things are different in kind and it is best to think of them separately.

[279] Until the early 1970s, so far as competence of lawyers and the quality of legal services were concerned, the Canadian law societies in general concerned themselves only with ensuring that a lawyer, upon admission to practice, had undergone the education and training which was required. The law societies did not supervise the post-admission competence of lawyers – though they had come to encourage continuing legal education – nor did they do anything to ensure that lawyers provided legal services only when competent to do so.

[280] In Quebec, the Board of Notaries had long carried out a programme of inspection of notarial offices by board officials. This included the examination of documents prepared by notaries. Then, in 1973, the *Professional Code*[120] enacted specific requirements which applied to all of

---

[118] The notions of competence and diligence are both discussed in the Appendix.

[119] A competent lawyer, though acting diligently, may make a mistake which brings the quality of service below an acceptable standard, but that is negligence of a kind which is not within the disciplinary purview of the governing bodies.

[120] *Professional Code,* S.Q. 1973, c.43,ss.107,110,111,114, (as revised by *code des professions*, L.R.Q. 1977, c.C-26) (and as amended by *loi modifiant le code des professions et d'autres lois*

(continued...)

the professions governed by it, including both the Board of Notaries and the Bar of Quebec. The Code:

1. establishes a professional inspection committee in each governing body;

2. requires each professional inspection committee to "supervise the practice of the profession by the members of the order", and, in particular, to "inspect their records, books, registers...and the property entrusted to them by their clients", and provides for inspectors to be retained to perform these functions;

3. requires the committee, at the request of the governing body, to "inquire into the professional competence" of a member, with power to conduct such inquiries on its own initiative as well;

4. requires the committee to make a report to the governing body with recommendations, including a recommendation that the governing body require a member "to serve a period of refresher training or take a refresher course" or both, and a recommendation that the governing body restrict or suspend the member's right to engage in professional activities during the training period or course.

Thus, it was in Quebec that incompetence was first brought within the disciplinary purview of governing bodies of the legal profession and special remedies provided for it. Ordinary disciplinary offences turned up during the investigation are to be put into the usual disciplinary process.

[281] In British Columbia, a special committee which reported to the Law Society in 1973 recommended "that the Act and Rules should be amended to contain additional provisions in order to allow the profession to deal in a timely way with the issue of continuing professional competence in situations other than those that involve alleged professional misconduct".[121] The British Columbia Act was therefore amended to

---

[120] (...continued)
professionelles, S.Q. 1994, c.40,ss. 94,97,98,101). See Hurlburt 1979, at 429.

[121] "Report of the Special Joint Committee on Competency appointed by the Law Society of
(continued...)

provide for investigations of competence by the governing body, with power to require members who had demonstrated incompetence to take courses or training, pass examinations, impose conditions of practice, and suspend members until these things had been done.[122]

[282] But it was the Canadian Bar Association's Code of Professional Conduct of 1974 that provided the major impetus for the movement of the Canadian law societies into the regulation of professional competence and quality of service.

[283] Lawyers are supposed to have special competence in the provision of legal services. That is why the practice of law is reserved for lawyers. By the very fact that they undertake to provide a legal service, a lawyer represents to the client that the lawyer has that special competence and will exercise it faithfully and diligently for the client's benefit.[123] A moment's thought based on those statements makes it obvious that it is unethical for a lawyer to undertake to provide a legal service unless they have the competence to perform the service, and that it is unethical for a lawyer to provide a legal service that does not meet a professional standard of adequacy. But, in Canada, historical mind sets did not give way to that moment's thought until 1974. It was the advent of the 1974 CBA Code that enabled the connections between ethics and competence and between ethics and diligence to be generally perceived in Canada.

[284] The 1974 Code laid down the following rule (which is really two or three rules):

> **Rule**
>
> (a) The lawyer owes a duty to the client to be competent to perform the legal services which the lawyer undertakes on his behalf.

---

[121] (...continued)
British Columbia and the B.C. Branch of the Canadian Bar Association," in Hurlburt 1979, at 403.

[122] The amendments are reproduced in Hurlburt 1979, 435. Note that a Special Committee on Competence had made an extensive report to the Law Society of Manitoba, which is reproduced in Hurlburt 1979, at 337.

[123] "The solicitor's very presence as a lawyer...is an assurance to the public that he has the training, the talent and the diligence to advise them about their legal rights and competently to aid in their enforcement." *Cook v. Szott et. al* (1968) 68 D.L.R (2d) 723,726 (Alta. App. Div.).

> (b) The lawyer should serve his client in a conscientious, diligent and efficient manner and he should provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation.

The Federation of Law Societies, having, as noted above, accepted the 1974 Code and recommended its adoption by the Canadian law societies, gave thought to the implementation of the rule. The mechanism chosen was to assemble a National Conference on Quality of Legal Services, which was an invitational conference with representation from every province. Participants included Federation officials, law society officials, practitioners, academics, continuing legal education and bar admission officials, and judges. The Conference, which was held in 1978, made wide-ranging recommendations for measures intended to maintain and improve competence and quality of service, including both positive support measures and the imposition of sanctions through the disciplinary process or a like process for breaches of the duties of competence and diligence. [124] The 1978 Conference was followed up in 1980 by a national Workshop which was intended to monitor progress following the Conference and to make specific suggestions for programs which the law societies might adopt; and the Workshop also made substantial recommendations. The participants were law society officials, continuing legal education officials and academics. [125]

[285] Since the 1978 Conference and the 1980 Workshop the activities of the law societies in the maintenance and improvement of competence and in the enforcement of the duties of competence and diligence have been expanded as indicated in the descriptions of the present situations with respect to each as described above.

[286] So it is now generally recognized in Canada that a lawyer is under an ethical duty to be competent to render the legal services they undertake. In some cases, this duty appears expressly in professional

---

[124] The Conference materials and papers are found in Hurlburt 1979, and the Conference's recommendations are at pages 29-38.

[125] The Workshop materials are to be found in Hurlburt 1981, and the Workshop's recommendations are at pages 21-40.

conduct handbooks or in regulations.[126] In others it appears by necessary implication from regulations or statutes. The Alberta and British Columbia Professional Conduct Handbooks go on to impose a broader duty, that is, a duty to maintain competence in "each area", or "all areas" " in which the lawyer practises".[127]

[287] Disciplinary sanctions can be imposed for a breach of the duty to be competent to perform services which are undertaken. The ordinary discipline procedure may apply, or there may be a separate track for competence – or, more correctly, incompetence – matters. The usual disciplinary organs may perform the disciplinary function or special committees may perform some part of the function. In all cases, special remedial measures are available in addition to the usual sanctions, usually a power to require the lawyer who is found to have provided inadequate service because of incompetence to undergo remedial education or training or a power to limit the lawyer's areas of practice.

[288] It is also generally recognized that a lawyer is under an ethical duty to be diligent in rendering the legal services they undertake. Lawyers are therefore under a duty of diligence as well as a duty of competence. That is to say, lawyers are not only required to have the capacity to provide the services they undertake to provide but must also apply that capacity or ability in a diligent manner. This duty may be imposed expressly by a code of professional conduct or by inclusion in a general requirement to give competent or adequate service. Or it may fall within the general

---

[126] See, e.g., *B.C. Professional Conduct Handbook,* c.2, Rules 1 and 2; *The Law Society of Alberta Professional Conduct Handbook,* c.2, Rule 2; *Law society of Saskatchewan, Code of Professional Conduct*, c.2, Rule (a) ; *Manitoba Code of Professional Conduct*, c.2, Rule (a); *The Law Society of Upper Canada Professional Conduct Handbook,* Rule 2: *Professional Code*, *L.R.Q. 1977, c. C-6, s.112; Barristers and Solicitors Act,* R.S.N.S. 1989, c. 30, s. 31. There does not appear to be special mention in New Brunswick legislation, and the New Brunswick Professional Conduct Handbook merely says that negligence does not normally constitute professional misconduct (Part C, Rule 13).

[127] B.C. *PCH* c.2, Rule 1*; Alberta PCH* c.2, Rule 1, *supra,* note 130. These rules are appropriate as aspirational standards. However, if an "area" means more than the specific area demarcated by what the lawyer actually does, the rules will have the effect of saying that a lawyer who stays within the limit of their competence and delivers only legal services of an appropriate quality can be guilty of an ethical breach of duty because they were not competent to perform services which they did not undertake to perform. It is not clear to me why this should be.

power of a law society to impose penalties for unethical conduct. In any of these cases it may be treated as an ordinary discipline matter.[128]

ii. In England

[289] In the past, according to Professor Ross Cranston,[129] "there was a reluctance to treat a failure in care and skill as professional misconduct". As late as 1971, Sir William Boulton, though he said in his *Conduct and Etiquette at the Bar* that "a barrister should, while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interests of his client without regard to any unpleasant consequences either to himself or to any other person", did not mention any duty of competence to act. Sir Thomas Lund, at page 61-62 of his 1960 *A Guide to the Professional Conduct and Etiquette of Solicitors* said: "Negligence or want of professional skill on the part of a solicitor are not, I think, in themselves grounds for the exercise of disciplinary jurisdiction, and the proper remedy in such matters is a civil action for damages", though he went on to quote a Disciplinary Committee statement to the effect that negligence may be of such a character and so aggravated as to merit the description of professional misconduct or conduct unbefitting a member of the solicitors' profession. Gross delay could also amount to professional misconduct. The Law Society's 1974 *Guide*[130] said that "professional negligence could be professional misconduct if it is dishonourable or "such as to be regarded as deplorable by his fellows in the profession", but the context does not suggest that mere incompetence would be included. [131]

[290] Now, however, sec. 12.02 of the 1996 *Guide* says that "[a] solicitor must not act, or continue to act, where the client cannot be represented with competence or diligence", and sec. 12.06 says that "[a] solicitor must

---

[128] Of course, where both incompetence and lack of diligence contribute to the inadequacy of legal services, the disciplinary authority may not differentiate.

[129] Cranston 1995, at 11.

[130] *A Guide to the Professional Conduct of Solicitors*, The Law Society, 1974, 28, paras 14.1-14.3.

[131] By 1986, the situation had changed: Principle 7.12 of *The Professional Conduct of Solicitors* of that year was "A solicitor who has accepted instructions on behalf of a client is bound to carry out those instructions with diligence and must exercise reasonable care and skill". Principle 11.01 added duties of promptness and keeping the client properly informed.

carry out a client's instructions diligently and promptly." So the duties of competence and diligence are now specifically recognized.[132]

[291] The *Solicitors Act 1974* has two remedial provisions which have no counterpart in Canada:

1. Under sec. 37A and Schedule 1A, the Law Society's Council has the following powers where services provided by a solicitors "are not of the quality which it is reasonable to expect of them":

   (a) power to disallow a solicitor's costs;
   (b) power to direct a solicitor, at the solicitor's expense, to rectify an error or take other action;
   (c) power to direct a solicitor to pay compensation up to 1000 pounds to the client.[133]

2. Under sec. 35 and Schedule 1, the Council, for undue delay or incapacity as well as for suspected dishonesty and a number of other circumstances, may take possession of the money and documents held by a solicitor in connection with the solicitor's practice.

These powers are delegated by the Council to the Office for the Supervision of Solicitors. They are a material addition to the remedies available for inadequate service.

[292] Barristers are also under duties of competence and diligence. Sec. 601 of the *Code of Conduct* says that "[a] practising barrister...must in all his professional activities...act promptly conscientiously diligently and with reasonable competence", and "must not undertake any task which...he knows or ought to know he is not competent to handle".

---

[132] See also *Law Society's Code for Advocacy*, Annex 21A to the *Law Society Guide 1996*, s. 4.1, p. 349.

[133] *Administration of Justice Act 1985* (U.K.), 1985, c.61, gave the Council and the Solicitors Disciplinary Tribunal power to impose sanctions, and the present provisions were substituted by the *Courts and Legal Services Act 1990 (U.K.)* 1990, c.41.

[293] In England as well as in Canada, it is only comparatively recently that the governing bodies of the legal profession have considered it unethical for a lawyer to undertake work without being competent to perform it, or to fail to be diligent in carrying it out. Now, however, breaches of the ethical duties of competence and diligence can be dealt with through the usual discipline process.

6. Practice Review

[294] A further device which has been adopted by some of the Canadian law societies is "practice review". This is a remedial process which involves reviewing a lawyer's work processes with the lawyer with a view to improvement. It is not part of the ordinary disciplinary process, and in some cases is voluntary only, though it may be entered into in order to avoid disciplinary action, in which case its voluntary quality may be dubious. It is most useful in some cases in which disciplinary action would otherwise take place then, or, due to a lack of some of the qualities necessary for practice, is likely to take place at some time in the future. Its purpose is to assist a lawyer to acquire good habits and methods of practice and thus to practice with competence and diligence.

7. Summation

[295] In my submission, the devices I have described constitute a system of self-regulation. One principal component of the system is a group of devices designed, in a positive way, to promote the competence and ethical motivation of those who provide legal services. A second principal component is a deterrent group of devices designed to police and penalize failures of competence and ethical conduct. A third component is a group of devices that partake of both aspiration and policing. A fourth is a group of devices for the compensation of clients for serious departures from standards of ethical conduct and competence of service.

[296] The self-regulation system has historically grown by delegations and accretions. Not all of the English and Canadian governing bodies use all of the devices I have listed, so that the systems of the different governing bodies have significant differences from each other. In some cases, the use of some devices is not within the control of a governing body. The similarities are, however, more important than the differences. A common form of self-regulation is recognizable.

CHAPTER IV - WHAT IS PROFESSIONALISM?

A. Introduction and Purpose of Chapter IV

[297] Chapters II and III have described the structures and organization of the legal profession in England and Canada, the process by which the professional bodies came to have self-regulatory powers, and the devices and systems of self-regulation. Chapters IV and V will try to explain what it is that animates the legal professions in the retention and exercise of the powers of self-regulation and why it is that publics and legislatures have been willing to grant the powers to them.

[298] Clearly, the legal profession in England and Canada has sought self-regulatory powers. Lawyers have collectively subjected themselves individually to those powers. They maintain establishments to administer the powers. Obviously, something motivates them to do so. In my submission, the motivation is a spirit of professionalism, which drives them to exercise the self-regulatory powers in the public interest. This chapter will examine professionalism with a view to determining whether or not professionalism exists and what it is.

B. Some Preliminary Wordplay

[299] Lawyers collectively are a "profession". Their occupation is also a "profession". Individually they are "professionals". They claim that there is something distinctive about their approach to their occupation which is called "professionalism". These usages, and the implications that flow from them, are generally accepted. An understanding of these usages, or, rather, of the notions embedded in them, is a necessary beginning for a discussion of the organization and functioning of lawyers and their institutions.

[300] The terms "profession", "professional" and "professionalism" are protean. "Professional" may be contrasted with "amateur": a professional takes money and, by so doing, makes into an occupation an activity that amateurs engage in as a pastime. The term "professional" may be "disparagingly applied to one who pursues relentlessly an activity or belief that is regarded with disfavour; inveterate, habitual, ruthless": a

"professional" diner-out, for example. "Profession" may be used to denote prostitution, or "any calling or occupation by which a person habitually earns his living". A "professional" may be a person "engaged in one of the learned or skilled professions, or in a calling considered socially superior to a trade or handicraft".[1] None of these usages is relevant or helpful for this discussion.

[301] What is relevant is the use of the label "profession" and the related terms "professional" and "professionalism" to distinguish one limited group of occupations – and, in particular, the legal profession – from other occupations which are not called professions, and to distinguish lawyers from those engaged in occupations that are not professions.

[302] But the nature of the distinction between professions and professionalism, on the one hand, and non-professions, on the other, is not always agreed. As will be seen below, the notion of professionalism is, to some, a recognition of duties that transcend the personal interests of the professionals, while, to others, it is a means of promoting and advancing those personal interests.

[303] Under the Oxford English Dictionary's definition of "profession" in its restricted sense, what distinguishes a profession is that "a professed knowledge of some department of learning or science is used in its application to the affairs of others or in the practice of an art founded upon it". This definition determines the content of the related OED definitions of "professional" and "professionalism".

[304] Lawyers profess to have a knowledge of law which they apply to the affairs of others. Many, and probably most, lawyers would accept or affirm that they practice an art founded upon that knowledge. It is, of course, possible to find lawyers doing routine work that does not require the application of knowledge of the law and that cannot be described as an "art". But most lawyers, and most other observers as well, would agree that the practice of law includes the elements of the OED definitions.

---

[1] These illustrations come from the Oxford English Dictionary, 2nd ed., v. 12, p. 572-574.

[305] But, in any discussion of the professions and their role and function, "profession" is more than the application of an art or an occupational group which practise the applied art; a "professional" is more than a practitioner of an applied art; and "professionalism" is a cast of mind which goes beyond the practice of an applied art. I now turn to the identification of the additional elements.

C. Some Models of Professionalism

1. A "Traditional" Model

[306] There is a model of professionalism which, among lawyers, is appropriately called the "traditional model".[2] Nowadays it is not so fashionable as it was, and it most commonly appears in after-dinner addresses and formal speeches.[3]

[307] Professor J.H. Baker, speaking of the 16th and 17th centuries, described the model thus:[4]

> At the same period the Inns, encouraged by the judges, began to insist upon the gentility of their members, and to aspire to the neo-classical ideal of a profession of gentlemen, detached from the pursuit of lucre and united in their devotion to a superior vocation.[5]

He attributed to this model the Bar's rules of etiquette prohibiting social contact with solicitors and the Bar's notion of the honorarium, saying:

> The lawyers adopted Ulpian's doctrine that the profession of the law was such a holy thing that it was not to be debased or evaluated in monetary terms, and that certain things could not with honour be sued for albeit they might with honour be accepted as presents.

---

[2] How long the "tradition" has been subscribed to is open to question. Certainly the legal profession has long organized itself, but it seems likely that even professional ethics were not claimed until the 19th century: Moore 1987 at 782.

[3] It has also been called a "structural-functionalist model": see, e.g., Pue 1990 at 57. The term conveys no meaning to me.

[4] This passage and the one next quoted come from Baker 1986 at 118. Footnotes are omitted. Those interested in the subject should read the author's discussion of the notion of the liberal profession and the honorarium.

[5] Note that this passage and the passage next quoted could also be read in support of the "honour" model of professionalism discussed below.

[308] The modern classical statement of the model is Dean Roscoe Pound's often-quoted analysis of a "profession". It is this:

> The term refers to a group...pursuing a learned art as a common calling in the spirit of public service - no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.[6]

[309] More recently, the American Bar Association Commission on Professionalism[7] said of Dean Pound's statement:

> The rhetoric may be dated, but the Commission believes the spirit of Dean Pound's definition stands the test of time. The practice of law "in the spirit of a public service" can and ought to be the hallmark of the legal profession.

The Commission did not say what in Dean Pound's definition is rhetoric and what is spirit. Presumably, it considered "in the spirit of public service" to be spirit.

[310] More recently still, the traditional view was stated thus by Justice Charles Gonthier:[8]

> In a professional setting, service and a sense of duty must be the motivating forces, and must take precedence over financial considerations and the self-interest of the professional.

And again:

> Vis-a-vis other members of the profession, the lawyer must be ever mindful that all are members of the same profession as a means of livelihood, it is true, though not primarily for that purpose, but rather to serve the interests of their clients according to law.

And Justice Gonthier quoted the following passage from Lord Macmillan:[9]

---

[6] Pound 1953 at 5.

[7] American Bar Association Commission on Professionalism 1986 at10.

[8] Gonthier 1991.

[9] Macmillan 1938 at 127.

> We call ourselves a learned profession. Let me remind you that we are also a liberal profession. The difference between a trade and a profession is that the trader frankly carries on his business primarily for the sake of pecuniary profit while the members of a profession profess an art, their skill in which they no doubt place at the public service for remuneration, adequate or inadequate, but which is truly an end in itself. The professional man finds his highest rewards in his sense of his mastery of his subject, in the absorbing interest of the pursuit of knowledge for its own sake, and in the contribution which, by reason of his attainments, he can make to the promotion of the general welfare. It is only by the liberality of our learning that we can hope to merit the place in public estimation which we claim and to render to the public the services which they are entitled to expect from us.

[311] A more recent, and rather more cautious, description of a "traditional" model was given by the Canadian Bar Association Systems of Civil Justice Task Force:[10]

> The ideal of professionalism encompasses several elements, including extensive formal learning and training, the ability to advance the public interest and the interests of clients through dedicated advocacy, a view of the practice of law as a profession informed by business principles (not as a business informed by the attributes of a profession), and a collective means of self-governance.

[312] And finally, the Manitoba Law Reform Commission in a recent report describes a "traditional" model thus:[11]

> While the profession as a whole was committed to acting in the public's interest, an individual professional primarily served the public by committing himself or herself to the best interests of the client or patient...[Professionals] were to be completely dedicated to the welfare of their patients or clients, even when this commitment infringed on their own interests.

[313] The "traditional" model of professionalism, then, is one under which the professional is motivated primarily by a desire to serve, not by a desire for gain.

---

[10] CBA 1996 at 62

[11] Manitoba Law Reform Commission 1994 at 4.The Commission's discussion includes some of the economic effects of professional regulation. (It also says that "[The current model of professionalism] is a product of the belief that, properly applied, science and rationality would result in something approaching a perfect world". I have not encountered this belief in the legal profession.

2. A "Sociological" Model

[314] Professor Richard Abel's "sociological" model[12] is the antithesis of the "traditional" model:

> I view professionalism as a specific historical formation in which the members of an occupation exercise a substantial degree of control over the market for their services, usually through an occupational association.[13]
>
> All occupations under capitalism are compelled to seek control over their markets...The foundation of market control is the regulation of supply. Occupations...that produce services constrain supply principally by regulating the production *of* producers. Professions are distinguished from other closed occupations by their requirement of demonstrated mastery of a body of formalized knowledge. Although advocates of control invariably portray their object as improving the quality of services, we should not let this claim blind us to the fact that any improvement necessarily also limits entry.[14]

And

> Professions pursue market control and status enhancement through collective action. Having erected barriers to entry, professional associations seek to protect their members from competition, both external and internal. In order to avert external surveillance, they engage in self-regulation.

[315] This theory rejects the idea that professionals devote themselves primarily to the public service. It holds, on the contrary, that professionalism is a device for the maximization of income and status of professionals. Lawyers achieve and maintain a monopoly on the provision of legal services in order to reserve lucrative opportunities to themselves. They impose educational and ritual requirements on entrants to the profession in order to control the supply of producers, and thus to control the price of legal services. They encourage legal aid schemes in order to

---

[12] The paper *The Rule of Lawyers* which was prepared for the Fabian Society in 1998 adopts the "sociological" model. It treats it as a truism that controlling entry, self-regulation and codes of ethics are all part of the professional project by which the profession seeks to control its market and cites recent writings as establishing this (Arora and Francis 1998, 5). However, in its discussion of what should be done about the handling of consumer complaints the paper suggests that an initial template for reform could be the current model of the medical profession under which the regulatory function is performed by the General Medical Council and the representational function by the British Medical Association. (id. 14).

[13] Abel 1988, 123. Abel recognizes that concepts of professionalism exist "that stress technical expertise, or standards of competence and ethical behaviour, or altruism". Professor Abel's theory is developed at length in Abel 1988 and Abel 1989.

[14] Abel 1988, 23-24.

enhance the demand for legal services. They promote self-regulation in order to avoid regulation by the state. [15]

[316] So, under the sociological model, the professionalism is motivated primarily by desires for gain and status, and is not motivated at all by a desire to serve.

3. An "Honour" Model

[317] Professor Michael Burrage[16] has developed a third model. In his view, professionalism, at least the professionalism of the legal profession in England and probably the United States, is a device to maximize status. This "honour" model differs from both the "traditional" and "sociological" models described above.

[318] The "honour" model differs from the "sociological" model in that it is not a device to maximize incomes; indeed, the professions have shown themselves willing to sacrifice income-maximization on the altar of status-maximization. In Professor Burrage's view, the collective actions of both the Bar and the solicitors' branch have served to reduce demand for their members' services by encouraging both barristers and solicitors to withdraw from some fields of endeavour and to refrain from responding to others. He suggests that this economic self-abnegation may be a general characteristic of "well-organized, self-governing professions", and refers to similar activities in Spain, France and the United States.[17] His argument is "that well-organised, self-governing professions depress the demand for their members' services". Recent interest by the Law Society in its members' economic well-being and the recent assumption by the Bar Council of a trade-union role are, in his view, reactions to

---

[15] The attribution of a mere desire to maximize income and status may be too flattering. Professor Wesley Pue says this: "[w]hat appears when these [either "the elements of 'professionalism' which danced in the heads of elite Canadian lawyers in the first year of the Canadian Bar Association" or the specific sorts of 'unprofessional conduct' which caused them distress] are probed is an unpleasant admixture of nativism, disdain for the "commercialized" practices of non-elite practitioners, the sort of class bias which refuses to recognize as legitimate the legal claims of working people, and a vision of rule of law more oriented towards paternalism than the empowerment of the citizenry" [footnote omitted]. Pue 1991, 244. I do not propose to follow up this model.

[16] Burrage 1996.

[17] Burrage 1996, 46-47.

current developments and are not a disclosure of previously disguised economic motives. In his view, "[t]he idea that both professions managed to enlist the support of the majority of their potential members over many generations while disguising their real intentions seems far-fetched".[18]

[319] The "honour" model, in Professor Burrage's view, goes back at least to the charter of the Society of Gentleman Practitioners, which declared the society's purpose to be "supporting the honour and independence of the profession", and to a 1741 direction of the *S*ociety to its committee to take into consideration "any matters relating to the benefit of suitors and the honour of the profession"; these amounted to a declared aim, continued ever since, "to defend and enhance the status of its members".[19] This explains not only the self-restriction of the two professions to honourable work jurisdictions, but also the measures taken by the Law Society to maintain the apprenticeship system which "necessarily conveyed a due appreciation of the value of membership of the profession" and "also necessarily instilled respect for one's elders, for their experience, for their manners, conventions, and ethics and for their sense of corporate honour".[20]

[320] Evidence for the existence of the "honour" model is not unknown in Canada. Indeed, the Upper Canada statute of 1797,[21] which probably expressed the views of the small bar of the time, established the Law Society of Upper Canada " as well for the establishing of order amongst themselves, as for the purpose of securing to the province and the profession a learned and honourable body, to assist their fellow subjects as occasion may require, and to support and maintain the constitution of the said province", and similar wording appears in some of the other provincial statutes. In the view of Professor Blaine Baker, legal education in Upper Canada "...was designed to generate a self-conscious and literate social elite which apparently had, at least for its first half-

---

[18] Burrage 1996, 48.

[19] Burrage 1996, 49.

[20] Burrage 1996, 54.

[21] *An Act for the better regulating the practice of the law,* S.U.C. 1797, 37 Geo. III, c. 13, s.1

century, relatively open ranks", and which was "...based on ability and merit, not on wealth or birth".[22]

[321] Many of the consequences of the "honour" model would be the same as the consequences of the "traditional" model. Both models require lawyers to be competent and to act according to high standards of conduct. Both downplay economic self-interest as a strong motivation for lawyers' conduct. But they do so for different reasons. Under the "traditional" model, the motivating force is devotion to serving the public. Under the "honour" model, the motivating force is a desire for honour or status: talking of the solicitors' branch, Professor Burrage[23] says that "the attorneys and solicitors who founded and joined the early law societies evidently believed that, in order to obtain the higher status they sought, they were obliged to ensure an honourable standard of behaviour amongst their members."

[322] Professor Burrage's view appears to be that the "honour" model is no longer dominant in the Law Society: solicitors, under pressures from the state and from changing imperatives of professional organization, "...have an identity problem, are torn between two models, and at times ... seem rather schizophrenic". He does not develop an argument about the Bar's model of professionalism, but, as the Bar is one of the two models between which the solicitors are torn, he appears to imply that the Bar's model is the "honour" model.[24]

[323] The "honour" model is consistent with much of the past history of the profession's legal institutions, though more so in England than under the different social and structural environment of the Canadian provinces. But, whether or not it explains the past, it does not, in my submission, explain the present attitudes of the profession. Professor Burrage points out that the criteria for entry into the solicitors' profession have become "public, technical, cognitive, formally-certified

---

[22] Baker 1981, 56,57.

[23] Burrage 1996, 49. Emphasis is in the original.

[24] Burrage 1996, 70-71.

and universalistic",[25] and the same is true of the Canadian profession. The solicitors' branch in England and the Canadian profession are much more fragmented and are subject to much stronger economic pressures and competitiveness than they were formerly. Preservation of status is not, in my submission, the dominant concern among them today, even if it was in the past. The Bar's traditional ethos, based on more cohesive organization through the Inns of Court and its collegial traditions, is more attuned to considerations of "honour", but it is doubtful that this leads to the conclusion that the maintenance of status is the cornerstone of its professionalism. Although Professor Burrage's arguments are attractive and forcefully put, I propose to end the discussion of the "honour" model here.

D. Assessment of the "Traditional" and "Sociological" Models

1. Contrast

[324] Professionalism, if one must choose between the "traditional" and "sociological" models, is either

- dedication to public service, with little attention to the income and status of professionals; or
- dedication to maximizing the income and status of professionals, or at least of the elite professionals, with little or no attention to public service.

Dedication to public service cannot co-exist in the same person or group with dedication to maximizing the income and status of the person or group. Both cannot both be the dominant motivation of any group at any one time. It is possible that neither is. The two should be assessed with a view to determining which, if either, is the dominant motivation.

2. Assessment of the "Traditional" Model

[325] Let us look at Dean Pound's definition.

[326] Whether lawyers "[pursue] a learned art" and whether they do so "as a common calling" need not be discussed here. The question that is

---

[25] Id.

fundamental to this discussion is whether, in the pursuit of whatever they pursue, pursuing it "in the spirit of a public service" is "the primary purpose" of lawyers, so that obtaining a livelihood is merely incidental to that primary purpose.

[327] The practice of law is a public service, though the beneficiaries of the service are most commonly individual clients. Lawyers get satisfaction from providing the service and protecting clients' interests. Lawyers take pride in doing their work well. Lawyers are accustomed to put their clients' interests ahead of their own interests.
[328] None of this means, however, that public service is the **primary** motivating factor of the great mass of lawyers and that obtaining a livelihood is merely incidental to that public service. The proposition that the generality of lawyers practise law **primarily** for the benefit of the public and only incidentally for their own benefit seems to me to fly in the face, not only of the basic structure of human nature in the mass, but also of every aspect of my experience. It focuses on one aspect of motivation and does not take others into account.

[329] Readers may come to a different conclusion by applying their own judgment and experience. But I do not think that any profession has ever had public service as its **primary** aim. If one has, the golden age must have passed quickly. I think that any conclusion, or any course of action, based on the proposition that lawyers practise law primarily for the benefit of the public will be seriously flawed.

[330] The American Bar Association's Commission on Professionalism itself recognized the unreliability of perceptions in this area:

> Perhaps the golden age of professionalism has always been a few years before the time that the living can remember. Legend tends to seem clearer than reality.[26]

[331] For these reasons, I do not believe that the "traditional: model is an accurate representation of reality.

---

[26] American Bar Association Commission on Professionalism 1986, 55.

3. Assessment of the "Sociological" Model

[332] Abel and Lewis say this about evidence that supports the "traditional" model:[27]

> Lawyers' self-exhortations -- in ethical codes, bar association journals, and annual conventions -- presumably are intended primarily for public consumption, or at least as a means of collective self-deception or reassurance. For social scientists to confuse those prescriptions with actual behaviour would display unpardonable naivete.

[333] The passage assumes that professionalism is a device to maximize income and status. Starting with that assumption, it is easy to presume, without other evidence, that every statement that suggests that professionalism is not entirely self-interest is part of a profession-wide conspiracy to advance that income-and-status maximization. Evidence contrary to the maximization theory is at least discredited and may even be made to support the theory. It would be unpardonably naive to accept the statements at face value, but it is not, it appears, unpardonably sceptical to treat them as universally false and worthless. This is the argument *ad hominem.* It assumes that the power of the "professional project" is sufficient to maintain confidentiality over many professions, many countries and many decades. Like the "traditional" model, I think that the "sociological" model focuses on one aspect of motivation, though a different one, and fails to take others into account. It also flies in the face of my experience.

[334] The "professional project", in my submission, does not explain the activities of the institutions of the legal profession.

[335] First, reference should be made to the arguments of Professor Burrage which are described above and which suggest that some major policies of the self-regulatory institutions of the legal profession have actually tended to restrict their markets.

[336] Second, the institutions of the legal professions in England and Canada have effectively given up control over the number of new entrants into the profession. While the Law Society, the Bar Council and most of the Canadian law societies retain formal controls on the academic

---

[27] *Putting Law Back into the sociology of Lawyers*, in Abel and Lewis 1989, vol. 3, 495

elements in the education and training of lawyers, effective control of numbers and much of the content has passed to the law schools; and the continuation of apprenticeship and training contracts is not a control on numbers. Education and training requirements, while they constitute hurdles that must be surmounted by entrants to the profession, cannot be used by the self-regulatory institutions of the legal profession to restrict the supply of lawyers.[28] This loss of control over numbers has come about despite the alarm frequently expressed by lawyers about the number of entrants.[29]

[337] Third, the development of the panoply of regulatory devices and activities which have been developed by the institutions of the profession is not, in my submission, capable of being explained by a "professional project" for the control of markets. It is, of course, possible to make a blanket statement that everything that the institutions of the legal profession do is either designed to control markets directly or to persuade governments and society that they are acting in the public interest and should be left to regulate the profession without interference. But, while self-regulation has on a number of occasions been under fire in both countries, and while some steps have been taken by the self-regulatory institutions at times when such pressures have been present, there have been other times when extensions of activities have occurred when no threats were present. The development in Canada since 1980 of practice advisory services, practice reviews, mentor schemes, remedial continuing legal education, and the development of compulsory errors and omissions insurance do not appear to be reactions to public pressure.

---

[28] It may be relevant to note here that "the clear prevailing view" of a National Conference on Legal Education held at Winnipeg in 1985, which was convened at the instance of the Federation of Law Societies of Canada and heavily attended by representatives of the law societies as well as academic lawyers, "was that neither the profession nor the universities should further restrict admissions for the purpose of controlling the numbers of lawyers. There is no basis, manifestly justified in the public interest, for measures designed directly or indirectly only for the purpose of restricting numbers": Anderson 1987, 50.

[29] Between 1971 and 1986, the number of lawyers in Canada increased from 16,315 to 42,710: Stager and Arthurs 1990, citing Statistics Canada census statistics. In 1996, there were 5778 lawyers on the active practising list of the Law Society of Alberta for an Alberta population of 2,789,500, or one lawyer on the list for every 482 members of the population, and it appears likely that the ratio of population to number of lawyers will become even lower: *Projections of the Number of Members of the Legal Profession 1997-2016* , prepared for the Law Society of Alberta by the Population Research Laboratory, Department of Sociology, University of Alberta.

[338] Finally, I propose to refer to my own experience, recognising that this account may be discounted or scouted completely as that of an apologist for the legal profession. From 1967 to 1975 I was a bencher of the Law Society of Alberta and took an active part in many aspects of its affairs as well as serving for a year as its president. From 1970 to 1978, I was a representative to and director of the Conference of Governing Bodies of the Legal Profession of Canada and its successor, the Federation of Law Societies of Canada, and served as the president of that body also. In those fora during those times, the professional project to which those bodies devoted their efforts was not maximizing market control; generally speaking, it was improving the regulation of the legal profession in ways that advanced the public interest.

[339] I will describe some of the developments which took place in Alberta during my time as bencher. A system of random trust-account audits had been started a few years earlier and became systematized during my time; this was partly motivated by the self-interest of the profession in keeping down claims for defalcation, but it was at least as much motivated by the desire to protect clients. A system of compulsory errors and omissions insurance was instituted, motivated both by the desire to protect large segments of the profession against increasing insurance premiums and a vanishing insurance market and by the desire to ensure that clients would have some effective recourse for negligence; it is noteworthy that, insofar as the large firms concerned, they supported the adoption of compulsory insurance although it was contrary to their short-term economic self-interest, as they could get cheaper coverage on the open market. The benchers promoted the criminal legal aid programme in order to fend off a government suggestion that a public defender would be appointed, but the later firming up of the programme and its extension to civil legal aid was seen more as a service that should be available to people caught up in the legal system than as a means of increasing business. The Law Society established a lawyer referral service, which would provide the names of lawyers who would give an initial consultation for a $10 fee; this was seen more as a service than as a demand-increasing measure.

[340] In 1978, the Federation of Law Societies of Canada organized a National Conference on Quality of Legal Services. The primary initiative of the Conference was my own and I was, at the request of the Federation, a principal organiser of the 1980 National Workshop which followed. The motivation behind these initiatives came from the adoption in 1974 of the Canadian Bar Association's Code of Professional Conduct, which made it clear that the law societies had a previously-unrecognised duty to maintain not only the pre-admission but also the post-admission competence and quality of service of lawyers. The Conference and the Workshop made substantial recommendations for regulatory measures to maintain and improve the quality of legal services, and the provincial law societies have since that time instituted such measures, which are described in Chapter III.

[341] There was one area in which the motivation was the restriction of outside competition, that is, the restrictions placed by provincial law societies on lawyers coming in from outside one of the provinces to render legal services within that province. This was exceptional, and has largely been eliminated as a restrictive practice, albeit under pressure from the courts. An area in which motivation may have been mixed was the issuance of fee tariffs; these were defended on the grounds that they gave guidance to practitioners and protected clients against excessive charges, and they were not enforceable by the discipline power, but it is difficult to sort out the self-interest from the public interest in this area. The practice was discontinued. An area of controversy was control of advertising; this is considered a restrictive practice. To my mind, an advertisement that says who I am, where I practice, what my areas of practice are, and how my fees are established, is unobjectionable. An advertisement that puffs my services is not, in my view, compatible with an ethical solicitor-client relationship, as it identifies the lawyer with advertising practices under which the making of a statement does not make the truth of its contents any more probable. However, controls on advertising have now been relaxed so that both the latter and the former are acceptable, subject to some standard of truthfulness, and the controls are not really restrictive.

4. Conclusions with Respect to the "Traditional" and "Sociological" Models

[342] For all of the reasons I have given, I do not think that either the "traditional" model of professionalism or the "sociological" model accounts for all of the elements of the phenomenon of professionalism.[30]

E. A Fourth Model

1. Elements of the Model

[343] It is easy to criticize other people's models. I will now take the risks inherent in propounding my own. It derives from my own experience as well as my reading. It has to do with the attitudes which animate the legal profession in its self-regulatory aspects.

[344] I think that it would be counterproductive to ignore some factors which bear on lawyers' attitudes:

(a) that lawyers practice law for a living;
(b) that lawyers want to maximize their incomes;
(c) that lawyers want to maximize their status;
(d) that lawyers are influenced by the prevailing business ethic, which does not include a significant moral or public service element unless a significant moral or public service element helps to maximize profits.

[345] If the list of factors which affect lawyers' conduct stopped at this point, there might be professionalism in the "sociological" sense described above, but there would be no professionalism in the "traditional" sense.

[346] However, I suggest that, in addition to these strictly economic and selfish factors,

---

[30] A critique of both the "traditional" or "structural-functional" model and the "sociological" model has been made by Professor Wesley Pue (Pue 1990), who suggests that neither model gives a complete explanation of the phenomenon of professionalism, which in his discussion includes the element of self-regulation: "[b]oth silence the multitude of voices of the past in favour of uncomplicated straight-line interpretations". In order to understand professionalism, in his view, it has to be seen as "a cultural construct developed within an irrepressible wave of ' modernity' ". The construction of a satisfactory cultural model is, however, left to future research. In the meantime, it is necessary to go ahead on the basis of what is known to us about the present. I agree with much of what Professor Pue says here, though he would probably put forward the same criticisms with respect to the model of professionalism which I will develop below.

(e) lawyers recognize an individual duty to advance their clients' interests by the provision of conscientious and competent legal services;
(f) lawyers recognize an individual duty to conduct their clients' affairs according to accepted norms based on duty to clients and duty to society;
(g) lawyers recognize an individual duty to do these things even if their immediate self-interest would suggest otherwise;
(h) lawyers recognize a collective duty to try to ensure that lawyers discharge their individual duties.

[347] This version of "professionalism" accepts the reality, which the "traditional" model virtually ignores, that lawyers as a class, like human beings as a class, are strongly motivated by self-interest. It also accepts the reality, which the "sociological" model entirely ignores, that lawyers, as a class, like human beings as a class, are also strongly motivated by values which transcend self-interest, and it shows how these transcendent values can be made to serve the public interest.

[348] So, this model does not ignore the fact that professionals commonly provide services in order to be paid for them. It does not suggest that professionals are of a superior clay or are not moved by things that move other people. What it does do is to add and emphasize a dimension to lawyer-professionals' approach to the provision of professional services which is not morally or ethically required of persons engaged in non-professional occupations. It puts that approach as a matter of obligation.

[349] This model of professionalism could exist without self-regulation. The existence of a profession depends on the existence of professionalism, that is, a state of mind, not on the exercise of self-regulatory powers by the profession. Legislation providing for self-regulation has come to be regarded as a badge of professionalism, but, while it may be a badge of professionalism, the exercise of self-regulatory powers is not, in my submission, the thing itself.

2. Foundations of "Model 4" Professionalism

[350] A concept of professionalism that includes moral or duty elements rests on two pillars:

(1) ***A moral pillar.*** Lawyers tend to stand in a special relationship to their clients. Lawyers know the law and understand the legal system, and clients often do not. Clients are often unable to assess the adequacy of the services provided. Clients necessarily place trust in lawyers. That trust imposes a moral obligation on lawyers to look to the interests of clients. Lawyers as a profession recognize that obligation. The relationship therefore includes an element of duty not found in ordinary commercial relationships. While many business clients have become increasingly sophisticated and able to judge the quality and cost of legal services, this element of duty continues to be the moral pillar of professionalism.

(2) ***A "social contract" pillar.*** The discussion of the "social contract" is deferred to Chapter V. It is enough to say here that, in my view, there is a social contract under which society has delegated self-regulatory powers to the legal profession on terms that the profession will exercise those powers in the public interest, and under which the legal profession has accepted the delegation on those terms.

3. Is Self-regulation of the Legal Profession Based on "Model 4" Professionalism?

[351] "Professionalism", according to the Oxford English Dictionary, is "professional quality, character, method, or conduct; the stamp of a particular profession." As used in this book, it is a motivating spirit or concept.

[352] Is there a spirit or concept of "professionalism" today, and, if so what is it? Presumably, survey techniques could be adopted to test the understanding of the legal profession -- or of those who manage its institutions -- of the concept and the degree to which lawyers are guided by it either unconsciously or as a conscious construct. I am not aware that such a survey relevant to Canada or England has been conducted.

[353] One observer thinks that times have changed:

> "Such lawyers, then, are no longer quiet and careful repositories of wisdom to whom one goes for considered advice, nor are they local dignitaries offering a general practical common sense to a geographical area or a particular social class. Lawyers now are typically thrusting, macho, hard working technologists similar to their high finance whizz-kid clients. In this sense too, the age of professionalism has certainly declined."[31]

If that is a description of the class, it seems unlikely that the institutions of the legal professionalism, being the collective expressions of the profession, will be animated by professionalism.

[354] However, in my own experience, professionalism does exist. It is far from perfect and far from uniform, but in my experience, most lawyers are conscientious. As conscientious lawyers, they pay conscious attention to ethical obligations. As conscientious lawyers they have also internalized ethical obligations so as to be governed by them without having to give them special attention except in particularly difficult circumstances. Certainly, in my experience, lawyers do in fact discuss ethical questions with their colleagues and try to govern their conduct according to high ethical standards.

[355] The legal profession professes to adhere to ascertainable ethical standards. Unless those professions are taken to be a complete sham, they are some evidence of the existence of those standards. The institutions of the legal profession purport to enforce those standards. Unless the disciplinary systems of the institutions are themselves shams, the operation of those systems is further evidence of the existence of ethical standards. The institutions spend a great deal of money which is put up by practitioners, and, as levies are made by the profession's representatives, this again is some evidence that the profession has some feeling for things that go beyond lining its pockets.

[356] There are significant similarities among the institutions of the legal profession in the provinces and territories of Canada and between the ways in which those institutions have developed. There are also significant similarities between the Canadian institutions and their development, on the one hand, and the institutions of the solicitors' branch in England and their development, on the other. These

---

[31] Sherr 1990, 410.

similarities suggest, though they do not demonstrate, that a similar motivating spirit or concept has informed the institutions and their development.

[357] The formal similarities in the case of the Bar's institutions are not so great, particularly in the inception of those institutions and in their development to the middle of this century.[32] However, while the Inns and the Bar Council continue to be voluntary bodies and the older traditions are still influential, they now exercise their qualification and discipline powers in ways similar to those of the other institutions. I include the Bar's institutions in this discussion, while recognizing that they are in some respects significantly different from the others.

[358] "Professionalism" is not necessarily the same in different places at one time. Certainly, in its relationship to the acquisition and exercise of powers of self-regulation, its content has varied in different places over time;[33] it is unlikely that those who participated in the management of the institutions of the legal profession up to the end of the 18th century were animated by precisely the same spirit of professionalism as that which has animated their successors in the last half of the 20th century. This book, though it has summarized some of history of the institutions of the legal profession and the development and restriction of their powers, has done so only to assist in forming an understanding of the present, and will not attempt an extensive analysis of past motivations. The highest statement of the point being made in this chapter is that there is a form of professionalism which, while it recognizes the essential humanity of professionals, goes on to include the acceptance of duties that are not imposed on non-professionals, and that it is that form of professionalism which is at the bottom of the efforts of the legal profession to regulate itself in the times in which we find ourselves.

4. Summary

[359] I have tried to make the following points:

---

[32] The founders of the Law Society of Upper Canada intended that it should be patterned upon the Inns of Court and the latter were a significant influence on the Law Society, but the two institutions have functioned differently.

[33] I recognise that the proponents of the "sociological" model consider it to be a monolithic structure of self-interest, but I am advancing a different view.

(1) There is a concept that can be called "professionalism"

(a) which includes the recognition that lawyers are influenced by the same considerations of income and status as other people and the recognition that there is nothing wrong with that, but

(b) which also includes

(i) the acceptance by individual lawyers of a duty to advance the interests of clients by the provision of conscientious and competent legal services according to ethical norms, and

(ii) the acceptance by the legal profession collectively of a collective responsibility for ensuring, so far as practicable, that lawyers discharge their individual duties, and

(c) which, while recognizing that client and public interests must be protected and promoted, is consistent with the practical realities of professional life.

(2) The reasons for the acceptance of these individual and collective duties are as follows:

(a) lawyers, because of their relative knowledge of the law and the legal system and the common (though not invariable) relative inability of their clients to assess the adequacy or otherwise of the services provided, are subject to a moral and ethical obligation to advance their clients' interests;

(b) society has conferred special privileges on lawyers on the understanding that those privileges will be used for the benefit of society, thus imposing a moral and ethical obligation on lawyers individually and collectively to perform their side of the implied bargain, and also imposing upon them the risk that if they do not do so, the privileges will be revoked or attenuated.

(3) The acceptance of the collective duties is the basis of the self-regulation of the legal profession.

[360] There is no universally accepted definition of "professionalism." "Traditional" definitions focus on professionalism as a public service. "Sociological" definitions focus on professionalism as an income-and-status-maximizing device. Readers must decide for themselves whether there is such a thing as "professionalism" and, if so, whether it is best described by the "traditional" model, the income-and-status-maximizing model, the "honour" model, the "Model 4" presented in this book, or some other model. But a discussion of the subject without a mutually understood definition is likely to be meaningless. This book is based on the proposition that there is a "Model 4" professionalism which is described earlier in this chapter and in this summary.

CHAPTER V - PROFESSIONALISM, SOCIAL CONTRACTS AND THE PUBLIC INTEREST

A. Introduction to Chapter V

[361] Chapter II has described the acquisition of self-regulatory powers by the legal professions in Canada and England. Chapter III has described the devices of self-regulation and suggested that these devices collectively constitute a system of self-regulation. Chapter IV has provided an analysis of the notion of "professionalism" and has concluded that the acceptance of collective duties under the notion of professionalism is the basis of the self-regulation of the legal profession. The latter proposition will be analysed and carried further in this chapter.

[362] Chapter II has established that the powers of the law societies in both countries spring from legislation, that is, that the law societies' powers are delegated by Legislatures in Canada and Parliament in England. The only exception is the Bar of England and Wales, the self-regulatory powers of the institutions of which were effectively delegated by the higher courts through their refusal to give rights of audience to advocates who were not members of the Inns of Court. But Chapter II has also noted that Legislatures and Parliament have, particularly over the last 40 years or so, imposed restrictions and controls on the exercise by all of the law societies, including the institutions of the Bar of England and Wales, of the delegated self-regulatory powers, so that self-regulation is subject to checks and balances.

[363] The thesis of the first part of this chapter itself has two parts. The first is that the continuing delegation of self-regulatory powers to the law societies is intended by governments and legislatures in England and Canada, including the Parliament of the United Kingdom, to be in the public interest. The second part of the thesis is that the law societies have accepted the delegation, and continue to accept it, on the basis that they will exercise those powers in the public interest; this part of the thesis has already been adumbrated in previous chapters, but it will be developed further in this chapter.

[364] The latter part of the chapter addresses the question whether, however it is *intended*, the delegation is *in fact* in the public interest, and comes to an affirmative conclusion.

B. Is the Delegation of Self-regulatory Powers Intended to Be in the Public Interest?

1. What the Legislatures and Parliament Have Said

[365] The *Court and Legal Services Act 1990* has established a "statutory objective", which is "the development of legal services in England and Wales...by making provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice". The *CLSA* has also established a "general principle", which is, in effect, that rights of audience in courts, tribunals and inquiries and rights to conduct litigation in courts, tribunals and inquiries should be exercised only by persons of appropriate education and training and who are members of a body which enforces appropriate rules of conduct. The "statutory objective" is stated in public-interest terms, and the "general principle" is obviously established in the interest of those who receive legal services. So the public interest undergirds the systems of self-regulation in England and Wales.

[366] A few of the Canadian statutory delegations of self-regulatory power make specific reference to the public interest or some aspect of it. An example is the first Canadian statute of all:[1]

> "...it shall and may be lawful for the persons now admitted to practise in the law, and practising at the bar of any of his Majesty's courts of this province, to form themselves into a society, to be called the Law Society of Upper Canada, as well for the establishing of order amongst themselves, as for the purpose of securing to the province and the profession a learned and honourable body, to assist their fellow subjects as occasion may require, and to support and maintain the constitution of the said province."

[367] It may be that the 1797 Act said it all. Its stated immediate objective was to secure a "learned and honourable body". One of the purposes of that body was "to assist" their fellow citizens "as circumstances may require". While there is a danger of reading present-

---

[1] *An act for the better regulating the practice of the law*, 1797 S.U.C, 37 Geo.III c. 13 s. 1. Emphasis is added.

day thinking into a time long past, it seems likely that the legislator thought that a "learned" body would be likely to provide services up to a high standard of quality and that an "honourable" body would be likely to provide services up to a high ethical standard; if so, this would be a public-interest prescription that is useful today and supports present notions of the purposes of self-government. The second purpose of the body was "to maintain and support the constitution". It is doubtful that that would be recognized today as a purpose of self-regulation of the legal profession, though ethical prescriptions do require lawyers to uphold the law and the administration of justice, but it is a public-interest purpose.

[368] Some other Canadian statutory provisions are as follows:

1. **New Brunswick.** The New Brunswick Act also provides for a "learned and honourable" legal profession. However, the purposes of that profession are different from those prescribed by the 1797 Ontario Act. One purpose is the establishment of order and good conduct among its members, which is probably intended as a public protection and not merely as a protection against internecine strife. The other goes outside the regulation of legal services: it is promoting "knowledgeable development and reform of the law", but it does not seem likely that the Legislature intends the Law Society to exercise its regulatory powers in order to achieve law reform.

2. **British Columbia.** The principal "object and duty" of the Law Society is to uphold and protect the public interest in the administration of justice. It is to do this by "preserving and protecting the rights and freedoms of all persons", "ensuring the independence, integrity and honour of its members", and "establishing standards for education, professional responsibility and competence for its members and applicants for membership".

   This is rather overblown. A regulatory authority cannot itself be the protector of the public interest in the administration of justice, much less the protector of everyone's rights and freedoms: those are not the functions of regulators of a service. The inference must be that the Legislature thought, if it thought anything, that self-regulation will ensure – though "ensure" is probably too strong a

verb – the existence of a professional group characterized by independence, integrity and honour who meet appropriate standards of education, professional responsibility and competence; and that the existence of such a professional group will militate towards the achievement of the more general objectives.

The British Columbia statute does not use similar rhetoric in relation to lawyers' activities that do not fall within "the administration of justice". One subsidiary statutory object of the Law Society is the regulation of the practice of law, but there is no associated statement of purpose. Another subsidiary object is upholding and protecting the interests of the Society's members. Both of these subsidiary objects are "subject to" the main object.

3. **Yukon.** Under the Yukon Act, "the paramount duty of the society and its members is to serve and protect the public interest in the administration of justice and the preservation of the rights of all persons in a manner that is consistent with respect for independence, subject only to law, in the relationship between a member and his client." This enunciates the value of "independence", which must include at least the independence of the lawyer.[2] It makes that independence "subject to law". It is unlikely that the Legislature intended that the "paramount duty" of the Law Society should go further than the appropriate regulation of the legal profession.

4. **Quebec.** The statutory language is general but directed towards what self-regulatory bodies do. "The principal function of each corporation [including the Bar of Quebec and the Chamber of Notaries] shall be to ensure the protection of the public." "For this purpose it must in particular supervise the practice of the profession by its members." The result is that the function of each statutory corporation relates to supervising the performance of professional services, and that the corporation's objective is to protect the public against deficiencies in the way in which services are performed.

---

[2] Grammatically speaking, the "independence" referred to could be the independence of the client from the lawyer, but this interpretation seems improbable.

[369] These provisions establish public-interest objectives for the delegation of self-regulatory powers in some jurisdictions. In my submission, they confirm the public-interest nature of the delegations in all of the jurisdictions under discussion. It might be thought that the absence of such legislative statements in other jurisdictions suggests that the delegation of self-regulatory powers in those jurisdictions is not motivated by a perceived public interest. In my submission, this is not so: the presence of such statements in some statutes and not in others merely reflects different approaches to legislative drafting, and the discussion below is applicable in all of the jurisdictions under consideration.

2. What the Legislatures and Parliament Have Done and Why

[370] The first legislative delegation of self-regulatory powers in the two countries took place in Ontario in 1797. Thereafter, delegations took place in England and in the Canadian provinces and territories, whether by the initial establishment of a law society with regulatory powers or by further delegations to existing law societies, for the next 150 years. Delegations have been made by legislatures in new colonies; by provinces and territories under frontier conditions; by legislatures in maturing provinces; and, in the case of England, by the courts and Parliament in a highly complex society with a long history of law and legal and political institutions.

[371] More recently, Legislatures and Parliament have imposed restrictions and controls on the delegated powers of self-regulation and also on the informally-acquired powers of the Bar. These have included the designation of the Attorney-General to protect the public interest in Ontario, the appointment of lay benchers in several provinces, the establishment of l'Office des Professions with significant supervisory powers in Quebec, and, in England, the imposition of controls over changes in qualification and conduct regulations and the institution of the Legal Services Ombudsman.

[372] An important question is: why have the Legislatures and Parliament made these delegations?

[373] As has been noted in Chapter IV, one theory of "professionalism" is that it is "...a specific historical formation in which the members of an occupation exercise a substantial degree of control over the market for their services, usually through an occupational association".[3] On the theory that "[p]rofessional associations are founded or activated in order to seek or defend material benefits and social status"[4] and that restrictive practices are imposed through self-regulation,[5] it would seem to follow that the Legislatures and Parliament have simply been manipulated by the legal profession into granting self-regulatory powers for the legal profession to use for its own benefit, that is, the "professional project" of controlling supply of producers and product has been successful. But this necessarily assumes a remarkable degree of consistent tenderness by politicians towards lawyers in very different times, in very different places, and under very different political stripes.

[374] It is much more likely that the Legislature of Upper Canada in 1797, for example, saw a profession in need of regulation, and not merely 15 practitioners who wanted to maximize their incomes and status,[6] and it is quite likely, according to one student,[7] that the North-West Territorial Government, among other reasons, established a law society because it did not want to bear the cost of lawyer discipline and other professional activities. In general, in my submission, it is more likely that Legislatures and Parliament have granted self-regulatory powers to law societies because they thought, whether correctly or not, that self-regulation of the legal profession is more likely to work in the public interest than would no regulation or another form of regulation. Some corroboration of this view is provided by the restrictions and controls that have been instituted in the last few decades: they have been instituted after various forms of examination of the self-regulatory system and they

---

[3] Richard L. Abel, *England and Wales: A Comparison of the Professional Projects of Barristers and Solicitors,* 1988, at 23.

[4] Abel, Richard L., *The Legal Profession in England and Wales*, 1988, at 305.

[5] Abel, Richard L., *The Legal Profession in England and Wales*, 1988, at 41-44.

[6] The number comes from Riddell 1928,at 49. According to Justice Riddell, the main proponent of the 1797 Act was John White, a past and future Attorney General: Riddell 1928, at 47.

[7] Sibenik 1984, at 11.

reflect conclusions that self-regulation is still in the public interest but that, like any other system, it should include checks and balances.

[375] As I have noted in Chapter IV, it is my submission that the acceptance of self-regulatory powers on a public-interest basis, and undertakings to exercise the powers in the public interest, are based on a spirit of professionalism which recognizes that lawyers individually are, subject to overriding public interests, under duties to serve clients competently, faithfully and confidentially, and that lawyers collectively are under duties to do whatever is practicable to ensure that lawyers carry out their individual duties.

3. What the Courts Have Said

[376] Though we are concerned here with fact, not law, it is worth referring to judicial authority about the public-interest nature of the exercise of the delegated self-regulatory powers. The references will be restricted to one case from the ultimate court of appeal in each of Canada and England.

[377] In *Jabour* v. *Law Society of British Columbia*,[8] the Law Society proposed to impose disciplinary sanctions on one of its members because of his advertising practices. The member sought a declaration that the Law Society's actions violated the *Combines Investigation Act* and the member's right of free speech.[9] The Supreme Court of Canada held in favour of the Law Society on both issues on the basis that the Law Society was acting under powers delegated to it by a valid provincial

---

[8] [1982] 2 SCR 307. For other examples, see *Black v. Law Society of Alberta* [1989] 1 SCR 591, 627, where La Forest J. said: "The *Law Society Act* and the rules enacted thereunder are obviously aimed at a legitimate legislative objective, the regulation and control of the legal profession. The legal profession plays an important role in society and the government has, therefore, a valid interest in regulating the competence and ethical standards of its members." See also *Re Klein and Law Society of Upper Canada* (1985) 16 DLR (4th) 489 at 528 (Ont. Div. Ct.) where the Court held that "[the] Law Society is a statutory authority exercising its jurisdiction in the public interest...".

[9] This was a pre-Charter case, and it is not cited here in support of the validity of restrictions on advertising. It should also be noted that Estey J. stated the other side of the self-regulation question and referred to restrictions upon the self-regulatory powers. Further, the passages quoted here are not cited as evidence of the truth of their contents, merely for the proposition that the self-regulation of the legal profession is based upon notions of public interest.

statute. In the course of giving the judgment of the court, Estey J. said this, at page 334:

> The general public is not in a position to appraise unassisted the need for legal services or the effectiveness of the services provided in the client's cause by the practitioner, and therefore stands in need of protection. It is the establishment of this protection that is the primary purpose of the *Legal Professions Act*.

And, at page 336:

> The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. The uniqueness of position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community.

[378] *Swain* v. *Law Society*[10] was a case in which solicitors claimed that the Law Society held in trust for them a share of a commission paid to it by the insurance brokers through whom it arranged a compulsory group professional indemnity scheme under powers delegated to it by sec. 37 of the *Solicitors Act 1974*. An important question in the case was whether the Law Society, in establishing and operating a professional indemnity insurance scheme under sec. 37, was acting in a public capacity or a private capacity.

[379] Lord Diplock said this at page 830:

> The *Solicitors Act 1974* imposes on the Law Society a number of statutory duties in relation to solicitors whether they are members of the Law Society or not. It also confers on the council of the Law Society, acting either alone or with the concurrence of the Lord Chief Justice and the Master of the Rolls or of the latter only, power to make rules and regulations having the effect of subordinate legislation under the Act. Such rules and regulations may themselves confer on the Law Society further statutory powers or impose on it further statutory duties. The purpose for which these statutory functions are vested in the Law Society and the council is the protection of the public or, more specifically, that section of the public that may be in need of legal advice, assistance or representation. In exercising its statutory functions the duty of the council is to act in what it believes to be the best interests of that section of the public, even in the event

[10] [1982] 2 All ER 827 (HL). At p. 837, Lord Brightman made the point that the Law Society, in exercising its powers under s. 37, was performing a public duty intended not only for the protection of solicitors against the financial consequences of their mistakes but also "and far more importantly" to secure that the solicitor is financially able to compensate his client. The other three Law Lords concurred with both speeches.

> (unlikely though this may be on any long-term view) that those public interests should conflict with the special interests of members of the Law Society or of members of the solicitors' profession as a whole. The council, in exercising its powers under the Act to make rules and regulations and the Law Society in discharging functions vested in it by the Act or by such rules or regulations, is acting in a public capacity and what it does in that capacity is governed by public law...

There may be room for argument as to what is the public interest with respect to legal services. It may even be that some measures that will benefit the legal profession will be in the public interest. But any debate about professional self-regulation of the legal profession must focus on the question of the public interest.

4. Conclusion as to Basis of Delegation

[380] Given the wide range in times and circumstances under which the statutory delegations of self-regulatory powers to the legal profession have been made, extended and continued, it is unlikely that the delegations can all be accounted for by any one motivating force. It may well be that some delegations have been mere concessions to importunity and the political influence of the legal profession. But, in my submission, the proposition that Legislatures and Parliament, in their own ways – however misguided they may have been – have tried to promote the public interest in the availability and quality of legal services is more a satisfying explanation of the history of the delegation of self-regulatory powers than is the proposition that Legislatures and Parliament have acted to protect the professional interest of the legal profession in maximizing its income and status.

5. Acceptance by Law Societies of the Delegation of Powers on a Public Interest Basis

[381] If self-regulatory powers are delegated to law societies because legislatures think that the delegation is in the public interest, and if the courts recognize the public interest as the basis of the delegation, what of the law societies? Do they admit that the delegation is for the public benefit rather than for the benefit of the legal profession?

[382] The answer is affirmative. Law societies accept that the public interest is the basis of the delegation of self-regulatory powers. I will give two examples:

1. The benchers of the Law Society of Upper Canada have adopted a "role statement"[11] which declares that the Society exists to govern the legal profession in the public interest. The means to be adopted are ensuring that lawyers have high standards of learning, competence and professional conduct and upholding the independence, integrity and honour of the legal profession, and the Society's power are exercised for the purpose of advancing the cause of justice and the rule of law.[12]

2. The 1995 Annual Report of the Law Society of Alberta opens with the statement that "The Law Society's principal duty is to serve and protect the public interest".

I will add that throughout the time of my personal experience the governing bodies have always had that consciousness.

[383] A recent paper by Professor Wesley Pue[13] analyses arguments put forward on a number of occasions by various of the Canadian law societies in favour of self-regulation. These societies include the law societies of Alberta, British Columbia, Newfoundland, and Ontario. The point to note here about these arguments, whatever their force and validity, is that they are based on the public interest, particularly the importance to the public of an "independent" legal profession, that is, one that is self-regulated.

---

[11] Law Society of Upper Canada, *Role Statement* (24 June 1994) unpublished cited in Curtis 1995, 787,794.

[12] This view has not been universally held in its purest form. Stager & Arthurs 1990, at 32, for example, refer to a submission by the Law Society of Upper Canada to the Professional Organizations Committee to the effect that it is appropriate that a self-regulatory body should balance the public interest against the private interest of their members on the grounds that an economically sound legal profession is a necessary condition for its independence. I doubt that this view would receive substantial support today. It seems to me to be appropriate to identify the professional interest and then work through it to the public interest, with the latter to be the ultimate guide. Usually, however, it will be found that what is in the public interest is in the professional interest, not vice versa.

[13] Pue 1995. Professor Pue questions the logic of these arguments. He also argues that the frequent references to history in the various arguments are overblown. The purpose of the reference here is merely, as indicated, to show that the law societies not only recognize but claim that self-regulation is based on the public interest.

[384] The general purpose of the Bar's *Code of Conduct*[14] "...is to provide the standards of conduct on the part of barristers which are appropriate in the interests of justice", and, in particular, "in relation to barristers in independent practice to provide common and enforceable requirements and prohibitions which together preserve and enhance the strength and competitiveness of the independent Bar as a whole in the public interest...".

[385] The presidential foreword to the Law Society's Guide recognizes that "our behaviour must not fall below the community's expectations". The Law Society regards its regulatory functions as based on the public interest. It is significant that there is a body of solicitors' opinion that thinks that, because of the Law Society's public-interest function, it does not function sufficiently in the interests of the members of the profession, and that the two functions should be separated. [15]

6. The "Social Contract"

[386] The regulatory powers of the Canadian law societies depend entirely on delegation by statute. So do the regulatory powers of the English Law Society. The statutes also confer on lawyers enrolled under the statutes the exclusive (or occasionally the shared) right to engage in the provision of various kinds of services.[16] And the regulatory powers of the Bar, though otherwise acquired, have now received a significant degree of statutory recognition and regulation.

[387] That raises the question: do the law societies have an untrammelled right to exercise their powers for whatever purpose they please, or for the benefit of their members? As the discussion to this point has made very clear, the answer is no: Parliament and the Legislatures have conferred self-regulatory powers on the law societies for the benefit of the public,

---

[14] Bar *Code* 1994, s. 102.

[15] A resolution at the Law Society's 1996 Annual General Meeting required a postal ballot on the question whether the Law Society's "trade union" and "regulatory" functions should be split. It was defeated by a vote of 14,199 to 8,881 by the 30% of eligible voters who cast ballots: *Vote to split Law Society functions defeated*, 146 New Law Journal (October 18, 1996) 1498.

[16] It is often said that lawyers have a "monopoly", but it should be noted that entry to the profession is open to anyone who can satisfy conditions which can be satisfied by a substantial part of the population, and that the number of lawyers per jurisdiction varies from a few hundreds in Prince Edward Island to more than 76,000 solicitors in active practice in England.

not for the benefit of the members of the legal profession. The same is true of the statutory service monopolies and rights. Any other answer would be most extraordinary. There is no other obvious reason why the United Kingdom Parliament and the Canadian legislatures would confer monopolies of service and self-regulatory powers on the legal professions, and maintain them for 200 years, in the case of the Law Society of Upper Canada, and for lesser but still lengthy periods in most other cases of statutory delegation. The only apparent reason why they would confer the monopoly and self-regulatory powers is that they have thought that those powers would be exercised in the public interest.

[388] So, Legislatures and Parliament have delegated self-regulatory powers to the law societies, or, in the case of the Bar have acquiesced in the continued exercise of self-regulatory powers, on the understanding that the law societies will exercise the powers in the public interest. The law societies have accepted the delegation on the basis that they will exercise the delegated powers in the public interest. A delegation of regulatory powers on a certain understanding and the acceptance of those powers on the same understanding amounts to a form of social contract. The contract is

> that socially valuable expertise is the exclusive possession of certain occupations, which receive such privileges as monopoly, autonomy, status, and financial rewards in exchange for ensuring that this expertise is used in the best interests of society.[17]

[389] Society's side of the social contract is the grant to lawyers of two things. The first is the exclusive right to engage in the provision of legal services. The second is powers of self-regulation which are limited or controlled in various ways. Society has not said that these grants are part of a contract, but there is no apparent reason for it to grant the exclusive right to practice and the power of self-regulating without getting something in return: lawyers are not so popular that society is likely to want to grant them special rights and powers for the lawyers' own benefit. The lawyers' side of the social contract is found in their own claims. Lawyers claim that it is in the public interest that they should continue to have their service monopoly and power of self-regulation and,

---

[17] Lewis 1988, 4. The emphasis is added.

on that grounds, they resist measures that would trench on either. If this is not a promise of performance, it is very much like one. Professionalism is at the root of the social contract, but lawyers' claims and promises are their side of the contract itself.

[390] A recent indication that there is a social contract and that it is far from dead is the resolution *Basic Principles on the Role of Lawyers* adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.[18] Although this resolution relates primarily to criminal justice, it is general in its terms. It recites that

> professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest.

It provides that lawyers

> shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and protect their professional integrity"

and requires that governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

[391] The performance by the legal profession of its part of the social contract, has two aspects to it. One aspect is moral: society has entrusted special status to the legal profession on certain terms, and the legal profession, having accepted the status, ought to deliver the *quid pro quo*. The second aspect is self-interest: if the legal profession does not deliver the *quid pro quo*, its claim to special status will be diminished or lost.

[392] The notion of the social contract has its dangers for the legal profession. One side of the social contract coin is the grant of special

---

[18] Quoted at (1991) 17 Commonwealth Law Bulletin 205.

rights and powers to designated occupational groups. The other side of the coin is that society could decide that a profession is not performing its side of the bargain and revoke the contract or restate its terms by legislation. Professor Burrage is of the view that "the bar's and solicitors' agreements with the state"[19] have given way to an arrangement which "looks, in fact, rather like self-government 'during good behaviour', and one step short of complete divestiture and state control"[20]; the Lord Chancellor's Green Papers of 1989 were, in his view, a final declaration "that the state and the market could regulate the profession more effectively than its own members", and made known the government's "determination to abrogate the agreement altogether".[21] In his view, the solicitors' profession, at least, now "might best be labelled an open or a public profession since any privileges or status that it may maintain or earn in the future will depend, not on private, unwritten agreements with the state or the bar, but on a new kind of agreement with the electorate or public opinion".[22] Professor Alan Paterson has expressed a less apocalyptic view, that what is going on is a renegotiation of the social contract, not its abrogation.[23] In Canada, the renegotiation has not gone so far as it has in England, but the potential is always there. It is a fact of political life that the public, acting through the legislatures, can revoke the profession's privileges if it develops the political will to do so. There is no tenable general theory of the divine right of professions.[24]

[393] It should be noted that the professional interest usually follows the public interest, that is, what is good for society will usually, if not invariably, turn out upon analysis to be good for the legal profession. The legal profession is an unseverable part of the body politic and cannot

---

[19] Burrage 1996, at 62.

[20] Burrage 1996, at 74.

[21] Burrage 1996, at 50.

[22] Burrage 1996, at 75.

[23] Paterson 1990; Paterson 1996.

[24] As the Bar has never received a delegation of self-regulatory powers, the reasoning in the text may seem inapplicable to it. However, the self-regulatory powers of the Bar's institutions are now controlled by the *Courts and Legal Services Act 1990* in much the same way as those of the Law Society.

successfully maintain, at least over time, a position which is adverse to the interest of that body politic.

C. Is Self-regulation in Fact in the Public Interest?

1. Existence of a System

[394] Self-regulation[25] applies to lawyers from their professional cradles – entrance to the practice of the profession – to their professional graves – removal of their names from the registers of the professional bodies, whether by reason of death, resignation or other cause. It includes self-regulation of the incoming qualifications of entrants to the profession and how those qualifications are obtained. It includes self-regulation of standards of conduct by the prescription of standards and by the enforcement of those standards through disciplinary sanctions. It includes self-regulation of quality of service through disciplinary sanctions; through encouragement or requirement of continuing education; through the provision of support services for practitioners; through accounting requirements; and through programs for the assistance of those with substance or personal problems. It includes the maintenance of funds to compensate clients for defalcations and the maintenance of professional liability insurance to compensate clients for negligent work.

[395] On the face of it, therefore, self-regulation is a comprehensive system designed to ensure that legal services will be delivered competently, faithfully and confidentially. But the existence of an apparently comprehensive system of self-regulation does not prove its effectiveness, nor does it prove that it has no countervailing disadvantages which offset its advantages in whole or in part, nor does it in logic show that the whole system is not based on flawed premises and therefore contrary to the public interest. So it is necessary to consider benefits and costs further.

2. How to Address the Question

[25] It will be remembered that "self-regulation" is actually a mixed system under which the institutions of the legal profession exercise powers subject to limitations and to checks by other agencies.

[396] In its Report on Regulating Professions and Occupations, the Manitoba Law Reform Commission[26] made the following recommendations:

> 31. The power to administer a licensing or certifications regime should only be delegated to practitioners when it is in the public interest to do so and not merely because practitioners desire this power.
>
> 33. The power of self-government should only be granted when its advantages outweigh its disadvantages. This will only be the case when practitioners demonstrate the qualities needed to sustain self-government in the public interest and when adequate safeguards have been adopted to protect the public interest.

[397] These recommendations are appropriate. They do not, however, tell us how to determine whether or not a specific delegation is in the public interest, whether or not its advantages outweigh its disadvantages, and whether or not adequate safeguards have been adopted to protect the public interest. That must be determined in each case of delegation.

[398] It is necessary to go back to consider what regulation, and in particularly self-regulation can do.

[399] The law societies do not create the legal system and cannot shape it. They do not create the need for legal services and cannot affect it, except to the extent that self-regulation improves service and thus influences demand. They do not create the professionals who provide the services. They do not themselves provide legal services. The most that they can do is to establish standards of competence and conduct; to try to see that that the standards are adhered to; and to provide some remedial services to compensate for substandard legal services.

[400] The public-interest result which the delegation of self-regulatory powers is intended to achieve is that the public will receive legal services that are faithful, confidential, and of good quality. In order to achieve that end, self-regulation is intended to assure the public that lawyers are able to provide services of professional quality and are motivated to do so. It must be recognized, however, that there no really firm empirical basis

---

[26] Manitoba Law Reform Commission 199, at 107.

for any assessment, whether affirmative or negative, of the extent to which self-regulation has achieved those ends.

[401] In order to arrive at an opinion about the effectiveness of self-regulation, one could reason *a posteriori* -- identify desired results and work back on an "it stands to reason" basis to determine what is necessary to produce those results. Or one could try to compare the situation which exists under the present system of restricted and controlled self-regulation with the situations that might exist under a zero-regulation regime (though the dismantling of all regulation of lawyers is so unlikely that such a regime would be a straw target). Such discussions would be largely hypothetical. Or one could try to compare the nature and effects of the English and Canadian self-regulatory regimes with the nature and effect of other kinds of regulatory regimes. Even if the comparison could be made, there remains the difficulty that each regime exists within a social, legal and institutional context that is peculiar to itself and can be understood only if that context is understood.

[402] Any assessment of the effectiveness of self-regulation will depend on impressionistic arguments and views and upon inference and deduction. It is difficult to organize the consideration of the various factors in any intelligible way. So perhaps the best that can be done is to consider the positive benefits and the positive detriments that appear to flow from the self-regulatory system and speculate as to whether the net result is superior to those that might be expected to flow from non-regulation or from some other form of regulation that might be expected to be devised to fill a regulatory vacuum. This can not be done empirically, as there is no non-regulated or differently-regulated environment that is sufficiently comparable to form the basis of a comparison.

3. Entrance Requirements

[403] Regulation cannot ensure that only people who are competent to provide legal services enter the profession. What it can and does do is to ensure that entrants to the practice of law have undergone education and training which are intended to, and are thought to, equip them to enter upon the practice of law. Although entrants are legally qualified to provide any legal service, entrance-level competence will not normally qualify them to provide the highest level of services. Entrants have yet to

raise their competence to levels necessary for more the provision of more complex legal services, and, in the meantime, they must recognize their limitations and stay within them.

[404] There is no empirical evidence that demonstrates conclusively that entrants who have undergone the required education and training are more competent to enter on the practice of law than entrants with different education and training would be. There is only a generalised impression, based upon experience and accepted by the legal profession and by governments,[27] that some such combination of academic and practical training is as good a preparation for the practice of law as can now be devised. That impression, however, is based not only upon theory but upon the observation of results of previous systems of service under articles and the results of the present academic-vocational system as change-overs have taken place, and upon observation of current results. In my submission, there is enough factual and analytic foundation for the impression to make it more sensible to accept the impression than to assume that it is wrong. If the impression is correct, then the regulation of legal education and training does have some effect. No doubt we could do better, and it may be that in future better ways will be found "to address problematic aspects of our system of legal education and training".[28] But there is no reason to think that other systems for the prescription and management of legal education and training would do better.

[405] We have seen that in both Canada and England, prospective entrants into the legal profession must satisfy extensive educational and training requirements, which in Canada include pre-law post-secondary education and which, in both countries, include vocational training and apprenticeship-like training. The cumulative effect of these requirements is onerous: a Canadian lawyer is likely to have spent 6 to 8 years in post-secondary education and training (2 to 4 years in post-secondary pre-

[27] Such acceptance by lawyers is by no means unanimous: lawyers have often resisted the supplanting of "practical" training by "academic" education.

[28] Arthurs 1995, at 809.

law;[29] 3 years in law; a year under articles; and some period in a bar admission course), and an English lawyer is likely to have spent 5 to 6 years (3 years in post-secondary legal academic studies; a year in a vocational training course; and 6 months in pupillage or 2 years under a training contract).

[406] Such requirements reduce freedom of choice of occupation. They exact substantial costs in time and money from prospective lawyers. They are likely to reduce the numbers of lawyers and thus to reduce the number of lawyers from whom clients can choose. Reducing numbers will reduce competition and thus may raise prices of lawyers' services. Lawyers will no doubt try to pass on the costs of legal education and training, though the costs will already have been sunk and the competitive environment may not allow the costs to be passed on.

[407] Here we come to Professor Richard Abel's fundamental criticism: self-regulation is a professional project the purpose of which is to control markets by controlling supply, and to control supply by controlling the supply of producers. The principal way of controlling supply of producers is to control the number of entrants into the market. If these premises are correct, it follows that the professional project is not in the public interest but is rather in the interest of the legal profession.

[408] I have already discussed the basic thrust behind the legal profession's participation in self-regulation. I have argued that it is based on a kind of professionalism which recognizes and includes, but also transcends, the self-interest of the legal profession.[30]

[409] But, in this context, it should be noted that Professor Abel does not suggest that there is no public interest in having legal services delivered competently, faithfully and confidentially, nor does he point to a better

---

[29] It is my personal view that no more than two years of pre-law post-secondary education should be required, as the advantages become insufficient to justify imposing additional time and cost requirements on prospective entrants. (At the time I went through for law there was a combined Bachelor of Arts and Bachelor of Law programme at the University of Alberta which enabled me to complete my prelaw requirements in 2 years and my law requirements in 5 years. The reader will no doubt be impressed with the coincidence that the time that I spent to acquire my qualification is the time which is just right.)

[30] See Chapter IV.

way of achieving that end. It is doubtful that any significant body of responsible opinion doubts that it should be public policy to develop a legal profession that is capable of delivering legal services of adequate quality and motivated to do so something that public policy should try to develop. It is also doubtful that there is any significant body of responsible opinion to the effect that such a legal profession will be created by market forces alone without some education, training or measures to control conduct. If there is a body of opinion to either effect, it is, in my submission, simply wrong. Clients have too much at stake, and so does society, to remove all controls.

[410] The quality of legal services is something of the utmost importance to clients, whose important or essential interests may depend upon it, whether in a criminal trial or civil litigation or in the preparation of wills and commercial documents. The mechanical aspects of some kinds of legal services can be mastered fairly easily. That is not, however, true of most legal services. Where it is true, there is often a legal context that creates significant dangers unless that context is understood. A high standard of education and training cannot guarantee that every legal service will be rendered competently, but it provides a basic standard of competence which is in the public interest.

[411] What would be a better system for the regulation of qualifications? Non-regulation, that is, a change in the law so that anyone who wishes to do so can provide legal services, is a non-starter:[31] it is unlikely that any strong current of opinion will be found going in that direction or that any persuasive rationale can be provided for doing so. The only notions that compete with self-regulation in the area of qualifications are regulation by the state and regulation by agencies wholly or partially independent of both the profession and the state.

[412] Volume 2 of Abel & Lewis's *Lawyers in Society*[32]contains essays about lawyers in 11 civil law countries, which are considered to be "a broad, though not entirely representative, selection from northern and

---

[31] Chipping away at the borders of legal practice to enable non-qualified persons to provide specific services that are now considered legal services is not out of the question, but that possibility is not relevant to this discussion.

[32] Abel and Lewis, 1988.

southern Europe and the Latin American countries influenced by Spain and Portugal".[33] From these, Professor Richard Abel has prepared an analysis of the admission requirements of those civil law countries. [34] Control by the state is and has always been the norm, not control by the profession. A university education has been the principal element in entrance qualifications, with some form of apprenticeship or an examination sometimes but not always required and being of secondary importance. This has come about without a "professional project". He says:[35]

> Thus, the civil law world does not display the "professional project" so characteristic of the common law. Rather, the state is interested in obtaining highly qualified lawyer employees while controlling costs, and the university is torn between the desire to expand and the need to maintain educational quality. The size of the private profession is little more than an accidental by-product of these two forces.

His account does not suggest that control by the state in civil law countries has imposed lesser barriers to the practice of law; that is to say, civil law systems prescribed by the state in the interests of the state have not, according to his account, done significantly better at maximizing competition than have the common-law systems in England and Canada.

[413] In the United States, admission to practice is controlled by the states. A law degree, usually with pre-law college requirements, is central to the qualification of entrants to the legal profession, followed by a bar examination. The profession does not regulate entry. However, Professor Abel's view is that there has long been a "professional project" aimed at limiting the numbers of lawyers coming into the profession.

> The trajectory of entry control during the last century and a half, therefore, is a success story that simultaneously reveals the inherent limitations of the professional project. National and state associations have persuaded government to require lengthy prelegal and legal education, restrict the number of institutions

---

[33] Id., vol. 2, at xiii.

[34] Abel, *Lawyers in the Civil Law World*, 1988.

[35] Id., 17-18.

> in which lawyers could be trained, and increase the difficulty of the bar examination. [36]

The influence of the profession, it would seem, could be exerted effectively without self-regulatory powers. But,

> Nearly 800,000 American lawyers constitute the largest legal profession in the world, both in absolute numbers and in proportion to population.[37]

This is difficult to reconcile with the proposition that entry requirements established under the influence of the legal profession in the U.S.A. have effectively kept numbers down. Two passages from his book may explain this:

> Yet the subsequent expansion of public higher education has increased the number and diversity of those who could surmount each of these obstacles. And neither ascriptive barriers nor patently anti-competitive practices could withstand contemporary judicial scrutiny.

And:

> One plausible explanation for the surge of interest in the legal profession in the last two decades is the dramatic rise in lawyer incomes...If this interpretation is correct, then supply control will always be ephemeral within any relatively free economy. Although market correction may take years or even decades and introduce new imbalances, supply and demand do respond to each other.[38]

If the numbers of lawyers has increased almost exponentially in the United States despite the entrance requirements – and the numbers of lawyers in England and Canada have increased dramatically as well – the existence of a professional project for the control of the supply of producers is no longer a tenable explanation for the maintenance of the present entrance requirements, at least to the extent that the legal profession controls or influences those requirements.

[414] A different question is whether the requirement of a law degree followed by requirements of vocational training tend to produce a legal

---

[36] Abel 1989, 73.

[37] Id., at 3.

[38] Id. at 3, 80 respectively. Footnotes omitted.

profession that is too homogeneously composed of middle-class whites, particularly (though much less predominantly in recent years) middle-class white males. I do not doubt that these requirements, in Canada at least, have tended towards a relatively homogenous legal profession. If that is so, it has not, at least in the last few decades, been due to a system that is intended to discriminate, but rather to a situation in which minority groups are less likely to go to law school. Efforts have been made to increase the number of aboriginal people in the law faculties, and these have had some success, if not enough to give them numbers in the profession in proportion to their numbers in the general population. Incoming minorities are not likely to be represented in the profession in anything like proportion to their numbers until they have been in Canada long enough to amass the financial resources and the professional orientation to encourage and enable them to support themselves or their children through the education and training process, though minorities who came to Canada in significant numbers longer ago now do better. Women were for a long time much under represented, but are now entering in much greater numbers. More should be done to ensure that financial and cultural barriers are removed, but it is by no means clear that some other form of regulation would do better.

4. Post-entrance Regulation

[415] Is the regulation of established practitioners effective in ensuring that legal services are rendered competently, faithfully and confidentially?

[416] There is no doubt about Professor Harry Arthurs'[39] answer:[40]

> To conclude with excerpts from the rich Pythonian lexicon: this parrot of self-regulation is definitely deceased; it is pushing up the daisies; it has joined the choir invisible; it is bereft of life; it has met its maker; it is no more; it is bleeding demised.

---

[39] Professor Arthurs had had a long and intimate involvement with but detachment from the practising profession. His willingness, upon appropriate occasion, to take positions and express views that provoke actual thought rather than the mere complacent expression of conventional wisdom continues to render a valuable service to the legal profession and to the public.

[40] Arthurs 1995, at 809. The reader will no doubt remember the Monty Python skit in which the buyer of a parrot tries to return it to the seller on the grounds that it is dead, a proposition which is resisted by the seller.

It can be empirically determined that law societies exist and that they continue to do what regulators do. Professor Arthurs' meaning therefore has to be metaphorical: self-regulation as an idea or as an effective programme has suffered from the terminal problems encapsulated in the quotation because it is ineffective or is irrelevant to the competence and standards of conduct of lawyers.

[417] Professor Arthurs' article provides, I think, a good framework for the assessment of the value of the self-regulation of practitioners. He enunciates a number of arguments that are made for self-regulation and rebuts them, and he advances alternatives. I will address the arguments and his rebuttals, adding some additional propositions and comments of my own.

D. Arguments for Self-regulation

1. Need for an Independent Legal Profession

[418] Professor Arthurs states the first argument as follows:

> First, there is the argument from principle: self-governing professions are needed to defend society against the all-pervasive power of the state. An autonomous bar, as the argument runs, is a sort of extrusion of an independent judiciary, which, in turn is an indispensable adjunct of the rule of law.[41]

In one respect, this statement of the argument, I think, goes further than it needs to. It is possible to hold the view, and I do so, that the state frequently applies power, both the power of law and the power of force, to individual members of society, without holding the view that state powers are all-pervasive.

[419] The state is much more powerful, legally and physically, than are individual members of society. Individuals often do not fully understand their legal rights against the state and do not have the skills to assert those rights effectively, so that they are at risk of being overborne by the superior power of the state. Individual members of society have an imperative need for legal advice and representation in order to ensure

---

[41] Id., at 801. I would have thought that the argument would characterize an independent judiciary as an extrusion from an independent bar rather than the other way around.

that their legal rights are respected. It is imperative that they be able to obtain legal advice and representation that is independent of state control.

[420] In another respect, the statement does not go as far as it might. The state is not the only entity which has and can abuse superior power. Private entities can do the same, and, while they are not as likely as the state to override individual rights and liberties, they will frequently do so. It is imperative that individuals be able to obtain independent legal advice and representation in order to defend their legal rights against other non-state entities as well as against the state.

[421] The importance of advice and representation which is independent varies from case to case. But even in a conveyancing transaction, an individual needs to know that the advice and representation he receives will be independent of the influence of the other side, and the existence of a profession which regards independence as a duty is, in my submission, a safeguard which is imperative in the public interest.

[422] I do not regard an autonomous bar as an extrusion of an independent bench. Both bench and bar have vital roles to play in maintaining the rule of law and in ensuring that legal rights are respected by the state and by private entities. It is not necessary to consider either as an extrusion of the other.

[423] In response to the argument based on the notion of independence, Professor Arthurs points out:

(1)

> "that there are all sorts of liberal, pluralistic democracies...where the bar is not self-governing".

This is quite true. But it does not dispose of the argument. It does not, I think, necessarily follow from the fact that liberal, pluralistic democracy A functions without a safeguard that it functions *better* without it. Nor, I think, does it necessarily follow that liberal, pluralistic democracy B should try to function without the safeguard. The question for liberal, pluralistic democracy B is

whether or not the safeguard is desirable in the public interest of pluralistic democracy B.

(2)

> "there have been many times in our own Anglo-Canadian history when the bar and the bench were much more closely aligned with the forces of repression than with those of freedom."

The discussion should, I think, be restricted to the bar, but with the comment that if at any time the bench should be aligned with the forces of repression, the existence of an independent bar is more important than ever. Examples of the functioning of an independent bar in the face of a repressive judiciary can also be found in our own Anglo-Canadian history.

Presumably the point of the rebuttal is that the institutions of the legal profession are not to be trusted any more than the institutions of government so that there is no positive reason to confer self-regulatory powers on the former.[42] But there are a number of factors to consider.

First, the mere division of powers makes it less likely any one person or group will have access both to the levers of state power over individuals and the levers of regulatory power over lawyers. Second, the interposition of the law societies between lawyers and the state, or between lawyers and an inflamed public opinion, provides insulation which helps to maintain the independence of a lawyer's advice and representation. Third, the powers of the law

---

[42] In 1979, Chief Justice Williams of the Supreme Court of British Columbia, who was then at the bar and acting for the plaintiff in *Jabour v. Law Society of British Columbia* (in which I was called as a witness by the Law Society), wrote an article (Williams, 1979) directed against what the author considered to be abuses of power by the law societies, including such things as the *Jabour* case itself (restrictions on advertising), the early failure to admit women to the law societies, and the *Martin* case in British Columbia in which an applicant for admission was rejected on the grounds that he was a communist. There is no doubt that over time it is almost certain that some abuse of any power will occur. The author's proposed solutions did not include the abrogation of self-regulation, but rather included ways of ensuring greater public accountability, such as lay representation, public meetings of the governing body, a cabinet minister sitting as guardian of the public interest, a body such as the Quebec l'Office des Professions, and a clear division between the representational and regulatory functions of professional institutions. One of his conclusions was that a public regulatory authority to which law societies must apply for permission to adopt certain measures would destroy the independence of the profession.

societies are controlled by public-law devices, particularly by the role of the courts in appeals and judicial review, so that their misuse of regulatory powers will usually be corrected by the system. Fourth, the powers of the law societies are exercised by functionaries who are mostly elected by the members of the profession and are not subject to control by the state or by private entities.

In my submission, however imperfect any human institution necessarily is, the insulation of lawyers from state powers of compulsion and from the effects of inflamed public indignation that is effected by self-regulation of the legal profession is highly desirable and may even be characterized as being in the vital interests of the members of society.

(3)

> "some of our finest judges have come not from the self-governing wing of the profession, but from employment in government or universities".

I do not see the relevance of this to the question of self-regulation unless to rebut an unstated argument that the purity of the bench depends on the purity of the bar. This is not an argument that I would put forward. I would suggest, however, that the academic branch of the profession, while not subject in their academic capacities to the self-regulatory powers of the legal profession, is influenced by the values and ideals of the profession for entrance into which (among other purposes) they educate their students, which values and ideals are in turn maintained and promoted by self-regulation.

2. Whether Only Professionals Can Regulate Professionals

[424] Professor Arthus states the second argument as follows:

> "Secondly, there is the argument from practicality: professions must be self-governing because they alone understand what their members need to know, how they ought to behave, what constitutes deviant conduct, and which sanctions ought to be imposed when."

[425] In response, Professor Arthurs says this:

> ...it is certainly true that lawyers know more about how law is practised than anyone else; it is even arguable that this knowledge qualifies them to enforce standards of practice. But it does not follow that, because the profession has the power and the knowledge to regulate effectively, it will do so. The evidence is to the contrary: law societies have exhibited an invincible repugnance to the idea that they should use their knowledge and power to discipline incompetent lawyers, the very group that professional self-government is designed to suppress.

[426] I do not subscribe to the proposition that **only** lawyers can regulate lawyers. I do agree with what I think that Professor Arthurs says in this passage, that lawyers are qualified by knowledge and experience to regulate lawyers. I think that they are better qualified than others because of that knowledge and because of their ability to apply an informed spirit of legal professionalism.

[427] It is true that at least some law societies have had difficulty in coming to grips with the discipline of incompetence as such. I agree that in the time since new codes of professional conduct were adopted, starting in 1974, the law societies should have moved more quickly. I do not agree that they have "exhibited an invincible repugnance" to the idea; the benchers of the Law Society of Alberta, for example, having tried to grapple with the problem in various ways in the past, have approved in principle a discipline procedure for dealing with members who demonstrate a pattern of conduct indicating that they are incompetent to practise law. There have been various procedures adopted for dealing with incompetence as disclosed in action, for example, interviews and practice reviews with consequent directions.

[428] The fact that self-regulating bodies have not moved as quickly as they might have done in bringing their disciplinary powers fully to bear on incompetence, in my submission, does not show that self-regulation should be discontinued, much less that it is "bleeding demised". What it does show is that the law societies should pursue the question more diligently.

[429] I think that Professor Arthurs' position as stated in the quotation above is overly simplistic. It seems to equate the whole purpose of self-regulation with the discipline of incompetents: "the very group that self-government is designed to suppress". I agree that incompetents are a group against whose incompetence self-government should protect the

public, but the suppression of incompetents is far from the whole scope of self-regulation. And rehabilitation and practice restriction are alternative devices to suppression which may prove effective upon occasion. And there are many other devices as well as suppression that are used to promote competence and discourage incompetence. Further, self-regulation includes regulation of or influence upon incoming competence, and it includes the enforcement of standards of conduct. The mere discontinuance of self-regulation would not improve matters.

3. Precedent

[430] Professor Arthurs refers to and refutes an argument that because the legal profession has been self-regulating in the past it must continue to be self-regulating.[43] I agree that there is little point in appealing to history except for lessons that can profitably be learned from it: the past does not dictate what should be done in a different present. If self-regulation is not defensible in terms of the here and now (though I think it is), it should not be continued. There is an argument in favour of the stability of important institutions, but that argument cannot support the continuance of inappropriate institutions. But if self-regulation is defensible in terms of the here and now, then that is reason enough to continue it.

4. Alternatives

[431] Professor Arthurs inquires:

> Would it really matter if we were to abandon the idea of professional self-regulation and hand over powers of discipline and disbarment to the courts or a regulatory agency? [44]

My answer is that it would matter a great deal.

[432] In Professor Arthurs' view, much of the codes of professional conduct is not enforced and is therefore not operational; the criminal fraud and related matters and the breaches of fiduciary duty, which are the operational parts of the codes, could be turned over to the criminal

---

[43] Specific arguments along these lines are effectively addressed by Professor Wesley Pue (Pue 1995).

[44] Arthurs 1995, 802.

and civil courts for enforcement; and, anyway, "regulation is not a major determinant of professional conduct". Cases involving personal and professional disability would have to be handled by the Law Society or a body invented for that purpose, but that is about all. What shapes professional conduct is "the personal characteristics of the lawyer, the professional circumstances of his or her practice and the ethical economy of the profession". The crisis of competence which Professor Arthurs sees in the profession "is a reflection of fundamental changes in the very nature of law in our society, in the foundational understandings of legal intellectual work, and in our inability, so far, to address problematic aspects of our system of legal education and training", for which (*ex hypthesi*, in view of the inability he mentions) he does not prescribe a remedy.

[433] This is rather a large group of subjects to grapple with. I will, however, try to grapple with them:

1. It is true that the criminal and civil courts already deal with criminal fraud and related matters and breaches of fiduciary duty, and they can impose sanctions on lawyers as officers of the courts. But the courts can act only when a criminal charge is laid or a civil action is brought.[45] That would continue to be true if they were to exercise the whole range of disciplinary powers. They are not, in my submission, set up to deal adequately with professional discipline, and they did not deal adequately with it when they were the only disciplinary authorities.

2. It would be possible to establish another regulatory agency which would deal with discipline matters, either under its own jurisdiction or as a feed-in to the courts. But until a case is made for saying that the substitute regulatory agency would do the job better than the law societies do, this is not an argument for the substitution.

3. Is regulation "a major determinant of professional conduct"? If one looks at the whole system of self-regulation, I think that the answer is yes, though I admit that, apart from my personal experience

[45] Contempt in the face of the court is an exception to this generalization.

which may be dismissed as anecdotal, I have no more empirical evidence for that view than Professor Arthurs has for the opposite view. But self-regulation exposes the student and the lawyer to notions of professional responsibility throughout their legal education and their practising life; it sets those notions out in formal codes; it exhorts them, and in some cases compels them, to engage in continuing education, and brings before them the practical as well as the ethical advantages of doing so; and it exposes lawyers to unpleasant experiences and sanctions if complaints are made against them. Anecdotally, I can testify to the cumulative influence of those regulatory devices upon myself and upon those with whom I have been associated. Objectively, I submit that it is reasonable to infer that exposure to these various aspects of self-regulation has a significant influence; whether that amounts to a "major determinant" may be a question of substance or a question of semantics, but I have no doubt that the answer is affirmative.

4. I agree that "the personal characteristics of the lawyer, the professional circumstances of his or her practice and the ethical economy of the profession" are important influences on lawyers. But I think that the system of self-regulation, taken as a whole, is a significant influence on the "ethical economy of the profession". Ideas are important, even in the present age, and bringing ideas to bear on individuals throughout their educational and professional lives and the groups within which they pass those lives, will, in my submission, influence the "ethical economy" under which they operate. Further, the existence of sanctions for inappropriate conduct does have a significant, if not precisely measurable, effect on conduct.

5. If there is a crisis of competence in the legal profession, about the existence of which I am not at all convinced, and if it is due not only to the environment but also to the profession's inability, so far, to address "problematic aspects of our system of legal education and training", then there should be a debate, the problematic aspects should be identified, and steps should be taken to rectify the situation. But, if self-regulation were abolished, would the process

be better or more quickly done? Unless market forces are capable of rectifying the problematic aspects, which seems to me at best to be highly dubious, presumably Government would have the responsibility for addressing the problems. It would no doubt consult academics -- though it appears that they, as the operators of the law schools, are included in those who are unable to deal with the "problematic aspects". It would no doubt consult the profession through some mechanism or another. It would no doubt consult other segments of society. Nothing I have seen in the operations of Governments in relation to occupational education and training suggests that it is better equipped, or even as well equipped, to take the initiative in dealing with the "problematic aspects" of legal education and training than are the institutions of the legal profession.

6. Professor Arthur is correct in pointing out that many of the ethical prescriptions in the codes of professional conduct are not enforced by the laying of discipline charges for their breach. It does not follow, in my submission, that ethical prescriptions have no effect merely because no punishment is likely to be inflicted for their breach. Their obvious intention is to foster an "ethical economy" in which lawyers' ethical duties are recognized and discharged, and, in my submission, they do foster such an ethical economy, though I do not suggest that they achieve it perfectly. It is of course possible that lawyers would agree on written standards even if there were no law societies, but prescription of standards by the recognized governing bodies adds force to them.

No doubt there are lawyers who will have no regard to prescriptions that are not backed up by effective sanctions. No doubt there are lawyers who simply do not bother their heads about what is in the codes of conduct. However, in my submission, most lawyers recognize that they are bound by duties that do not bind other occupational groups, and most lawyers discharge the ethical duties that have been recognized by the profession, either simply because of that recognition as ethical duties or because they do not want to be regarded as unethical by their peers. Broadly-based empirical evidence may be lacking to either prove or disprove the effectiveness

> of aspirational prescriptions, but my personal anecdotal experience is that many lawyers engage in anxious discussions about their ethical duties without a disciplinary charge looming in the background.

[434] Professor Arthurs says that "regulation is not a major determinant of professional conduct", so that there would be no loss if the discipline system were abolished and criminal and civil wrongs left to the criminal and civil courts. It is probably true -- I certainly hope so and believe so -- that the number of lawyers who shape their conduct solely by the degree of likelihood that a given course of action will lead to disciplinary sanctions is not a large percentage of the profession, that is, that only a small proportion of lawyers are dissuaded from unethical and criminal conduct by fear of the consequences alone. But the existence of the possibility of disagreeable consequences, and the fact that law society machinery may well function where state machinery will not, must, in my submission, add weight to those elements in the "ethical economy" of the profession that militate against unethical or criminal conduct.

[435] But the arguments put forward by Professor Arthurs, in my submission, do not take into account much that law societies do that will not be done unless there is a similarly-motivated regulator:

(1) The prescription of accounting rules, requirements of accountants' certificates, and systems of random examinations of trust account records have done much to prevent premeditated defalcations and have done much to stop the kind of inadvertent slide into trust account shortages which finally leads to defalcations. [46]

---

[46] In the 1960s, for example, the Law Society of Alberta instituted both certificate requirements and a "spot audit" programme. In the times of my two predecessors as discipline chairman, the spot audits in particular almost routinely disclosed a significant proportion of serious failures in accounting, most of which were innocent but a number of which had within them the potential for a descent into serious trouble. By my time, a few years later, the routine problems were of almost negligible proportions. The accounting standards of the profession in Alberta had risen significantly in the meantime, and I am satisfied that the improvement was due to the activities of the Law Society which drew to the attention of practitioners the accounting rules and the importance of conforming to them, which exhortations were reinforced by the prospect of the spot auditor turning up on their doorsteps.

(2) At the low end, law societies receive many complaints about things that are not worth suing about and do not constitute criminal offences, delay, lack of attention to matters, and getting beyond lawyers' professional depth, for example. Law society staffs are often able to resolve the problems by getting lawyers to act or by resolving problems of communications between lawyers and clients. That helps in specific instances and, as it is not comfortable for the lawyers involved, tends to reinforce changes in lawyers' practices. In England, delegates of the law societies can even, in small matters, order compensation or the rectification of problems (though I have given reasons in Chapter III as to why, in my view, this is not an appropriate function for self-regulation).

(3) The support programmes of many of the law societies enable lawyers to give adequate service in particular cases and either to improve their competence or recognize their limitations on a more general basis. These programmes include the provision of assistance and, in some cases, the quasi-disciplinary practice review.

(4) The law societies actively investigate complaints.[47] Whether they always do so sufficiently actively may be open to question, but they do investigate. In case of need they have powers to investigate records. No doubt the police have power to investigate alleged crimes, but there are many occasions in which a complaint can be sufficient to activate a law society investigation where there would no be sufficient grounds to cause the police to act, or where there is no complaint at all but a law society becomes aware that there are grounds for concern. There is no investigatory machinery attached to the civil courts, and there are hurdles for clients who would sue their lawyers which do not stand in the way of an investigation by a law society.

(5) The law societies maintain funds to compensate clients for defalcations by lawyers and they maintain compulsory programmes of insurance against errors and omissions. Although these are not,

---

[47] For solicitors in England and Wales, this is the function of the Office for the Supervision of Solicitors. See Chapter III.

strictly speaking, regulatory, they are based on the regulatory functions of the law societies.

[436] It is doubtless imprudent to identify oneself with the Pythonian parrot-seller. But I think that the parrot of self-regulation is very much alive and that the account of its activities I have given in Chapter III demonstrates that. No doubt it should be kept under constant examination. However, if its vital signs appear to weaken, I suggest that the appropriate remedy would be a form of regulatory electro-shock. Administering the last rites or sending another parrot into the fray would not, in my submission, be in the interests of society.

E. Another Point of View: The Fabian Society

[437] Here I should take notice of the paper *the Rule of Lawyers* issued in 1998 by the Fabian Society.[48] While the paper includes a disclaimer -- the paper represents not the collective view of the Society but only the views of the authors -- it is part of the Society's "Modernising Britain Programme", and the paper states that "[i]n recent years the Society's work on the modernisation of the Labour Party's constitution and its analysis of changing political attitudes have played a significant part in the renewal of the party's public appeal." So it is necessary to pay attention to the paper.

[438] The discussion in the paper is almost entirely devoted to the Office for the Supervision of Solicitors and its complaints-handling system (with a few short references to the Bar's complaints-handling system). The principal point made is that the OSS is too close to the Law Society and that the OSS's complaints-handling role and the Law Society's representational role should be separated. The best solution, in the authors' view, would be a statutory regulatory authority along the lines of the Legal Services Ombudsman. Curiously, however, the authors would accept as an "initial" though imperfect "template" the regulatory system of the medical profession under which the British Medical Association, a wholly professional and voluntary body, performs the representational function while the General Medical Council, of which the majority are professionally-elected, performs the regulatory function.

---

[48] Arora and Francis 1998.

This is a system of self-regulation, so that its adoption would amount to a reorganization rather than an abrogation of self-regulation.

[439] A short passage in the paper suggests that the discipline function should also go to a body independent of the Law Society. The authors advocate this removal "upon the same justifications for removing self-regulation", from which it appears that the authors equate "self-regulation" with the OSS's complaints-handling function.[49] The passage refers to the need that justice be seen to be done and to police self-investigation raising questions of integrity and independence. The paper does not describe, much less analyse, the proper functions of a discipline system, the structure and operation of the existing discipline system or the extent to which the organs of the system are structured so as to be independent of the Law Society. It therefore does not give any rational basis for a decision to change the existing structures.

[440] The penultimate sentence in the passage entitled "Conclusions" is that "Self-regulation is an out-dated concept and has no place in modern Britain", and there is a reference in the preceding paragraph to the evils of "self-regulation". However, as noted above, the paper throughout equates complaints-handling processes with "self-regulation", and there is nothing of substance in the "Conclusions" to found any statement with regard to the general systems "self-regulation" which are described in Chapter III.

[441] In the submission of this outside observer, if restructuring is indicated, it is the separation of the consumer-complaints adjudication and adjustment systems from the discipline systems. The Fabian Society paper does not give any basis for the abolition of self-regulation as it is generally understood.

F. Conclusion

[442] In this chapter, I have tried to make the following points:

[49] This usage is not accidental. The paper at p. 6 refers to the OSS as "the regulating arm of the profession", thus excluding from the term "regulating" the Solicitors Disciplinary Tribunal and the Law Society in its other regulatory functions.

1. The powers of self-regulation are delegated to the legal profession by society, acting through its legislatures,[50] in the belief that the delegation is in the public interest.

2. The powers of self-regulation are accepted by the legal profession on the basis that they will be exercised in the public interest. They do so in the spirit of professionalism as it is described in Chapter IV.

3. The systems of self-regulation described in Chapter III function in the public interest. Their purpose is to make available to the public legal services that are rendered competently, faithfully and confidentially.

4. The recognition by the legal profession and by the law societies that the interest of the client must be preferred to the interest of the lawyer, and the supervision of the performance of that duty by the law societies, are important assurances that lawyers will render legal services faithfully.

5. The independence of the legal profession through self-regulation insulates lawyers from pressures from the state and powerful non-state entities and from inflamed public opinion. It is an important component of an underlying guarantee that legal services will be rendered faithfully.

6. The requirements of pre-entrance qualifications and the post-entrance requirement or encouragement of continuing education, together with the imposition and supervision of compliance with the ethical duty not to undertake to provide services which the lawyer is not competent to perform, are important safeguards against incompetence in the delivery of legal services.

7. The many incidental activities of the law societies, including the maintenance of funds for the compensation of clients for lawyers' dishonesty, the maintenance of mandatory insurance for errors and

---

[50] In relation to the Bar of England and Wales, this statement needs some qualification.

omissions, spot audits and practice reviews, give additional protection to clients.

CHAPTER VI - THE FUTURE OF SELF-REGULATION OF THE LEGAL PROFESSION

A. Introduction to Chapter VI

[443] The continuation of self-regulation is dependent upon the existence of some conditions in the internal environment of the legal profession and upon the existence of other conditions in the larger body politic which is the profession's external environment. What are those conditions? Are they likely to continue to obtain? These questions should be addressed, though the latter cannot be authoritatively answered.

[444] One necessary internal condition, in my submission, is a spirit of professionalism in the legal profession which acknowledges the special duties of individual lawyers and which also acknowledges the special duties of lawyers collectively. That spirit is a necessary foundation for a system of self-regulation which operates in the public interest.

[445] Another necessary internal condition, in my submission, is a perception that the system is not contrary to the private interest of the profession generally. It may seem paradoxical to suggest, on the one hand, that lawyers are motivated by a spirit of professionalism and at the same time to suggest, on the other hand, that a perception that self-regulation is not contrary to the interest of the profession is also a necessary condition for the continuation of self-regulation. If it is paradoxical, so be it. While professionalism recognizes duties to clients and others that do not apply to other occupations, I do not think that in the long run any large group of people will accept a system which imposes on them duties and obligations which they perceive as unfair. As a practical matter, the social contract must continue to run both ways.

[446] The necessary external condition is that the public and the government consider self-regulation to be in the public interest, or, at a minimum, that they consider its continuation to be less of an evil than the consequences of taking action to end it. Here it is the **perception** that the system operates, or at least is intended to operate, in the public interest that counts, but such a perception is not likely to continue for

long if the system is in fact operated for the private interest of the profession.

[447] Of course, the "public" is an illusionary entity; it does not really have a collective opinion, but rather has diverse opinions some of which are sufficiently widely and strongly entertained to have some influence on the governmental process. The governmental process may be indifferent about self-regulation; it may be tempted to do change or abolish the system in order to obtain popular support; it may be influenced by pragmatic factors such as a desire to stand well with the legal profession; or it may have an ideological bent that leads it to take a particular view of self-regulation.

[448] In the long run, the continuation of self-regulation of the legal profession is dependent upon the continuation of the form of social contract discussed in Chapter IV under which powers of self-regulation are bestowed and accepted on terms that they will be exercised in the public interest. The social contract can be abrogated by either society or the legal profession if it operates unfairly to either.

B. Internal Factors Which May Prove Adverse to Self-regulation

1. Decline of Professionalism?

[449] There a number of factors which tend to derogate from professionalism.[1]

a. Increase in size of firms

[450] Lawyers in private practice incur overhead costs. They have to recover a return for themselves which is part of the cost of service. These costs must be recovered from clients for whom professional services are rendered. The private practice of law is, in one aspect, the carrying on of

[1] Much of this discussion does not apply to the Bar of England and Wales because of its requirement that barristers in independent practice practise as individuals. The association of English barristers into Chambers does not have the same controlling significance as the association of English solicitors and Canadian lawyers into large firms. Nor does the association of Quebec notaries into partnerships, as these tend to be smaller: Stager and Arthurs 1990, at 171.

a small business. The efficient administration of that business is necessary to its success, or is at least a significant contributor to success.[2]

[451] The tendency towards the increasing complexity of society and business affairs has been accompanied by a tendency towards increasing complexity of professional practising organizations. In 1950, it appears that there were 28 lawyers in the largest law firm in Canada.[3] That firm would today be characterized at highest as a medium-sized law firm; as a result of mergers, the largest firm has over 600 lawyers. In England, the largest firm of solicitors had over 1200 fee earners in 1994; and the two next largest had just under 800 and just over 700 fee earners respectively; and a total of 20 firms had over 200 fee earners.[4] In the same year, "the 5% of firms in England and Wales with 11 or more principals...contained an astonishing 43% of the nation's solicitors in private practice."[5] Such size may produce efficiencies of scale, but those efficiencies are likely to be accompanied by the fragmentation of lawyers' work and by less close contacts among the practitioners in the firm and between individual practitioners and clients. The need for efficient administration of the business side of such firms is also likely to result in bureaucratization which works by the adoption of reporting and accounting measures and by the prescription of standards of measurable things like production of revenue. It can be argued, and, I think, argued with some considerable force, that these developments make it more difficult to maintain a spirit of professionalism.

b. Computerized administration and the billable hour

[452] The advent of the computer has greatly affected law office administration by making it possible to keep track of the fee-earning performance of all lawyers in usable form, thus making bureaucratic

---

[2] No doubt a practitioner can be found somewhere who practises without staff, without premises, and without a bookkeeping system, by undertaking specific services and taking cash payment of fees. The possible existence of such practitioners can be ignored for this general discussion.

[3] Stager and Arthurs 1990, at 177, citing the Canada Legal Directory for 1950.

[4] Flood 1996, at 179.

[5] Paterson 1996, at 159, n. 6, citing Jenkins, J., (1994) *Annual Statistical Report* (London, Law Society).

administration both easier and more effective. Contemporaneously with the advent of computer-organized administration has been the adoption of the use of time expended as the primary measure of bills rendered, and in particular the development of the notion of the "billable hour".

[453] In a way, the billable hour standard of fees is logical and reasonable. Overhead costs and lawyers' remuneration have to be recovered. As the time that any lawyer can devote to providing legal services in the course of a year is a finite number, it seems reasonable enough to distribute the overhead and lawyers' costs among the available time units, that is, hours and even fractions of hours. The result is the cost of providing an hour's service, and the cost of service to the client is what the client should pay. It is also the cost which the lawyer or the firm must recover in order to stay in practice and continue to provide legal services.

[454] The attractiveness of the time-based cost of service as the determinant of the fee is enhanced by the difficulty of finding another appropriate determinant. The use of the value of service as the determinant runs into a number of difficulties. *Ad valorem* fees became unpopular because they do not relate to the actual work done. The degree of success achieved by the lawyer may in some areas of practice, though not in others, be an appropriate determinant, but if the amount of the fee is contingent upon success it is likely to be higher than it would otherwise have been, and some external standard still has to be applied to determine the appropriateness of a contingency fee.

[455] There are, however, drawbacks to the use of time expended as the determinant of the fee. The charging of fees on a time basis does not reward efficiency or penalize inefficiency. It may encourage padding by the devotion of unnecessary time to a matter or by the over-reporting of time actually spent, particularly as individual lawyers are often required to provide a specified annual number of billable hours and will be judged by their production of billable hours.

[456] Again, while the production of revenue is a necessary part of the practice of law, the imposition of standards that relate more to the production of revenue than to efficiency and effectiveness in promoting

the legitimate interests of clients is a countervailing force to the spirit of professionalism.

c. Increased number of lawyers and advertising

[457] Another factor which may militate against professionalism is the combined effect of the increase in the numbers of lawyers and in the relaxation of the rules regarding touting and advertising.

[458] Although most of the law societies have some formal control over the requirements for entrance to the profession, they do not have any effective control over the numbers of entrants. For many years there have been complaints from the profession about the increasing numbers of entrants. If there are too many lawyers – and the question whether or not there are too many is a vexed one with not much in the way of empirical evidence on either side – there is likely to be greater competition for the securing of business and greater pressure to engage in solicitations of kinds that are not consistent with professionalism. The point at which solicitation of business becomes inconsistent with professionalism is another vexed question.

[459] The rules against advertising came to be considered as a restrictive practice imposed on the profession by its elites. The rules have accordingly been much relaxed. The general standards now relate to truth and some form of decency in advertising. There does not seem to be any reason in principle why professionals should not advertise who they are, where they are, what they do, and what they charge, even if they do so on large billboards.[6]

[460] Whether or not increasing competition for business, including advertising, is a countervailing force to professionalism is a question for which it is difficult to find a definitive answer. My own view is that an activity the success of which is judged by the number of revenue sources

---

[6] My own view is that if a lawyer advertises how good they are at what they do, and how much better they are able to serve clients than other lawyers, a line has been crossed. While maintaining the gentlemanly image of the profession is not something that self-regulation should try for generally, it does seem to me that lawyers should refrain from the shabbier kinds of commercial practices. My own view is that a statement made in advertising generally does not make its truth more probable. If the public comes to take that view of professional advertising, the profession and the public will suffer.

captured by a firm, necessary though it may be from a business point of view, has a tendency to militate against professionalism and is likely to emphasize commercial rather than professional relationships with clients.

d. Economic difficulties

[461] It is easier to maintain a spirit of professionalism when there is food on the table and the mortgage payments are up to date. Increases in the number of lawyers, resulting in increasing competition for professional business, coupled with difficult economic times, may militate against the maintenance of that spirit. It is not, of course, possible to forecast with any confidence the economic future of society and of lawyers within society, but past experience shows that bad economic times present challenges to self-regulation.

e. Fragmentation of the profession

[462] The continued existence of the spirit of professionalism is dependent upon the continued existence of a legal profession with common interests. That is at some risk.

[463] In 1797, the Law Society of Upper Canada was created with 15 members. That number has increased a thousand-fold. In England and Wales in 1998, there were over 75,000 solicitors with practising certificates and 9000 barristers in independent practice.[7] The maintenance of a common spirit of professionalism is obviously much more difficult in a profession of strangers than in a small group resident and practising within a comparatively small area, and self-regulation inevitably becomes much more bureaucratic and less personal with increased numbers and geographical dispersal.[8]

[464] The legal profession has become fragmented by area of practice and, consequently, by area of knowledge and competence. There may have been a time when the myth of the universally competent lawyer was accepted, though I doubt it, but with the increasing complexity of law and of affairs more and more lawyers practise in narrower and narrower

---

[7] The numbers of solicitors is taken from the annual report of the OSS for 1997-1998. The number of barristers is that given by the Bar Council's Web page on December 28, 1998.

[8] The extensive concentration of barristers in the Inns of Court is a distinctive characteristic which militates against the fragmentation described in the text.

specialties, whether or not specialization is officially recognized. The professional life of a lawyer who provides family law, conveyancing, will-drafting and estate services to individuals is one thing. The professional life of a Crown prosecutor or criminal-defence lawyer is very different. Different again is the professional life of a lawyer who effectively specializes in mergers and acquisitions, tax, immigration, or personal injuries claims, and the life of a lawyer who is employed by a government or a corporation. As lawyers' professional pursuits and lives differ, views of professional life are likely to differ, and the binding strength of common notions and ideals is likely to weaken.

[465] In part because of the fragmentation by area of practice, the legal profession has also become fragmented by income and by size and strength of business organization. Incomes of the lawyer in small towns or in shopping-centre or neighbourhood offices tend to be much less than the incomes of lawyers who act for large corporations and lawyers who conduct complex business litigation. The corporate ethos of a large city or inter-provincial law firm is likely to be significantly different from that of a solo or small-firm practice.

[466] The differences in income and professional life-style between various groups of lawyers can have effects on their attitudes towards regulation by the law societies. Small practitioners may complain of the enforcement of practice standards which are beyond their reach. Large firms may consider themselves able to regulate themselves and resent law society regulation. Criminal and civil litigation specialists may complain of high mandatory professional liability insurance premiums which are made necessary in disproportionate part by claims against other practice groups.

[467] Professor Harry Arthurs, in another provocative article, has said this:

> Essentially, I will argue that we are in the midst of a fundamental shift in the nature of legal knowledge which may in the end fundamentally transform the legal profession. If we end up with any kind of common professional future, it will likely be as a congeries or collection of sub-professions clustered around different

> kinds of knowledge, bound together – if at all – only by nostalgia and some residuum of self-interest.[9]

In his opinion, if we accept – as we must – "that lawyers must become expert in some fields of knowledge and know very little about others", and "if we expand and diversify our collective store of knowledge, we will trigger a knowledge explosion as dramatic as the explosion of the Mont Blanc in Halifax Harbour – and quite possibly as destructive".[10] As well, he sees the growing associations between lawyers and non-lawyers as adding to the centrifugal effect.

[468] Professor Arthurs' analysis of the centrifugal forces that have been and will continue to be generated in the internal environment of the legal profession is sound. These forces constitute a threat to the idea of a profession, and, consequently, to the spirit of professionalism and to self-regulation. His apocalyptic conclusion, that the fault lines he has described "may ultimately provoke a volcanic explosion – streams of intellectual lava, mudslides of knowledge, a sooty shower of expertise", and that "[t]he legal profession may soon share the fate of Pompeii – or Halifax" is, I hope too pessimistic – indeed it is stated only in terms of possibilities. But it does show that the legal profession, if it wants to maintain its existence as a profession and its spirit of professionalism will have to work hard at it. I do not share Professor Arthurs' pessimism, but it is doubtful that anyone can gaze deeply enough into the crystal ball to make a confident forecast.

f. Alienation of members from the law societies

[469] A consequence of the increased size, wide geographical distribution and fragmentation by practice area, income and organization of the profession, is that members of the profession are sometimes at odds with, or out of sympathy with, the governing bodies of the law societies and the requirements of self-regulation.

---

[9] Arthurs, H.W., "A Lot of Knowledge is a Dangerous Thing: Will the Legal Profession Survive the Knowledge Explosion?" (1995) In the article, Professor Arthurs develops the proposition that licensing lawyers to "do anything" necessarily involves a claim to"know everything", a proposition which he finds absurd. I doubt that any such pretension exists. If it does, it is indeed absurd. The codes of professional conduct, which require a lawyer to be competent in that which they undertake or in the areas of law in which they practise, recognize that universal competence is not attainable.

[10] Ibid, p. 301.

[470] Part of the difficulty is the inherent paradox: on the one hand, the members of the law societies are the lawyers, and the lawyers elect most of the members of the governing bodies;[11] but, on the other hand, the governing bodies, once elected or chosen, are duty-bound to act in the public interest even if that happens to diverge from the interests of their electors.[12] A governing body which focuses on the public interest may well appear to the membership to be taking insufficient account of the interests of the profession.

[471] In England, suggestions have been made for some years that the Law Society should devote itself much more to advancing the interests of its members. There has even been a strand of opinion that it should divest itself of its regulatory functions and restrict itself to its representational functions. In the summer of 1997, a ballot on the question was requisitioned, but approximately 60% of the votes cast opposed the divestiture.[13]

[472] Some Canadian lawyers also think that the law societies should do more to advance members' interests, particularly in such areas as prevention of unauthorized practice. The existence of the Canadian Bar Association, which in most provinces is a voluntary professional association, does provide an alternative form of representation, though, in general, it is more a "provider of personal and professional development and support" to its members than an advocate for the profession.[14]

---

[11] This is not strictly true of the Benchers of the Inns of Court.

[12] It is my own view that there are few occasions on which a measure that is in the interest of the public generally is not in the interest of the legal profession if the latter interest is properly understood. However, convergence of the public and professional interests is not always apparent to all members of the profession.

[13] See New Law Journal 146:6764 (October 18, 1996) 1498. The vote was 14,199 against the split, 8,881 for.

[14] This is the CBA's own view, taken from its Website on December 4, 1998. The CBA is also extensively involved in reform of law and the justice system. Another of its functions is the protection of the independence of the judiciary and the bar.

[473] In England, substantial deficits in the Solicitors Indemnity Fund have also caused dissatisfaction, and proposals have been made to dissolve the Fund entirely or to leave members free to find errors and omissions insurance in the market if they wish to do so; indeed, a substantial majority of the solicitors who voted on a mail ballot voted for an end to the SIF's monopoly.[15] Some members are also dissatisfied with the approach taken by the Office for the Supervision of Solicitors and its predecessor, the Solicitors' Complaints Bureau, which they think favours complaining clients.

[474] In Ontario, there has also been dissatisfaction with the Law Society of Upper Canada on two principal grounds. One is the Society's errors and omissions insurance scheme which has also run into some difficulties, though these seem to have been brought under control. The other is the handling of Legal Aid, though the Legal Aid scheme has now been taken over by the Government.

[475] It is likely that some of these problems are functions of sheer size: the Law Society and the Law Society of Upper Canada are the largest of the law societies in England and Canada. But there is doubtless some degree of alienation of members of many of the smaller, but still substantial, law societies as well. If the mass of the profession should become disaffected to the idea of self-regulation in the public interest, there would be a significant threat to the future of self-regulation.

C. Association of Lawyers with Non-lawyers: Multi-disciplinary Partnerships/Practices

[476] Traditionally, English barristers in independent practice must practise as individuals and other lawyers in private practice in England and Canada have been able to practise only as single practitioners or in partnership with other lawyers. None have been able to share their fees with non-lawyers. In England, a corporation can carry on a solicitor's practice if it is approved by the Law Society and if it is controlled, managed and ultimately owned by solicitors.[16] In Canada, legal

---

[15] The result is reported in The Lawyer, May 10,1999.

[16] Law Society *Guide* 1994, Annex 3C. "Registered foreign lawyers" may also participate. Some flexibility is allowed in the case of a receivership or death of a solicitor.

profession statutes provide for the practise of law by "professional corporations" which must be wholly owned by lawyers; these professional corporations do not have limited liability. No other corporate structure is permitted. The limitations on permissible practising arrangements have been matters of ethics and have also been part of the foundation of self-regulation.[17]

[477] Proposals for allowing lawyers to practice in an undefined and possibly undefinable number of business relationships with non-lawyers are being vigorously debated. These are usually discussed under one of two rubrics. One is "multi-disciplinary **partnerships**". The other is "multi-disciplinary **practices**". It is not clear to me whether or not the two rubrics are intended to have the same meaning, but it appears likely that the second is likely to comprehend a broader group of relationships than the first.

[478] The acronym "MDPs" is commonly used as a shorthand for the relationships under discussion, whatever they may be. It may refer to either rubric. It usually appears that any general discussion of either version of "MDPs" relates not only to relationships with all of the incidents of legal partnerships, or to functional relationships with enough commonality that the participants can be said to be in a "practice", but also to any number of looser forms of association, extending as far as an arrangement for the mutual referring of clients. On the other hand, much of the specific discussion deals with difficulties which are likely to arise only if an MDP association is close enough that the participants are engaged in the same undertaking. I will use "MDP" in the broad sense and the term "true multi-disciplinary practice" in a narrower sense to denote a practising arrangement under which the participants share offices and systems, including a partnership in the strict legal sense.

[479] Arguments in favour of allowing MDPs are put forward on both public-interest and private-interest grounds. The public-interest argument is that MDPs will provide "one-stop shopping" so that clients

---

[17] "Limited liability partnerships" of lawyers are now permitted in Ontario and Alberta. For purposes of self-regulation, LLPs are much the same as ordinary partnerships, though, in Alberta at least, they have resulted in provision for the ultimate control by the Government of the amount of errors and omissions insurance which LLPs must carry.

will be served more efficiently and cost-effectively in one place and will not have to consult different professionals in different places. The private-interest argument is that MDPs are necessary in order to enhance or preserve the competitive position of the legal profession. One of the arguments is that the coming of MDPs is also said to be inevitable, the implication being that if self-regulation stands in the way, it will be pushed aside by an irresistible force.[18]

[480] The Law Society of Upper Canada[19] has established a very narrow category of true multi-disciplinary partnerships under which a lawyer or firm takes into partnership, under the effective control of the lawyers, a person who provides services to support the practice of law, which has to be the partnership's only occupation. MDPs are not permitted in England, and, except for Ontario, they are not permitted in Canada.

[481] Two other common-law jurisdictions permit restrictive forms of true multi-disciplinary partnerships. New South Wales permits such MDPs so long as their business **includes** legal services, but lawyers must hold majority voting rights and must receive more than half of the partnership's net income. Washington, D.C., permits true multi-disciplinary partnerships in which lawyers and non-lawyers are partners, but a permitted MDP's practice must be restricted to providing legal services, and non-lawyer partners must provide professional services which assist the organization in providing legal services.[20] The information of the Law Society of Upper Canada's Working Group was that, as of July 1998, 11 firms had organized under the MDP rules in New South Wales and none had done so under the Washington, D.C., rules.

[482] It is often said that in Europe the large accounting firms are the largest law firms. If the lawyers and accountants were partners and the

---

[18] For example, the chairman of the City of London Law Society was quoted as saying that his personal view was that "some form of MDPs is inevitable. How far it goes is the matter for debate": Law Society's Gazette, October 21, 1998.

[19] See By-Law 25 of the LSUC, adopted April30, 1999, and amended May 28 and June 25, 1999.

[20] The information about MDPs in New South Wales, Washington DC and Europe is taken from the *Final Report of the Working Group on Multi-Disciplinary Partnerships*, Law Society of Upper Canada 1998.

partnership provided both accounting and legal services, these would be true multi-disciplinary partnerships. The Ontario Working Group concluded, however, that this is not the case: the legal components of the European MDPs, if that designation is applicable, though they may use the trade names of the accounting firms and practise from the same premises with the same support structures, are separate partnerships and revenues are not directly shared. If the Working Group's information is correct, the relationships between the accounting firms and the lawyers' firms as they now exist may give rise to some regulatory concerns, but these are not the concerns which would arise if one partnership which included both accountants and lawyers were delivering both legal and accounting services.

[483] The Law Society of Upper Canada's Working Group on Multi-Disciplinary Partnerships recommended against most forms of true multi-disciplinary partnerships.[21] They thought that solicitor-client privilege is likely to be adversely affected by true MDPs, as arrangements under which non-lawyers have access to clients' confidential information are likely to cause the loss of privilege. They thought that practising in true MDPs would adversely affect the independence of the legal profession, as there may be pressures to advise clients in ways advantageous to a true MDP as a whole. They thought that, particularly in view of the different exigencies that affect, say, lawyers (who must maintain confidentiality of almost all clients' information) and auditors (who are obliged to make disclosure of some clients' information), it is likely that conflicts will arise between the ethical requirements of different professions. They also thought that a true MDP relationship would conflict with a lawyer's duty as an officer of the court.[22]

[484] Consideration of the subject continues. The Federation of Law Societies of Canada is formulating conclusions. The Bar of Quebec has under consideration the establishment of a system of true multi-disciplinary partnerships between lawyers and accountants under which

---

[21] Ibid.

[22] I have difficulty in reconciling this argument with the fact that employed lawyers are allowed to appear in any court in Canada and in at least some courts in England.

the non-lawyers would agree to comply with the legal profession's conduct rules. The Canadian Bar Association is considering a committee report[23] which recommended that "MDPs involving 'practices', such as Captive Law Firms, and fully integrated partnerships" be permitted without restriction as to ownership or to the scope of services rendered. In the CBA model, the lawyers in an MDP would be individually responsible for ensuring that the services they deliver comply with all law society requirements, with provisions to be worked out to address specific regulatory issues, including particularly the preservation of solicitor-client privilege. In the United States, the American Bar Association's Commission on Multidisciplinary Practice has recommended that true multi-disciplinary practices be permitted, subject to a number of safeguards for the core professional values, including, in the case of an MDP not controlled by lawyers, undertakings to the supervisory courts that the MDP will not interfere with, and will establish and enforce procedures designed to protect, a lawyer's exercise of independent judgment.

[485] In England, the question of MDPs was on the agenda of the Green and White Papers of 1989 though it was not carried through to the *Courts and Legal Services Act 1990*. In 1998, the Law Society started a consultation on the question. Its consultation paper[24] put forward in a sympathetic way a number of different kinds of MDPs which might be considered, with varying degrees of lawyer-control and revenue-sharing. The President of the Law Society was also quoted as hoping that the consultation would lead to a satisfactory way to permit them, and the current President is reported to have told the 1999 Solicitors Law Festival that the Council gave MDPs a "cautious green light" in October 1999 "but only if we can find ways to preserve our independence and

---

[23] *Striking a balance*, *The Report of the International Practice Committee on Multi-Disciplinary Practices and the Legal Profession*, Canadian Bar Association, 1999.

[24] The paper was available on the Law Society's Website on December 28, 1998. In the foreword the President noted that the Law Society's Council had decided in 1996 "that blanket opposition to MDPs could leave the profession unprepared to deal with changing market developments" and had therefore "decided to review the ban on MDPs with an open mind".

protect clients".[25] It appears that the Office of Fair Trading has also said that it wants to see MDPs.[26]

[486] Internationally, an official of the World Trade Organisation has said that bans on MDPs seem "slightly unrealistic", and that a ban "would be questioned on the basis of whether it was the minimum regulation required to meet justified policy objectives, such as avoiding conflict of interest and retaining client confidentiality".[27]

[487] If there are efficiencies to be achieved through some form of MDP association between lawyers and members of other disciplines or occupations, there is a public interest in enabling those efficiencies to be achieved and to give clients the greatest possible choice of service-providers. The questions that have to be resolved are: Is there such a public interest? If so, can the safeguards of self-regulation be substantially maintained if lawyers can practise in MDPs? If trade-offs have to be made, what are they?

[488] Explicitly or implicitly a partnership -- and probably a closely-knit "practice" which is not legally a partnership but involves integration of service-providers, systems and services -- is likely to set standards of competence and conduct for its members and employees in relation to client service. It is likely to provide for the setting of fees or fee targets. Immersion in a different ethos and dependence on control groups who do not share lawyers' standards may exert pressure on lawyers to cut corners and fail to perform professional duties. It is possible that regulation of the individual lawyers may be enough to see that professional standards are maintained. It is also possible that, to be fully effective, regulation (whether self-regulation or not) must apply to every level of decision-making in relation to the provision of professional services. That consideration would suggest that a full-blown system of MDPs in which a partnership composed of lawyers and non-lawyers

---

[25] *Beginning of an era*, the Law Society Gazette, November 6, 1999.

[26] The other information in this paragraph is taken from the Consultation Paper on the Law Society's Web page as at December 28, 1998, and the Law Society's Gazette, October 21, 1998.

[27] The information in this paragraph is taken from The Law Society's Gazette, September 23, 1998.

furnishes legal services is not consistent with self-regulation.[28] This is apart from such considerations as the preservation of solicitor-client privilege and the handling of trust money.

[489] Many lawyers are employed by governments and businesses where the upper levels of decision-making are beyond their control., and self-regulation is able to cope with that situation. However, in most such situations the employer is the client. If a client chooses to enter into an arrangement under which a lawyer who is not an independent professional provides legal services to that client alone,[29] that is the client's concern, and the public interest in regulating the lawyer-client relationship, though it exists, is not paramount. Regulation does apply fully to the lawyer's external conduct, including conduct before the courts.

[490] What is essential is the preservation of a system of self-regulation designed to provide clients with loyal, competent and confidential legal services is essential. The advent of MDPs may be a threat to that system if the independence of lawyers is compromised by their exposure, within MDPs, to pressures that conflict with lawyers' individual duties of loyalty, competence and confidentiality or to en ethos which does not share those values. The question is whether self-regulation can either be flexible enough to cope with MDPs while preserving what is essential or, if MDPs prove incompatible with self-regulation, whether self-regulation can confine lawyers' associations with non-lawyers to relationships under which it can achieve its goals.

[491] The advent of existing relationships between lawyers and non-lawyers and the possible advent of true multi-disciplinary practices or partnerships constitute a challenge with which self-regulation must cope one way or another.

---

[28] I think that there is also a technical question whether the partnership as a whole, and thus the non-lawyer partners, would be practising law. If the answer is affirmative, the problem could be cured by amendments to legislation.

[29] The position of a Crown prosecutor employed by a government authority is unusual and somewhat anomalous, as the legal services rendered by prosecutors are imbued with a strong public interest over and above the interest of the employer. Important decisions are necessarily made by Crown law officers or delegates. The extent to which law societies can regulate the conduct of prosecutors is a matter of controversy.

D. The External Environment

[492] Until the middle of the 20th century the history of self-regulation of the legal profession was one of the accumulation of self-regulatory powers by the law societies in England and Wales and in Canada. During the last 50 years, however, the self-regulation of the legal profession has come under examination in both countries, and additional restrictions have been placed on the self-regulatory powers.[30] These restrictions have, however, left substantially intact self-regulation as it is understood in the two countries.

[493] In England, self-regulation has been seen by Thatcherite governments as obstructive of the free market; by Labour governments as preserving the privileges of elites; and by the consumer movement as an obstacle to consumer satisfaction. These views led to the enactment of the *Court and Legal Services Act 1990.* That Act provided mechanisms for broadening solicitors' rights of audience and for the securing of rights of audience and rights to conduct litigation by other groups. It imposed requirements of advice and approvals on changes in the qualification rules and rules of conduct of the Bar and of the Law Society insofar as such rules relate to rights of audience and rights to conduction litigation. It provided for the establishment of the Legal Services Ombudsman to oversee the handling of complaints against barristers and solicitors.

[494] Now, the *CLSA* controls having proved cumbersome and ineffective, similar views have led to enactment of the *Access to Justice Act 1990.* The latter Act has, by amendments to the *CLSA,* given the Lord Chancellor alone the ultimate power to authorise new bodies to grant rights of audience and rights to conduct litigation, the ultimate power to accept or reject changes in qualification rules and rules of conduct, and a new power to impose changes in those rules.

[495] A somewhat more restricted but still important threat is to the handling of complaints by the Office for the Supervision of Solicitors. The inability of the OSS to cope with the great flood of complaints against

---

[30] This is a statement of a general tendency. There have been many amendments to Canadian legal professions legislation that have improved the self-regulatory powers of the law societies, the most recent of which being SO 1998 c. 21 and SBC 1998 c. 9 (a complete new Act) which have made the Law Societies of Upper Canada and British Columbia respectively better able to perform their functions.

solicitors has created a crisis of confidence and has led to the inclusion in the *Administration of Justice Act 1999* of a provision allowing the Lord Chancellor to establish a Legal Services Complaints Commissioner, who would go beyond the function of the Legal Services Ombudsman to investigate the handling of complaints, set targets, demand plans, and impose financial penalties if a professional bodies fails to provide or to implement a satisfactory plan.

[496] This latter provision is curious. On the face of it, it is an assertion of further and much more extensive Government control, at least potentially, over the disciplinary organs of the Bar and the Law Society. However, it does not go the whole way and provide for a Government take-over of the discipline process. It is almost as if the Government, having looked into the abyss, recoiled from undertaking the actual operation of the Bar and Law Society consumer-complaints systems, much less their true self-regulatory functions, a development which may mean that professional control over the consumer-complaints systems is likely to continue, at least if the Law Society makes a good fist of overcoming the present difficulties of the OSS.

[497] Views adverse to self-regulation have claimed some support in Canada, particularly the view that self-regulated groups do not give satisfaction to consumers. However, the major examinations of self-regulation and the major proposed and effected changes have come about, not so much because of perceptions with respect to the self-regulation of the legal profession, but because reviews of self-regulated bodies in general have been thought desirable.[31] A further factor has been that provincial governments have had difficulty in dealing with the proliferation of occupational groups who want to achieve professional status by obtaining the enactment of self-regulatory legislation; inquiries into that topic have tended to lead to studies of the existing self-

---

[31] This is apparent from various reports. One case is apparent from my own experience. In 1970, a resolution providing for a review of professions and occupations appeared on the Alberta Legislature's Order Paper, and the Executive Committee of the Law Society, of whom I was one, attended on the Attorney General to ask him what the implications of this resolution were for the Law Society. His answer was that the Government wanted to give the Standing Committee on Law and Regulations something to do and at the same time to find a solution for the problem of dealing with a large number of applications from various occupational groups for professional-type legislation. Nevertheless, the Law Society was thoroughly drawn into the work of the Special Committee which replaced the Standing Committee in the investigation.

regulatory structures. Little has happened since the 1970s, though the Manitoba Law Reform Commission made a substantial report on the regulation of the professions in 1994[32] and some changes working through the system in Alberta in relation to professions and occupations in the health field may have some future effect on the Legal Profession Act.

[498] The effectiveness of self-regulation is dependent upon the exclusive right to provide legal services.[33] External threats to the exclusive practice areas of lawyers continue to appear. Accountants advise on tax matters. Lawyers are threatened in the real estate conveyancing field by non-lawyer conveyancers in England and by American title insurance companies in Canada. In England, the *Court and Legal Services Act 1990* created the possibility of rights of audience and rights to carry on litigation being granted to non-lawyers, and in Canada "agents" compete with lawyers in traffic court matters. Non-lawyers provide advice and representation in immigration matters. The area of exclusive practice has been eroded, and further erosion is possible in the future.

E. Conclusion

[499] As I have noted above, there are both internal and external threats to the continuance of controlled self-regulation. In addition, lawyers have rarely, if ever, been popular. Neither has the legal system of which lawyers are a prominent part. The cost of legal services, particularly in litigation, is beyond many pocketbooks, to the extent that it is sometimes said that only the very rich, who can afford to pay, and the very poor, who are supported by legal aid schemes, can afford to litigate. The delays in the legal system add to the feelings of distrust in it. While initiatives are frequently taken to reduce cost and delay, the basic problems of the system tend to remain in much the same form as in the past.

[500] Yet another factor, at least in Canada, is that self-regulation extends to large numbers of occupational groups and is sought by many more, so that governmental and legislative attention is sometimes drawn

---

[32] Manitoba Law Reform Commission 1994.

[33] Self-regulation could be based solely upon a protected title without a protected field of practice, but that is not the present situation in the legal profession.

by the numbers of applicant occupational groups and by the extent to which grants of some self-regulatory powers have spread. When attention is drawn to one self-regulating occupation or to the group, there is a tendency to include all self-regulatory bodies in the resulting review and development of policy. That is, attention is sometimes drawn to the legal profession as one of a perceived group when that attention would not be attracted by it alone.

[501] On the other hand, the fundamental conditions which have given rise to self-regulation and have continued it in force are unchanged.

[502] Society must have mechanisms to solve disputes between persons and business organizations, and between both persons and business organizations and Governments, and to adjudicate on criminal charges. Persons and business firms require skilled and faithful legal assistance, and society's deeply-held values require that skilled, faithful and confidential legal assistance be available to the members of society. The increasing complexity of affairs in general makes those needs even more acute. Only a major upheaval in society and societal values would do away with those needs. The court system is entrenched beyond any significant likelihood of abolition, though not beyond the curtailment of its business by the development of alternative ways of dealing with disputes. If a specialized occupational group of people familiar with law did not exist, it may be assumed that market forces would create one. It is safe to say that for the foreseeable future there will be a place for a specialized and skilled group of people who provide legal services.

[503] The provision of legal services could be left to be regulated by market forces without regulation and without legally prescribed exclusivity of practice. Custom and the imperative requirements of skill, faithfulness and confidentiality make complete deregulation unlikely. Or regulation by a governmental or quasi-governmental agency could be substituted for self-regulation. That is to say, self-regulation is not the only possible form of governance of the specialized and skilled occupational group of people who provide legal services.

[504] There is no basis for complacency about the future of self-regulation. The centrifugal and anti-professionalism forces at work within the legal

profession threaten the notion of professionalism and thus threaten the foundation of self-regulation. The ever-present dangers of loss of core areas of legal practice to other groups or to multi-disciplinary firms, and the ever-present danger of acute external dissatisfaction with the self-regulation of the legal profession make it clear that there is no basis for complacency about the future of self-regulation.

[505] Professor Alan Paterson said this 10 years ago:

> The challenge of the consumer movement is important, but it is unlikely to herald a new era of patronage control of the profession. At most, it is an indicator that today's society is more "streetwise" than its recent predecessors were. Public trust in the legal profession has been eroded. As a consequence, there has been closer scrutiny of the unwritten agreement granting the profession autonomy, monopoly rights, and high status in exchange for high standards, a service ethic, and self-discipline. Yet society is not tearing up the agreement. Rather, having seen that the profession failed to deliver its promises[34], society merely is renegotiating the bargain. In short, it is premature to argue that the legal professions in the common law world are now in decline.[35]

It seems likely that this passage is a fair depiction of attitudes of governments and, to the extent their attitudes are ascertainable, publics. The centrifugal forces mentioned above and public dissatisfaction with cost and efficiency of the legal system and the handling of complaints by the law societies threaten the continuation of exclusive areas of practice and of self-regulation. This historic position of the self-regulated professions in general and the legal profession in particular; the degree of respect for legal institutions and for lawyers and their skills that still remains; the cost of alternative government regulation and the distrust of government control; and the very real need for assurances, even if only partial ones, that lawyers' competence and conduct will be of a high standard; these help to maintain a climate in which the exclusivity of practice and self-regulation can be maintained, albeit on changing lines.

---

[34] An alternative to the view that the profession failed to deliver its promises is the view that society merely wants more than was promised.

[35] Paterson 1988.More recently (Paterson 1996) Professor Paterson has elaborated on this theme, suggesting that there are a number of specific developments which require re-negotiation which would deregulate some restrictive practices and reregulate some public protection measures such as quality and client care. (A more pessimistic view is advanced by Nancy J. Moore in a review essay about the ABA Commission report, *Professionalism Reconsidered*, 1987 American Bar Foundation Research Journal 773.)

[506] The task of the law societies is to maximize the actuality – and the resulting appearance – of high professional standards, and to give assurances that the public interest is being safeguarded by self-regulation. The tasks of the legal profession as a whole are to provide services to a high standard; to minimize cost and delay; and to take an active part in promoting the efficient working of the legal system.

[507] "Self-regulation", it will be remembered, is a system of regulation of lawyers by the Law Society of England and Wales, by the Bar Council and the Inns, and by the Canadian law societies, subject to a diverse set of controls by courts, governments and other agencies, and lay and ex officio members of the governing bodies.[36] That is, it is highly controlled self-regulation. That is not likely to change, though the nature and identity of the controls may change.

[36] See the description of self-regulation and the various controls in Chapter II.

APPENDIX - What is Competence?

A. Some Conceptual Difficulties

1. Lawyer's Qualities That Affect the Quality of Legal Services

[1] Two elements enter into the quality of a legal service. One is the degree of competence of the provider in relation to the provision of the service.[1] The other is the way in which the service provider applies their competence, that is, the degree of diligence with which the service provider provides the services.[2] "Diligence" here means, to use one OED definition, "constant and earnest effort to accomplish what is undertaken". Since what is undertaken is legal service to advance the client's interest, "diligence" includes loyalty as well as application.[3]

[2] "Competence" can be used to include diligence: For example, the definition of "the competent lawyer" adopted by the benchers of the Law Society of Upper Canada in 1997 says this (emphasis added): "A competent lawyer has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client". Sometimes adjectival or adverbial forms of "competence" are used to describe a quality of the service provided or the way in which it is provided, e.g., "competent service", or acting "competently". In the latter usage, it merges into "diligence".

[3] For the purposes of analysis, "competence" is in this book restricted to its natural meaning, that is, to denote only a state or quality of a service provider.

---

[1] An incompetent service provider may by chance provide a good quality of service in a particular case. This possibility can be ignored for the purposes of this discussion.

[2] Much the same distinction is drawn by Professor D.T. Anderson: "In certain contexts, it may be appropriate to modify the provisional definition of competence quoted above so as to emphasize not the performance, but the capacity to perform, legal services in an efficient, economic, ethical and careful way. This would provide a distinction between having the requisite skill and knowledge (being competent) and failure to use it, having undertaken to do so": Anderson 1979, at 85.

[3] A competent service provider acting diligently may provide service of poor quality, e.g., a competently devised and supervised system for ensuring that limitation periods are observed may malfunction, or a material typographical error may escape the attention of a competent lawyer who diligently peruses the document in which it appears. See the discussion of "negligence" below.

[4] In this book, then, the discussion of the quality of legal services involves the consideration of the competence, or qualification, of the service provider to provide a specific service, and also the service provider's diligence, or the way in which the service provider applies their competence. But, as will be seen, some regulatory devices are used with a view to promoting a more generalized competence, that is, a general level of competence in relation to the practice of law and not merely a special degree of competence in relation to the provision of a specific service.

2. What Is "Competence"?

a. Semantic confusion

[5] "Competence" and "competent" are fairly simple English words. However, their context informs their meaning, and their use in different contexts in connection with the self-regulation of the legal profession leads to muddle. In particular, if one party to a discussion has in mind the ethically-mandated degree of competence to undertake a specific legal service, while another has in mind the generalized competence of a lawyer to engage in the practice of law, the discussion is likely to proceed at cross-purposes.

[6] It is hoped that the following discussion will clarify the muddle rather than lead to further obfuscation.

b. General meaning

[7] The relevant OED definitions are:

(1) "Competent": possessing the requisite qualifications *for* or *to*"; properly qualified.

(2) "Competence": a sufficiency of qualification; capacity to deal adequately with a subject".

[8] "Competence" so defined is not a general or abstract quality, but is rather a quality in relation to a specific activity or set of circumstances. Reflection shows that this must be so: no one is universally competent. For the purposes of this discussion, "competence" must mean a capacity to deal adequately with, or having the requisite qualifications for, a

specific legal service or cluster of legal services (such as civil litigation or real estate transactions), or a more broadly-conceived capacity to turn one's talents to any field of legal practice. Even the latter meaning relates to a defined subject-matter, but it is more abstract because it is difficult, if not impossible, to have in mind at one time competence in relation the whole field of legal services.

c. Meaning in specific contexts

[9] I will set out here some examples of the use of the word in different contexts:

(1) "A practising barrister...must not undertake any task which...he knows or ought to know he is not competent to handle."[4]

(2) "A solicitor must not act, or continue to act, where the client cannot be represented with competence or diligence."[5]

(3) "The lawyer owes a duty to his client to be competent to perform the legal services which the lawyer undertakes on his behalf...Competence in the context of the [branch of the rule just quoted] goes beyond formal qualification of the lawyer to practise law. It has to do with the sufficiency of the lawyer's qualification to deal with the matter in question..."[6]

(4) "Most North American commentators agree that competence typically refers to the "capacity to perform certain tasks adequately or to a specific standard". Although competence is a question of capacity, however, there is also a close link between competence and performance: what is at issue is the capacity to perform a given task. Competence is usually gauged by assessing actual performance."[7]

---

[4] Bar Council, *Code of Conduct of the Bar of England and Wales*, s. 601.

[5] Law Society, *Guide to the Professional Conduct of Solicitors*, s. 12.02

[6] Canadian Bar Association *Code of Professional Conduct* 1974 c. 2.

[7] Paterson, 1990,1. Professor Paterson cites: American Law Institute/American Bar Association, Committee on Continuing Professional Education 1980 and 1981; Crampton

(continued...)

(5) "A lawyer has a duty to be competent and to render competent services...A lawyer must maintain a state of competence on a continuing basis in all areas in which the lawyer practises[8]...The term "**competence**" eludes precise definition because it encompasses a broad range of characteristics. "Some of these...are the following: (a) professionalism; (b) knowledge of the law, legal procedures and legal institutions; (c) sound professional judgment; (d) skill; (e) management and organization; (f) intellectual and emotional capacity to perform competently; (g) experience; and (h) maintenance and improvement of knowledge and skills."[9]

(6) "A competent lawyer must have appropriate knowledge, skills and qualities to provide legal services competently. These include: A. General Knowledge and Basic Skills; B. Legal Knowledge; C. Legal Skills; D. Management Skills; E. Professional Attitudes; F. Personal Characteristics".[10]

[10] It will be seen that the meaning of competence changes with the context in which it is used in these six quotations:

(1) Where any of the first three of these quotations applies, the question is: was this lawyer competent to provide the specific services undertaken in this particular case? That is, did the lawyer have the requisite, proper or sufficient qualifications to render the

---

[7] (...continued)
1981; and Hurlburt "Incompetent Service and Professional Responsibility" (1980) 18 Alta. L. Rev. 145. Professor Paterson speaks with his own authority and has added value to the proposition by his clear articulation of it so that I think it appropriate to refer to that authority despite being one of the commentators cited.

[8] I have assumed that "areas of practice" means "areas of practice generally recognized as such", e.g., criminal law, civil litigation and real estate transactions. If it means "areas of practice demarcated by what the lawyer actually does", the criticisms made of the Rule in the text would not apply, but restricting the requirement of competence to areas defined by what the lawyer undertakes would add little, if anything, to the requirement of competence in what the lawyer undertakes.

[9] Law Society of Alberta, *Code of Professional Conduct,* c. 2. The first sentence is the Statement of Principle, the second comes from Rule 1 and the third comes from Commentary G.1.

[10] Fitzgerald and Thompson 1996, Appendix C, "A New Model". Note that the 6 lettered components are described later in their text.

particular services? This question should be asked by the lawyer before undertaking to provide a specific service, and it should be asked by the disciplinary tribunal if the matter goes into the discipline system. "Competence" is confined to competence to provide specific identifiable services.

(2) In the fourth quotation, Professor Paterson approaches the subject from the consumer's point of view rather than the regulator's or the lawyer's. He ties competence closely to the service rendered. This quotation raises the difficult connection between the notion of competence and the notion of standard of service, which includes what I have called "diligence".

(3) The statement of principle in the fifth quotation has two branches: first, the lawyer must be "competent", and, second, the lawyer must render "competent services".

Taking the latter branch first, it will be noted that "competent" is used as an adjective to describe the **service**: since a service cannot be "competent" in any way in which the term is used nowadays, this usage must take over from the notion of the competent lawyer the notion of services of a quality that would be rendered by a competent lawyer. This is still in the context of the specific service, and it is a matter of ethics.

However, the first branch appears to require competence in a context that includes more than specific services undertaken: that is, the lawyer must have a quality of competence which relates to something that may go beyond the specific services that the lawyer undertakes, even over time. This appearance is confirmed by the quoted Rule, which requires the lawyer to be competent in "areas in which the lawyer practises". Then competence is effectively defined by the Commentary as including certain qualifications which may or may not be needed in the rendering of a particular legal service. So the meaning of competence has shifted from competence to render a specific service at least to competence to render services

within one or more areas of practice,[11] but the attainment and maintenance of competence within those areas is a matter of ethics and, presumably, discipline.

(4) The sixth quotation is yet further removed from the context of a specific service. It is intended to suggest general qualities that a lawyer should have. It thus establishes a standard of competence which regulators should promote through devices such as educational requirements and which lawyers should aim for through personal development, but it is not a standard that must be met as a matter of ethics.

[11] The benchers of the Law Society of Upper Canada have adopted the following definition of "the competent lawyer":[12]

> A competent lawyer has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client. These include:
>
> (i) knowing general legal principles and procedures, and the substantive law and procedure for the areas of law in which the lawyer practices;
>
> (ii) investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client as to appropriate course(s) of action;
>
> (iii) implementing the chosen course of action through the application of appropriate skills including:
> (a) legal research
> (b) analysis
> (c) application of the law to the relevant facts
> (d) writing and drafting
> (e) negotiation
> (f) alternative dispute resolution
> (g) advocacy, and
> (h) problem solving ability
> as each matter requires;
>
> (iv) communicating in a timely and effective manner at all stages of the matter;

---

[11] As noted above, I have assumed that "area" means an area that is generally thought of as an "area" (e.g., criminal law) rather than an area demarcated by what a lawyer actually does (e.g., defending summary conviction offences), but the term could be read either way.

[12] See Law Society of Upper Canada, Competence Task Force - Final Report to Convocation - November 28, 1997.

(v) performing all functions conscientiously, diligently, and in a timely and cost effective manner;

(vi) applying intellectual capacity, judgment and deliberation to all functions;

(vii) complying in letter and in spirit with the Rules of Professional Conduct;

(viii) recognizing limitations in one's ability to handle a matter, or some aspect of it, and taking steps accordingly to ensure the client is appropriately served;

(ix) managing one's practice effectively;

(x) pursuing appropriate professional development to maintain and enhance legal knowledge and skills;

(xi) adapting to changing professional requirements, standards, techniques and practices.

[12] The LSUC definition is basically action-oriented. The competent lawyer's "skills, attributes and values" must be relevant "to each matter undertaken on behalf of a client", and the competent lawyer must apply the "relevant skills, attributes and values in a manner appropriate to each matter undertaken on behalf of a client". The first particular, which requires knowledge "for the areas of law in which the lawyer practices", could be read as requiring that the competent lawyer have some skills in abstraction from the purpose to which they are to be put, but, being a particular, it is confined by the general definition.

[13] The LSUC definition includes not only what I have called competence, but what I have called "diligence". Indeed, it includes in the one term not only standards of quality of service but also standards of conduct generally. It seems to me more useful for analytical purposes to keep ability to maintain quality of service apart from standards of conduct, and I do so in this book, but the definition is a useful compendium, whether it refers to quality of service or to standards of conduct or both.

[14] It will be seen that what is "competence" depends on the context in which the word is used. A lawyer who is "competent" to provide a specific limited legal service may not be "competent" within their area of practice. A lawyer who is "competent" within a narrow area of practice may not be

"competent" in an area more broadly defined or in a broad general sense. That is, the same lawyer may be competent or incompetent depending on the factual context against which their competence is being judged. In the discussions that follow, these differences must be born in mind if confusion is to be avoided.

[15] The "competence" required by a provision in a code of ethics requiring a lawyer to be competent to provide a specific service is much more limited than competence in a practice area or the "competence" that a governing body tries to promote through legal education and other devices. "Old Necessity" (so called because he knew no law) might be competent to defend a quasi-criminal charge where the only question is whether the traffic light was red or green when the accused entered the intersection, but he would not be generally "competent" in the sense of the sixth quotation and probably would not be "competent" in his area of practice in the sense of the fifth quotation, unless "area of practice" means defending red-light violations and Old Necessity does nothing else. So long as Old Necessity is aware of the limitations on his competence and stays within the boundary so drawn, he discharges, in my submission, the lawyer's duty to be competent.[13]

d. One standard of competence?

[16] Competence in relation to a specific legal service is the capacity to perform that specific legal service to an acceptable standard. At this level, it is appropriate to apply one standard of competence to every lawyer. A junior lawyer, or another lawyer who has little or no experience in a given area, can satisfy their ethical duty by declining to perform the service or by performing only that part of the service which they are competent to perform. For example, a newly-admitted junior following their principal into court need not be competent to conduct litigation if their participation will be limited to things which they are competent to do, such as taking notes, making sure that the principal has covered everything, or conducting an uncomplicated examination or cross-examination. A lawyer need not be competent in the whole area of real estate transactions if they act only in connection with simple house

---

[13] See the discussion of "a realist's definition" of competence in Gold 1992, 135.

purchases in relation to which they have an adequate understanding of what is to be done and of the difficulties that may arise.

[17] But the situation is different if competence is considered in relation to areas of practice or to practice generally. In Professor Paterson's view (with which I agree),[14]

> Although there is still a school of thought that competence is an absolute - a uniform standard applied to all - there is growing support for the view that competence is a relative concept. It can be seen as a continuum stretching from incompetence through minimal competence to excellence. Thus different standards can be applied to different lawyers in different contexts.

He goes on to question whether a generalist solo practitioner can be expected to provide service at the same level of quality as that of the lawyers for a large corporation, at very different fee rates and supported by very different resources, and whether all legal aid services can be expected to be of "high quality", pointing out that there is a balance to be achieved between access to service and quality of service.

> If low pay and staff shortages lead to overwork, failures in preparation and reduced standards...can the practitioners involved fairly be described as incompetent?[15]

Holding all lawyers to the same standards of competence, particularly if they are required to apply their competence so as to provide the same standards of performance, may make it impossible for lawyers to provide services which people low on the economic scale can afford.[16] On the other hand, a lawyers who holds themself out as a specialist may be held to a higher standard of performance, because that is implicit in their claimed specialist's status.

[18] The difficulty of applying one standard is shown by an analysis of the requirement of the Alberta Code in the fifth quotation above. The Code requires a lawyer to be competent "in all areas in which the lawyer practises". It does not differentiate. It follows, I think, that the Code

---

[14] Paterson 1990, at 5.

[15] Id.

[16] See Cooper 1991, at 118.

imposes on each lawyer the same duty with regard to the same area of practice, that is, that there is one level of duty and one level of competence in a given area of practice.

[19] But this is not practical. Take the clearest case. It may be said with confidence that a newly-admitted lawyer is not competent throughout any area of practice. The newly-admitted lawyer may enter on practice, first, by undertaking unaided those things that they are competent to do by reason of their legal education and vocational training, second, by acting under supervision or obtaining assistance on aspects of any service which they are not then competent to do unaided, and, third by incrementally extending their competence to cover any areas in which they wish to practise or in which work is available.

[20] But the Alberta *Code of Professional Conduct*, which applies to all lawyers, whether or not newly-admitted, says that a lawyer must not do anything unless competent in the relevant area of practice, and reinforces the natural meaning of the words by including "experience" as a characteristic that is encompassed by the term "competence". This seems to me literally to say that a newly-admitted lawyer cannot acquire experience without pre-existing competence and cannot become competent without experience.

[21] It is my submission that generalized competence, whether generalized with respect to a field or area of practice or with respect to the practice of law generally, is necessarily a variable quality, and that treating it as one identical quality for all practitioners or for all practitioners in a field or area of practice will lead to confusion and give rise to practical problems. It is one thing to require a lawyer not to undertake a specific service unless competent to do so, but quite another thing to require a lawyer not to undertake a specific service unless competent to provide services across a substantial area of practice.

e. Standards of measurement

[22] The discussion has not yet touched on two other questions which are integral to the discussion and are interrelated as between themselves and as between themselves and the meaning of "competence":

(1) by what standard is it determined that a lawyer is competent or incompetent?

(2) by what standard is it determined whether or not a legal service is of an appropriate quality?[17]

[23] The passage quoted from Professor Paterson above raises these questions and points. It notes that "competence is usually gauged by assessing actual performance", which is sensible, as the quality of the service that one provides is good evidence of what quality of service one has the capacity to provide.[18]

[24] Legal services are rendered in order to advance clients' interests by achieving results that advance clients' interests. Specific legal services that meet a high standard of quality are more likely to achieve advantageous results, and specific legal services that do not meet a high standard of quality are less likely to do so. But the quality of services cannot be tested solely by results – that is, by seeing whether or not the client's objectives were met – because adequate services may end in failure and inadequate services may end in achievement.

[25] The result achieved is only part of a matrix of facts against which the quality of the legal services should be assessed. Even in a case in which the result may speak for itself – the appearance of a prior registered encumbrance on a title that was to be clear, or a missed limitation period, for example – it is necessary to know more in order to determine whether the lawyer was competent and acted diligently, and in most cases the imponderables are so great that the result is of little evidentiary value without a great deal more information. Success cannot be the test of quality of service: professional legal services are too often required in circumstances in which there are so many imponderables that results cannot be predicted or guaranteed, and even in the apparently clear examples given above there may be other facts that show that the legal services rendered were actually adequate. The client

---

[17] The notion of "diligence", which, as noted above, is also integral to quality of service, is left aside in this discussion.

[18] Of course, a failure in quality may be due to a failure in diligence as well as to a failure in competence, but that is an irrelevance here.

is entitled to legal services of a high quality, but they are not entitled to a guarantee of a specific result, and the degree of achievement is not the test of quality.

[26] The 1978 Conference on Quality of Legal Services[19] essentially adopted the OED definitions quoted above by saying:

> The Conference accepts the definition of "competence" as the state of having the ability or qualities which are requisite or adequate for performing legal services undertaken...

It then went on:

> A lawyer is competent if he has the demonstrated capacity to provide a quality of legal service at least equal to that which lawyers generally would reasonably expect of a lawyer providing the service in question. The words 'demonstrated' and 'reasonably' must be liberally interpreted so that any review of competence will take into account all circumstances, especially those of new graduates and of practitioners in smaller centres.[20]

[27] This latter passage is not without its difficulties. First, it is not entirely clear whether it is a further definition of "competence" or whether it establishes a test for "competence" as already defined. But, on either interpretation, it suggests that the requisite, proper or sufficient qualifications are the qualifications which will enable a lawyer "to provide a quality of legal service at least equal to that which lawyers generally would reasonably expect of a lawyer providing the service in question." That makes the reasonable expectation of the generality of lawyers the yardstick and would apply that yardstick to legal services provided by a lawyer so as to determine whether the services demonstrated competence.

[28] A second difficulty with the passage is that it is not entirely clear how "all circumstances, especially those of new graduates and of practitioners in smaller centres" should be taken into account. Would the test permit a new graduate to undertake work for which they were not

---

[19] This Conference was convened under the aegis of the Federation of Law Socieites of Canada to make considered proposals for the discharge of the responsibility of the law societies of Canada for the maintenance and improvement of lawyers' competence.

[20] Hurlburt 1979, 29.

competent in the sense of being able to give services that would meet the general-expectation standard? That would expose the client to the risk of inadequate work. Or would it require the new graduate to recognize their limitations and either decline to act where they are not competent to act or obtain whatever help is necessary to enable them to provide the appropriate standard of service and meet the general-expectation standard?

[29] Another aspect of the 1978 Conference's test that should be noticed, whether or not it is a difficulty, is that the first quoted passage defines or provides a test of competence for legal services undertaken and that the second refers to "a lawyer providing the service in question", that is, it contemplates competence with respect to specific services. That is because the Conference was considering, as a relatively new subject, the proposition that undertaking to provide services without the competence necessary to provide them adequately is ethically wrong. The definition can, however, be extended to competence to render a given class of legal services, e.g., services within the field of civil litigation or the field of real estate transactions.

[30] In my submission, the Conference's definition of "competence" – requisiteness or adequacy of qualifications for the services undertaken – supplemented by the quality standard enunciated – the reasonable expectations of the generality of lawyers – provides, in relation to the policing of the quality of legal services, a suitable underlying standard of competence in relation to specific legal services provided by a lawyer. At that level of abstraction, however, the definition is difficult to apply. It is difficult for either the service-provider or the regulator to determine what expectations the generality of lawyers would have in a given case or to determine what precise actions would satisfy those expectations.

[31] The validity of the Conference's approach is not uniformly accepted.

[32] In the view of Fitzgerald and Thompson,[21] definitions such as that of the Conference "are problematic since they are subjective and vague".[22] It is true that the Conference's definition is vague, as it requires the identification of the hypothetical general expectation of lawyers about a specific set of facts; and it may be subjective in fact because either the lawyer or the regulator trying to apply it is likely to apply their own view as to what the generality of lawyer would expect in the specific situation. However, while this may not be an answer, it can be said that the courts have long looked to the reasonable-person test to determine whether standards of care in negligence have been breached, and they have done so without a survey of what reasonable persons think and on the basis of the courts' own views as to what reasonable persons would do.

[33] It might also be thought that the Conference's definition comes down to this: competence is the capacity to provide legal services of a quality provided by competent lawyers. However, in my submission, circularity is avoided by the appeal to the expectations of the generality of lawyers. That expectation determines what quality of service should be provided. The quality of service that should be provided determines the required capacity or qualification, because it is the capacity or qualification necessary to provide that quality of service. The standard may be difficult to apply, but it is at least a standard that can be applied to the provision of specific legal services.

[34] Can some form of "objective" standard of quality of legal services be devised, that is, a standard which is not determined by reference to the qualities, abilities and practices of those who provide legal services, namely, lawyers? No doubt, the standard could be services of a

---

[21] Fitzgerald and Thomson 1996, at 10. I have interpreted their characterization of standards as relating to the definition adopted by the Conference on Quality of Legal Services.

[22] It should be noted that the Conference recommended that methods of analysis of competence be devised, and referred to the work then being done by the ALI-ABA Committee on Continuing Professional Responsibility: Hurlburt 1979, at 29. The subsequent National Workshop on Quality of Legal Services recommended that a number of questions be asked in the analysis of competence: whether the lawyer gathered appropriate facts; whether the lawyer formulated the material issues; whether the lawyer developed an appropriate problem-solving strategy; whether the lawyer's service was thorough, economical, responsive, accurate, consistent and clear; and whether or not the lawyer saw the client's problem through: Hurlburt 1981, at 25. These proposals would do something to bring the standard down to earth, though they do not themselves prescribe a standard.

"reasonable" quality, or doing whatever is "reasonable" under the circumstances, but in determining what is "reasonable", the first inquiry must inevitably be, I think, what responsible practitioners do and how responsible practitioners would characterize the services rendered in terms of adequacy.

[35] There are difficulties with using general practice standards as the standard by which to judge the quality of service. The use of such standard tends to validate what exists merely because it exists. The general standard may permit shoddy work. Practitioners can get together and lower the standard. Identifying the general standard may be difficult, and, in discipline proceedings, a lawyer will be entitled to introduce "expert" evidence -- that is, evidence of other practitioners -- as to what the standard is. It may also be said that a general standard adopts the lowest common elements, though defining the general expectation in terms of what would be expected of a **competent** lawyer may help to overcome this difficulty.

[36] Nevertheless, the standard is, in my submission, appropriate for policing purposes. The governing bodies are entrusted with the formulation of ethical standards in general and may be expected to carry out their duties as much in the public interest in the formulation of standards of quality of service. If it appears that the general expectations of the profession, as indicated by its practices, are too low, it will be for the governing bodies to raise them. In so doing, it is their obligation to act in accordance with the tenets of professionalism as they emerge from the discussion in Chapter IV.

f. Standards of general competence

[37] The approach exemplified by the work of Fitzgerald and Thompson,[23] which builds upon previous work, is interesting and may well prove fruitful. Having considered the changing functions of lawyers and past efforts at devising practice standards, they propose a "New Model". This approach is of value when ways of promoting competence through education, advice and persuasion are being devised or considered. It does not, I think, apply when the question for consideration

[23] See Fitzgerald and Thompson 1996.

is whether a lawyer was competent to undertake a specific legal service, e.g., the conduct of a criminal prosecution which did not require management skills, or the completion of a house transaction which did not require advocacy skills.

[38] The proposals in the Fitzgerald and Thompson paper do not, however, disclose the ultimate standard of competence to be applied. The New Model would, for example, require a lawyer to have knowledge and comprehension of legal theory and communication skills, including litigating or advocating, but it does not describe the standard by which it would be determined whether a lawyer had sufficient knowledge and skills.

[39] This is not a criticism of the proposals contained in the Fitzgerald and Thompson paper or of any reasoned attempt to provide an analysis of lawyers' competence that will provide a useful guide to lawyers, regulators and law teachers. Such proposals, and the BC paper is a good example, are worth consideration, and further development is to be encouraged. The point here is that an overarching standard is needed, and that it may be a different overarching standard depending on the purpose of the analysis. One standard may be appropriate when considering whether a lawyer undertook to provide services which they were not competent to undertake. Another standard may be appropriate when considering the content of legal education and training. In each case, there is a question as to whether the objective is a uniform amount of competence in relation to legal services being delivered or some more general degree of competence that is not related to the lawyer's specific practice.

g. Conclusion with respect to the meaning of "competence"

[40] This discussion has, in my submission, demonstrated at least that "competence" and its adjectival and adverbial forms, must be understood differently in different contexts:

1. if the question is whether a lawyer is or was competent to undertake to deliver specific legal services, "competence" is the capacity or qualification necessary to deliver those specific legal services at an acceptable standard of quality.

2. if the question is whether a lawyer is or was competent to practise within a defined area of practice, "competence" is a more general capacity or qualification necessary to deliver legal services at an acceptable standard of quality over that defined area, and it may go on to include a broader range of capacities or qualifications than those necessary to deliver specific legal services.

3. if the question is whether a lawyer has a basic competence to enter into the practice of law, "competence" includes a yet broader range of capacities or qualifications such as those quoted from the Fitzgerald and Thompson paper (though the back-up explanation of those capacities or qualifications is not given in this paper), which will make the lawyer a true professional who is not limited to legal skills and who is not subject to specific limitations of practice except in the short run.

[41] The question whether a lawyer is competent to deliver specific legal services at an acceptable standard of quality is an ethical question: the lawyer has an ethical duty not to undertake to provide the services unless they are competent to do so. However, for the purpose of assessing competence to deliver specific legal services – that is, for the policing side of a law society's regulatory activities – I do not think that lists of qualities that make up competence are determinative. It does not seem to me that a Crown prosecutor who lacks office management skills but has no administrative responsibilities should be described as incompetent and subject to sanction. It does not seem to me that a solicitor whose practice is restricted to house transactions should be described as incompetent and subject to sanction because they lack advocacy skills. A vital component of competence for the policing side is the ability to recognize one's own limitations and keeping within them, but a lawyer who does both discharges the ethical duty of competence.

[42] Of course, a law society's objectives go beyond policing incompetence in action. They include promoting and maintaining general standards of competence in the legal profession which will make generally available a high quality of legal services, or even a legal profession which looks beyond the provision of specific legal services to an understanding of the function and place of lawyers and legal services in society. In relation to

those objectives, lists of qualities to be encouraged in lawyers generally become useful. Generally speaking, it is highly desirable that lawyers to have capabilities of legal research, analysis, application of the law to the relevant facts, writing and drafting, negotiation, alternative dispute resolution, advocacy, and problem solving ability, to use the list of the Law Society of Upper Canada, to which should be added, I think, personal and practice management skills, without which general competence to deliver legal services is likely to be ineffective to produce results of the requisite quality.

[43] Essentially, the "competence" to which the law societies should and do look in their policing function is the ability to perform a specific legal service up to the standard that lawyers generally would expect in similar circumstances, while the "competence" which the law societies should and do look in their function of promoting and improving standards in the legal profession generally is a much broader degree of competence which will enable lawyers in general to provide standards of service throughout the whole area of legal services and to understand their appropriate place and function in the service of the public and the maintenance of the rule of law in society.

MONOGRAPHS, PERIODICALS AND OTHER MATERIALS REFERRED TO IN THIS BOOK

Abel, Richard L., *American Lawyers* (Oxford: Oxford University Press, 1989)

Abel, Richard L., *The Legal Profession in England and Wales* (Oxford: Blackwell, 1988)

Abel, Richard L., "England and Wales: A Comparison of the Professional Projects of Barristers and Solicitors", in Abel and Lewis, *Lawyers in Society*, Vol. 1, The Common Law World, 23 (Berkeley: University of California Press, 1988)

Abel, Richard L., "Lawyers in the Civil Law World" in Abel, Richard L. and Lewis, Philip S.S., eds, *Lawyers in Society*, Volume 2: The Civil Law World. (Berkeley: University of California Press, 1988)

Abel, Richard L. and Lewis, Philip S.S., eds, *Lawyers in Society*, Volume 1: The Common Law World, Volume 2: The Civil Law World, Volume 3: Comparative Theories (Berkeley: University of California Press, 1988)

Abel, Richard L., *American Lawyers*, (Oxford: Oxford U. Press, 1989)

Abel, Richard L., and Lewis, S.C., "Putting Law Back into the sociology of Lawyers", in Abel and Lewis, eds., *Lawyers in Society*, Volume 3, Comparative Theory, (Berkeley: University of California Press, 1988), 478

Abel-Smith, B. & Stevens, R. *Lawyers and the Courts: A Sociological Study of the English Legal System 1750-1965* (Cambridge: Harvard University Press, 1967.)

ACLEC (The Lord Chancellor's Advisory Committee on Legal Education and Conduct), *First Report on Legal Education and Training, 1996* (London, ACLEC, 1996).

ACLEC (The Lord Chancellor's Advisory Committee on Legal Education and Conduct), *Continuing Professional Development for Solicitors and Barristers: A Second Report on Legal Education and Training* (London: ACLEC, 1997)

ACLEC (The Lord Chancellor's Advisory Committee on Legal Education and Conduct), Annual Report for 1997-1998 (London: ACLEC, 1998)

American Bar Association Commission on Professionalism, *"In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism* (U.S.A.: American Bar Association Commission on Professionalism, 1986)

American Law Institute/American Bar Association, Committee on Continuing Professional Education , *A Model Peer Review System* (1980)

American Law Institute/American Bar Association, Committee on Continuing Professional Education , *Conference Report: Enhancing the Competence of Lawyers* (1981)

Anderson, D.T., "Mandatory Continuing Legal Education, the United States Experience" in Hurlburt, W.H. ed., *The Legal Profession and Quality of Service: Report and Materials of the Conference on Quality of Legal Services* (Edmonton, Canadian Institute for the Administration of Justice, 1979)

Anderson, D.T., "Report on the Workshop Discussions', in Matas, R., and McCawley, D., eds. *Legal Education in Canada: Reports and Background Papers of a National Conference on Legal Education, 1985* (Montreal: Federation of Law Societies of Canada, 1987) 42

Arora, A. and Francis, A. "*the Rule of Lawyers"* (London: the Fabian Society 1998)

Arthurs, H.W., "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?" (1995) 33 Alta. L. Rev. 800 (Referred to as "Arthurs 1995)

Arthurs, H.W., "A Lot of Knowledge is a Dangerous Thing: Will the Legal Profession Survive the Knowledge Explosion?" (1995) 18 Dal. L.J. 295 (Referred to by full title)

Arthurs. H.W., "The Law School in a University Setting", in Roy J. Matas and Deborah McCawley, eds. *Legal Education in Canada: Reports and Background Papers of a National Conference on Legal Education, 1985* (Montreal: Federation of Law Societies of Canada, 1987).

Baker, G.B., "Legal Education in Upper Canada 1785-1889: The Law Society as Educator", in David H. Flaherty (ed.) *Essays in the History of Canadian Law*, vol.1, (Toronto: Published for the Osgoode Society by University of Toronto Press, 1981)

Baker, J.H., *The Legal Profession and the Common Law: Historical Essays* (London: the Hambledon Press, 1986)

Bar, General Council of the, *Code of Conduct of the Bar of England and Wales* (London: The General Council of the Bar of England and Wales, 1994)

Bell, D.G., *Legal Education in New Brunswick, A History* (Fredericton: University of New Brunswick, 1992)

Boulton, W., *Conduct and Etiquette at the Bar* (London, Butterworth, 1957, 1971)

Brierly, J.E.C., and Macdonald, R. A., *Quebec Civil Law: An introduction to Quebec private law* (Montgomery 1993)

Burrage, M., "From a gentleman's to a public profession: status and politics in the history of English solicitors" (1996) 3 International Journal of the Legal Profession 45

Canadian Bar Association, Committee on Legal Education, "Comparative Tables Relating to Various Matters Connected with Legal Education" (1919) 4 Proceedings of the CBA 201

Canadian Bar Association, *Code of Professional Conduct*, (Canadian Bar Association, 1974)

Canadian Bar Association, *Systems of Civil Justice Task Force Report* (Ottawa: Canadian Bar Association, 1996)

Cocks, Raymond, *Foundations of the Modern Bar* (London: Sweet & Maxwell, 1983)

Cole, C.J., *A learned and honourable body: the professionalization of the Ontario Bar 1867-1929* University of Toronto: Thesis)

Conference of the Governing Bodies of the Legal Profession in Canada, "Special Committee Endorses Portability of Law Degrees: A Complete Report" (1970 1 Can. Bar J. 30

Consultative Group on Research and Education in Law (H.W. Arthurs, Chair), *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: Social Sciences and Humanities Research Council, 1983.)

Cooper, Jeremy, "What is Legal Competence?" (1991) Mod. L. Rev. 112 Appn16

Crampton, Roger C., "Lawyer Competence and the Law Schools" in ALI/ABA *Conference Report: Enhancing the Competence of Lawyers* (1981)

Cranston, R., "Legal Ethics and Professional Responsibility" in Cranston, R., ed., *Legal Ethics and Professional Responsibility* (Oxford: Clarendon Press, 1995) 1

Curtis, C., "Alternative Visions of the Legal Profession in Society: A Perspective on Ontario" (1995) Alta. L. Rev. 787

Esau, Alvin, "Specialization and the Legal Profession" in Hurlburt, W.H. ed., *The Legal Profession and Quality of Service: Report and Materials of the Conference on Quality of Legal Services* (Edmonton, Canadian Institute for the Administration of Justice, 1979) 219

Esau, Alvin, "Recent Developments in Specialization Regulation of the Legal Profession", in Hurlburt, W.H., ed., *The Legal Profession and Quality of Service: Further Report and Proposals, Report and Materials of a National Workshop on Quality of Legal Services* (Edmonton: Federation of Law Societies of Canada, 1981),267.

Fitzgerald, Maureen, and Thompson, Donald F., *Standards for Lawyers: What is Everyone Afraid Of? A Background Paper for the Federation of Law Societies Workshop on Lawyer Competence* (Law Society of British Columbia, 1996)

Flood, J., "Megalawyering in the global order: the cultural, social and economic transformation of global legal practice (1996) 3 International Journal of the Legal Profession 169

Girard, P., "The Roots of A Professional Renaissance: Lawyers in Nova Scotia 1850-1910" in Gibson, D. and Pue, W.W. (eds.) *Glimpses of Canadian Legal History* (1991)

Gibson, L., "A Brief History of the Law Society of Manitoba", in Harvey, Cameron, (ed.), *The Law Society of Manitoba 1877 - 1977* (Winnipeg: Peguis Publishers. Ltd. 1977) at 28

Gold, Neil, "Reconceiving Professional Competence" (1992) 10 Journal of Professional Legal Education 135.

Gonthier, C., *What is Professionalism?* (Federation of Law Societies of Canada, 1991)

Gower, L.C.B., "English Legal Training, a Critical Survey" (1950) 13 Mod. L. Rev. 137

Holdsworth, William, *A History of English Law*, (London: Methuen & Co., 1938)

Hurlburt, W.H., ed., *The Legal Profession and Quality of Service: Report and Materials of the Conference on Quality of Legal Services* (Canadian Institute for the Administration of Justice, 1979)

Hurlburt, W.H., "Incompetent Service and Professional Responsibility" (1980) 18 Alta. L. Rev. 145

Hurlburt, W.H., ed., *The Legal Profession and Quality of Service: Further Report and Proposals, Report and Materials of a National Workshop on Quality of Legal Services* (Edmonton: Federation of Law Societies of Canada, 1981)

W.H. Johns, History of the Faculty of Law, Alberta Law Review, 25th Anniversary Issue, 1980, pages 3-4.

Kimmel, E., The Notarial system and its impact in Canadian law, in Landry, R., and Caparros, E. (eds.) *Essays on the Civil Codes of Quebec and St. Lucia,* 1984.

Kyer, C. Ian, and Bickenbach, Jerome E., *The Fiercest Debate: Cecil A. Wright, the Benchers, and Legal Education in Ontario 1923-1957* (Toronto: The Osgoode Society, 1987).

Law Society, *The Guide to the Professional Conduct of Solicitors, 7th ed.* (London: The Law Society 1996)

Law Society of Upper Canada, "Report of the MCLE Subcommittee" (Federation of Law Societies, Workshop on Competence, 1996)

Lederman, W.R., "Canadian Legal Education in the Second Half of the Twentieth Century (1971) 21 U.T.L.J. 141.

Legal Services Ombudsman, *Fifth Annual Report of the Legal Services Ombudsman 1995*(London: HMSO 1996) 2n141

Legal Services Ombudsman, *"Modernising Justice"...Modernising Regulation? Annual Report of the Legal Services Ombudsman 1998/99.*

Lewis, Philip S.C., "Introduction" in Abel, Richard L., and Lewis, Philip S.C, eds., *Lawyers in Society, Volume 1; The Common Law World*, (Berkeley: University of California Press, 1988) at 4

MacKenzie, Gavin, *Lawyers and Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 1993)

Macmillan, Lord, *Law & Other Things* (New York: Books for Library Press, 1937)

Manitoba Law Reform Commission, *Regulating Professions and Occupations* (Winnipeg: Manitoba Law Reform Commission, 1994)

McLaren, John P.S., "The History of Legal Education in Common Law Canada" in Roy J. Matas and Deborah McCawley, eds. *Legal Education in Canada: Reports and Background Papers of a National Conference on Legal Education, 1985* (Montreal: Federation of Law Societies of Canada, 1987). c3f4,7

McRuer, J.C., *Royal Commission, Inquiry into Civil Rights, Report No. 1* (Ontario: Queen's Printer, 1968)

Moore, Nancy J., Professionalism Reconsidered (1987) American Bar Foundation Research Journal 773

Paterson, Alan A., "The Legal Profession in Scotland: An Endangered Species or a Problem Case for Market Theory?"in Abel and Lewis, *Lawyers in Society*, Vol. 1, The Common Law World, 76 (Berkeley: University of California Press, 1988)

Paterson, Alan A. *Professional Competence in Legal Services: What it is and how do you measure it?* (National Consumer Council, 1990)

Pound, R., *The Lawyer from Antiquity to Modern Times* (Minnesota: West Publishing Co., 1953) at 5

Pue, W. Wesley, "Trajectories of Professionalism? Legal Profession after Abel" in Alvin Esau, ed., *Manitoba Law Annual* 1989-90 (Winnipeg: Legal Research Institute, 1990)

Pue, W. Wesley, "Becoming "Ethical": Lawyers' Professional Ethics in Early Twentieth Century Canada" (1991) 20 Manitoba Law Journal 227

Pue, W. Wesley, "In Pursuit of Better Myth: Lawyers' Histories and Histories of Lawyers"(1995) 33 Alta. L. Rev. 730

Riddell, W.R., *The Legal Profession in Upper Canada in its Early Periods* (Toronto: Law Society of Upper Canada, 1916)

Riddell, W.R., *The bar and the courts of the province of Upper Canada* (Toronto: McMillan, 1928)

Severide, N., "The Role of Various Organizations in the Continuum of Legal Education in Canada", in Matas, R, and McCawley, D., eds. *Legal Education in Canada: Reports and Background Papers of a National Conference on Legal Education, 1985* (Montreal: Federation of Law Societies of Canada, 1987).

Sherr, Avrom, Book Review of *The Legal Profession in England and Wales* by R.A. Abel (1990) 53 Mod. L.R. 406

Sibenik, Peter M., *The Doorkeepers: The Governance of Territorial and Alberta Lawyers, 1885-1928)* (Master of Arts, University of Calgary 1984)[unpublished].

Sibenik, P.M., " 'The Black Sheep': The Disciplining of Territorial and Alberta Lawyers, 1885 - 1928" (1988) 2 Canadian Journal of Law & Society 109.

Southin, Mary, "What is 'Good Character?' ", (1976-1977) The Advocate 129

Stager, D, and Arthurs, H, *Lawyers in Canada* (Toronto: Published in association with Statistics Canada by University of Toronto Press, 1990)

Sugarman, D., "Bourgeois collectivism, professional power and the boundaries of the State. The private and public life of the Law Society, 1825-1914", (1996) International Journal of the Legal profession 81

Taylor, James P., "Some Thoughts on the Content and Relationship of Pre-Law Education to Legal Education" in Roy J. Matas and Deborah McCawley, eds. *Legal Education in Canada: Reports and Background Papers of a National Conference on Legal Education, 1985* (Montreal: Federation of Law Societies of Canada, 1987).

Thornton, A., "The Professional Responsibility and Ethics of the English Bar", in Cranston, R., ed., *Legal Ethics and Professional Responsibility 53* (Oxford: Clarendon Press, 1995)

Watts, A., *History of the Legal Profession in British Columbia 1869-1984* (Evergreen Press, 1984)

Williams, Bryan, "Abuse of Power by Professional Self-Governing Bodies" in Law Society of Upper Canada, *Special Lectures* (Toronto: Richard de Boo Limited, 1979)

Willis, John, *A History of Dalhousie Law School* (Toronto: University of Toronto Press, 1979).