The Law Reform Commission

REPORT OF THE LAW REFORM COMMISSION

REVIEW OF THE LAW REGULATING LEGAL PRACTITIONERS IN THE CAYMAN ISLANDS

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Final report No. 2

The Law Reform Commission

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Table of contents

1. INTRODUCTION

1.1 In August 2003 a draft Legal Practitioners Bill was prepared by the Legislative Drafting Department on the instructions of the Attorney-General. Previously the Cayman Islands Law Society and the Caymanian Bar Association had been working on proposals for such a Bill and had submitted material for this purpose. In 2004 the draft Bill was reviewed by the Attorney-General and the Chief Justice.

1.2 In September 2005 the Attorney-General decided to transfer the Legal Practitioners Bill to the Law Reform Commission for a more in-depth review of the Bill. The review of the Legal Practitioners Bill commenced in September 2005 and was one of the first projects undertaken by the Commission. After a first round of consultation with the judiciary[1], Cayman Islands Law Society and the Caymanian Bar Association in 2005[2] the proposed Legal Practitioners Bill was re-drafted several times to take into account comments made by those associations. The Bill was thereafter sent for public consultation on 29th January 2007. The Commission received a joint response from the Caymanian Bar Association and the Cayman Islands Law Society[3] and a response from Mr. John Meghoo[4], attorney-at-law. Representatives from the associations mentioned also made oral representations to the Commission on 28th February 2007. Further written submissions from the associations were submitted on 14th March 2007. Informal comments were also received from the Chief Justice.[5]

1.3 The recommendations for reform contained in this report and the annexed draft legislation are the culmination of in-depth legal research and deliberations as well as extensive consultation with all relevant stakeholders.

[1] letter of 19th January 2006
[2] 11th November 2005; letter from Appleby 24th November 2005
[3] 19th February 2007
[4] 9th March 2007
[5] 13th April, 2007

2. EXECUTIVE SUMMARY

- The current law, the Legal Practitioners Law (2003 Revision) ("the Law"), was first enacted in 1969. While the Law has served its purpose well, developments with respect to the circumstances in which law is practised have changed significantly since its enactment. The jurisdiction of the Cayman Islands is now a sophisticated financial services center in which the services offered by lawyers are a crucial component to its continued success. With the exponential growth in the number of lawyers admitted to practise in the Islands and the establishment of foreign offices by local firms, new challenges in the regulation of the legal profession have also emerged. The Law therefore has several shortcomings that need to be addressed as a matter of urgency.

- One of the main deficiencies of the Law is the absence of a definition of the practice of law. Further, the Law contains few provisions relating to the discipline of practitioners. There is no official mechanism for a member of the public to make a complaint against an attorney under the legislation. The Law provides for suspension and striking attorneys-at-law off the Court Roll with no intermediate sanction for professional misconduct. The Commission recommends that the Law be completely revised to provide for a more modern regulation of the practice of law in the Islands. Appendix A of this report contains a copy of a draft Bill entitled "A Bill for a Law to provide modern regulation of the practise of law in the Islands; to provide for the establishment of a Complaints Committee; to provide for the establishment of a Disciplinary Tribunal; and for connected purposes.".

- The Commission recommends that there be established a Complaints Committee for the purpose of receiving and considering complaints against any attorney-at-law, other than the Attorney-General and a government attorney-at-law. The Commission also recommends the establishment of a Disciplinary Tribunal to hear complaints referred to it by the Complaints Committee.

- While the Commission agrees that all attorneys, including government attorneys, should be called to the Bar, have practising certificates and comply with the same Code of Professional Conduct, the Commission recommends that the Court should continue to be responsible for the discipline of government attorneys in order to avoid conflict of interests which may arise and which could hinder such attorneys in their work on behalf of the public. Government attorneys will also continue to be subject to disciplinary proceedings under the Public Service Management Law, 2006 and Regulations and the official corruption provisions of the Penal Code (2006 Revision).

- Currently there are persons employed as attorneys by the overseas affiliates or branches of local firms who are giving advice on the law of the Cayman Islands but who are not admitted to practise law in the Cayman Islands. The

Commission, after much consideration, recommends that the Law provide that such persons be admitted to the local Bar but that, in order to maintain the credibility and integrity of the local practising certificate, such persons should be regulated. In determining the type of regulation to which these attorneys would be subject the Commission took into account, inter alia, the manner in which the United Kingdom regulates its overseas solicitors under the Solicitors' Overseas Practice Rules, 1990. The Commission's aim is to ensure that those practising oversees will be regulated to the same standard as those practising locally with the necessary modifications to deal with the differences in circumstances. The Commission therefore recommends the following minimum conditions for an acceptable system of licensing of non-resident attorneys-

- There must be a substantial nexus with the jurisdiction and for this purpose the definition of a recognised law firm should apply to firms where the majority of partners or persons holding equity interests in the firm are Caymanian or persons ordinarily resident in the Islands who practise primarily in the Islands. Alternatively, at least half of the attorneys employed by the firm must be ordinarily resident or practise primarily in the Islands.

- A partner of the firm will be required to report on any significant unresolved complaint or disciplinary action against the non-resident attorney outside of the Cayman Islands that comes to his knowledge; a failure to report will render a partner liable to discipline for professional misconduct.

- The non-resident attorney will be required, like all other attorneys, to file an annual certificate of good standing (if available) or affidavit certifying that he has not been the subject of disciplinary sanction by any disciplinary body outside of the Cayman Islands that would be considered professional misconduct in the Cayman Islands, before a practising certificate can be issued. The giving of false information will be an offence and grounds for a finding of professional misconduct.

- The Complaints Committee may, if it deems necessary, carry out onsite visits to the jurisdiction in which the non-resident is practising to interview complainants and witnesses, inspect relevant accounts and hold discussions with the partners in overseas offices and their disciplinary counterparts on the matter under investigation. The costs of these visits are to be borne by the relevant recognised law firm.

- The non-resident attorney, like the resident attorney, will be subject to rules of conduct set out in Schedule 5 to the Law. Such rules would include provisions similar to those set out in the Solicitors' Overseas Practice Rules 1990 of the UK (modified for the purposes of this jurisdiction) including provisions relating to the treatment of trust

accounts.

- The Commission believes that persons who are trained outside of the Islands and who request admission to the local Bar should have basic knowledge of certain local statutes and areas of the laws relevant to the Islands. This is particularly important with the admission of non-resident attorneys who would have no daily exposure to the laws and legal system on the Islands. After consultation on this point, the Commission recommends therefore that any foreign attorney who has not trained in the Islands should, at the date of application for admission, provide evidence to the court that he has undertaken relevant courses and passed relevant examinations approved by the Legal Advisory Council for this purpose. These courses would, for example, relate to the legal system and rules of practice in the Island, as well as specific areas involving the regulatory laws, company law, anti-money laundering, terrorism financing and confidentiality laws.

- Alternatively, applicants could be required to serve for a period of four months under the supervision of an attorney who is generally admitted to practise in the Cayman Islands and who is of more than five years standing at the Bar. During the period of supervision the supervising attorney is expected to provide instruction to the applicant in relevant Cayman Islands law. "Relevant Cayman Islands law" for this purpose should include the Proceeds of Criminal Conduct Law (2005 Revision) the Money Laundering Regulations (2005 Revision), the Confidential Relationships (Preservation) Law (1995 Revision), the Terrorism Law, 2003, any laws which may replace such laws and such other statutes or aspects of law that will be relevant to the intended areas of practice indicated by the applicant.

- The Commission recognises that many foreign attorneys seeking admission to practise in the Islands will have substantial experience and expertise in the various areas of the common law applicable to the Cayman Islands. As a consequence the Commission recommends that the Law provide the Legal Advisory Council with discretion to waive the additional requirements for examination or supervision relating to the relevant Cayman Islands laws. This waiver would apply to attorneys with more than five years post qualification experience upon application by persons applying for admission on a case by case basis.

- One of the requests made during the consultation on the Bill was for a review of the mechanism for the operational licence fee and the introduction of new fees. The Commission is of the view that this is not within its remit and is a matter that should be submitted by the legal associations directly to the Financial Portfolio.

3. DISCIPLINE OF ATTORNEYS-AT-LAW

3.1 Section 7(1) of the Legal Practitioners Law (2003 Revision) provides that a judge, for reasonable cause shown, may suspend any attorney-at-law from practising as an attorney during a specified period, or order his name to be struck off the Court Roll. However before a judge takes such action the judge must, in writing, inform the attorney-at-law of the nature of the complaint against him. The attorney is entitled to call witnesses and to be heard. Under section 7(3) a judge may, if he thinks fit, at any time order the Clerk of Court to replace back on the Court Roll, the name of an attorney whose name had been stuck off.

3.2 The Law therefore provides that judges may decide whether to suspend or strike an attorney off the Court Roll and to readmit an attorney who has been struck off. Under section 8 of the Law an attorney may appeal to the Court of Appeal if he is aggrieved by a decision or order made by a judge.

3.3 The Legal Practitioners Bill provides a new regime for the investigation of professional misconduct and for the discipline of attorneys, with an emphasis on self-regulation. Under the draft Bill a body to be known as the Complaints Committee will be responsible for receiving and considering complaints against all attorneys-at-law, including those practising overseas. The Committee will investigate a complaint and following its investigation it shall either dismiss the complaint or refer the complaint to the Disciplinary Tribunal. The Committee may also on its own motion refer evidence of what it considers to be the misconduct of an attorney-at-law to the Disciplinary Tribunal. In accordance with clause 25 of the Bill the Complaints Committee will have the power to receive and consider complaints against any attorney-at-law, other than the Attorney-General and a government attorney-at-law.

3.4 Clause 25(2) of the Bill deals with the composition of the Committee and provides that the Complaints Committee shall comprise-

(a) three attorneys-at-law appointed by the President of the Cayman Islands Law Society;
(b) three attorneys-at-law appointed by the President of the Caymanian Bar Association;
(c) one attorney-at-law employed by the Legal Portfolio of the Government and appointed by the Attorney-General; and
(d) two persons appointed by the Chief Justice who are not required to be attorneys-at-law and who, in the opinion of the Chief Justice, have demonstrated a wide knowledge of law, finance, financial regulation, accounting or arbitration principles.

3.5 It should be noted that persons other than attorneys-at-law may be a part of the Committee. The Commission is of the opinion that the Committee should be funded from the general revenue of the Islands. It is suggested that part of the moneys collected annually by the Government as fees for practising certificates under the Law should be a levy to be used for the purpose of defraying the

administrative costs of the Committee. The amount payable would be determined by the Financial Secretary.

3.6 It is proposed that the Disciplinary Tribunal shall comprise[6]-

(a) a chairman who shall be the Chief Justice or a judge of the Grand Court designated by him;
(b) one member appointed by the Chief Justice after consultation with the President of the Cayman Islands Law Society; and
(c) one member appointed by the Chief Justice after consultation with the President of the Caymanian Bar Association.

3.7 The Tribunal may impose a disciplinary sanction if it is satisfied that an attorney-at-law-

(a) is guilty of misconduct in his professional capacity;
(b) has behaved in a manner tending to bring the legal profession into disrepute; or
(c) has been convicted of an offence punishable by a term of imprisonment or an offence involving moral turpitude.

3.8 It is proposed that the Tribunal may impose any of the following types of sanctions -

(a) an order that the attorney-at-law's name be struck off the Court Roll;
(b) an order that the attorney-at-law's practising certificate be qualified to the effect that he shall not be entitled to appear as an advocate before all or any courts or tribunals in the Islands or to practise in specific areas of law either permanently or for a specified period;
(c) an order that the attorney-at-law be suspended from practise as an attorney-at-law for a specified period, not exceeding five years;
(d) an order that the attorney-at-law pay a fine of twenty five thousand dollars;
(e) where the attorney-at-law practises outside the Islands or is temporarily admitted, a report of his conduct to any other professional association or authority having jurisdiction over him;
(f) a reprimand of the attorney-at-law;
(g) advice to the attorney-at-law as to his future conduct; or
(h) no action.

3.9 The Cayman Islands Law Society and the Caymanian Bar Association had proposed that all attorneys-at-law should be subject to the same discipline. However, after considering the advantages and disadvantages of such proposal the Commission recommends that the Complaints Committee and the Disciplinary Tribunal should have jurisdiction over all attorneys except those employed by the Portfolio of Legal Affairs ("government attorneys"). Apart from the many layers

[6] Clause 36

of oversight to which a government attorney[7] is subject there is also the issue of conflict of interests to consider. The Commission believes that if government attorneys are made subject to the same disciplinary process as private attorneys there is some potential for the complaints mechanism to be used to hinder such attorneys from effectively carrying out their work on behalf of the public. On balance the majority of the Commission considers that it is in the public interest to have the Courts retain the power to discipline attorneys.

3.10 In researching this matter the Commission considered legislation in other jurisdictions and such legislation show varying approaches.

3.11 In Ontario attorneys are all disciplined by the same body, the Law Society of Upper Canada. In the United Kingdom the Law Society is responsible for regulating the conduct of solicitors and for handling consumer complaints while the Bar Council is responsible for handling complaints against barristers. It should be noted however that the U.K. Parliament is currently considering legislation which would overhaul the regulation of the profession. In 2003 in an article published in Legal Week it was reported that the U.K. Government had recruited an industry figure to hold a wide ranging inquiry into the regulation of the legal profession in a move that could see the Law Society stripped of its regulatory powers. The key focus of the inquiry was the Law Society's position as both the representative body for solicitors and the regulator of the profession in light of repeated attacks by the Government and the Legal Services Ombudsman on the quality of the society's complaints handling. The article continued-

> "In recent months, the Society has also come under fire for its failure to police an effective conflict of interest regime after a study showed that many top City firms were flouting the rules.".

3.12 A review was conducted by Sir David Clementi[8] and his report was published in December 2004. Since that time a draft Legal Services Bill has been submitted and was introduced to Parliament on 24th May 2006. The Parliament is currently considering the Legal Services Bill, which would among other things, provide for the establishment of a Legal Services Board as a single oversight body for the profession.

3.13 In a paper entitled "Self-Governance- Walking The Tightrope" Janice Mucalov[9] noted that-

[7] The Public Service Management Law, 2006; the official corruption provisions of the Penal Code (2006 Revision) (sections 90 to 98);

[8] Report of the Regulatory Framework for Legal Services in England and Wales" December 2004

[9] A lawyer and freelance writer based in Vancouver; article published in October 2004 edition of the National Magazine of the Canadian Bar Association

"Last year [2003] in Australia lawyer self-regulation was effectively wiped out in three states. In England, the government wants to strip the Law Society of its responsibility for handling complaints against lawyers. And in the U.S. the Federal Trade Commission has cast a dubious eye towards the American Bar Association's attempts to define the "unauthorised practice of law".

3.14 In the said paper Ms. Mucalov further noted-

"Australia's systems of self-regulation first came under attack in the 1980s. In Victoria, after decades of inept handling of public complaints, the state imposed a co-regulation complaints regime in 1997. Henceforth, the state decreed, the investigation of grievances would be shared between the government ombudsman and the lawyers' professional associations. Then, in July 2003, after highly publicized clashes between the ombudsman and the Law Institute of Victoria (the solicitors' governing body), the axe fell. A new independent board took control of the regulation of lawyers, and a Legal Services Commissioner was appointed to oversee complaints investigations.

The Queensland Government – after receiving a scathing report from its state ombudsman – also seized control over lawyer discipline. Complaints had soared, doubling from 685 in 2001 to 1,227 in 2002, and numerous complaints about gross over-billing and alleged fraud remained unresolved. In its report, the ombudsman described the Queensland Law Society as "nothing but a post office box" that received complaints, forwarded them to the lawyer, and then sent back the lawyer's response to the complainant.

The Law Society had tried to redeem itself by appointing a retired judge to review its complaints process and make changes. But it was too late, and on June 29, 2004, a separate Legal Services Commission was created to take on the job of complaints.

The Tasmanian government went even further. Last September, it stripped its law society of not only the right to investigate complaints, but also of the responsibility for issuing practice certificates, supervising trust accounts and developing practice rules. And early this year, legislation was introduced to formally abolish self-regulation in the legal profession.".

3.15 In Jamaica, under the Legal Profession Act, 1972, attorneys are disciplined by the Disciplinary Committee which is appointed by the General Legal Council. There is an appeals process where the attorney or the aggrieved person can appeal against an order to the Court of Appeal. In Barbados there is also a Disciplinary Committee but its role is limited to investigation and recommending the form

discipline (if any) to the Chief Justice who will thereafter refer a matter to the Court of Appeal which is the sole disciplinary body for all attorneys.

3.16 In Bermuda the Court has the power to suspend or strike off the Roll any barrister or attorney for reasonable cause under section 57 of the Supreme Court Act 1905. Section 53(2) specifically provides that government attorneys are subject to the disciplinary measures under section 57. However, the Court cannot suspend or strike an attorney's name off the Roll for improper conduct arising under the Bermuda Bar Act unless disciplinary proceedings in relation to that attorney have been determined under that Act by the Standing Committee of the Bermuda Bar Association.

3.17 In Trinidad under the Legal Profession Act 1986 a Disciplinary Committee considers complaints of professional misconduct against all attorneys other than the Attorney-General and government law officers who are disciplined by the High Court only. Also under the Legal Profession Act of St. Lucia a Disciplinary Committee is empowered to discipline all attorneys other than government attorneys and the Attorney- General. The High Court has a general power to discipline all attorneys at-law including government attorneys.

3.18 The Commission, having considered the different ways in which discipline of attorneys is handled in the above-mentioned jurisdictions and the problems which some jurisdictions are facing with self-regulation of the profession, recommends that the Court is the appropriate body in the Islands to determine complaints of misconduct against Government attorneys. Thus clause 30 of the Bill provides that any person who has a complaint against a government attorney may file such complaint with the Clerk of the Court and the Clerk of the Court shall submit such complaint to the Chief Justice for such action as the Chief Justice considers appropriate in accordance with clause 46 of the Bill. As soon as possible after the Clerk of the Court has submitted a complaint to the Chief Justice he shall cause a copy thereof to be sent to the Attorney-General for his information.

3.19 Clause 46 of the Bill provides that the Grand Court has the power to take disciplinary action against a government attorney in accordance with rules of court made for the purpose and in particular the Grand Court may make any of the following orders-

(a) an order removing from the Roll the name of the attorney-at-law against whom disciplinary proceedings have been instituted;
(b) an order suspending the attorney-at-law from practice for such time as the Grand Court deems fit;
(c) such order as to costs, as regards both the proceedings before it as the Grand Court deems fit; or
(d) such further or other order as the circumstances of the case may require.

3.20 The attorney-at-law whose professional conduct is the subject of any disciplinary proceedings before the Grand Court will be entitled as of right to appeal to the Court of Appeal from any decision or other determination of the Grand Court in such proceedings.

4. PRACTISING CERTIFICATES GENERALLY

4.1 A practising certificate, apart from being a valuable revenue item for any government, is essential in providing protection for the organisation which employs legal staff as well as for the client of the organization. Where an attorney holds a practising certificate he is subject to the legal professional privilege which encourages the effective use of professionals skilled and qualified in law. Therefore the employer organisation is not required to disclose-

- confidential communications between the organisation as client and its in-house counsel as attorney, the dominant purpose of which is the seeking or giving of legal advice ("attorney/client privilege") or
- information brought into being by the client or lawyer for the dominant purpose of use in current or anticipated litigation ("litigation privilege").[10]

4.2 With regard to in-house counsel, legal professional privilege extends to legal advice given by employees provided that, in giving the advice, they act in their capacity as legal advisers and not simply as employees possessing special skills.[11]

4.3 The issue as to whether an attorney who works with the Government should be required to be called to the Bar and to have a practising certificate was debated by the Commission. In considering this matter the Commission looked at the legislation of some other jurisdictions.

4.4 In New South Wales all attorneys must have a practising certificate (interstate or local) but the practising certificates issued to government attorneys are subject to different conditions to those issued to private sector attorneys. The Legal Profession Act of 2004 provides, for example, that with a local practising certificate a government attorney does not have to undergo continuing legal education, is not limited in the areas of practise and is not subject to any particular conditions concerning employment or supervision. In New Zealand under the Lawyers and Conveyancers Act of 2006 all attorneys are required to have practising certificates.

4.5 In Jamaica under the Legal Profession Act, 1972 attorneys are called to the Bar and their names entered in the court roll. Government attorneys may be enrolled

[10] CLANZ- "The Value of Employers of Lawyers with Practicing Certificates"

[11] Ibid.

but this is not necessary. Therefore only attorneys in private practice need to obtain a practising certificate. Legal officers, i.e. government attorneys, are deemed to be attorneys by virtue of their office. Section 7 of the Act provides that every law officer of the Crown and every legal officer of government who is enrolled or though not enrolled, possesses a qualifying certificate shall so long as he continues to be a law officer of the Crown or a legal officer of Government be entitled to practise in all Courts of Justice in Jamaica.

4.6 In Barbados under the Legal Profession Act, 1973 all attorneys are admitted to the Bar, including Government attorneys and must obtain a practising certificate. While in Bermuda under the Bermuda Bar Act 1974 and Supreme Court Act 1905 all attorneys (barristers and attorneys) are admitted and enrolled under section 51 of the Supreme Court Act 1905 (SCA 1905). The names of those admitted are entered on a Roll, maintained under section 54 of the same Act. Under section 53 of the SCA 1905 government attorneys are admitted by right of office, but their appointment must be notified to the Registrar of the Supreme Court who maintains the Roll. They do not need to hold practising certificates.

4.7 The Legal Profession Act 1986 of Trinidad and Tobago provides that all attorneys in private practice must hold a practising certificate. Government attorneys are deemed to hold a practising certificate by virtue of their office. Also, in St. Lucia under the Legal Profession Act Chap 2.04 government attorneys are not required to have practising certificates. Section 26 of the Act provides that a law officer (which is a government attorney-at-law) and a member of the Cabinet who is an attorney-at-law shall so long as he remains a law officer or member of the Cabinet be deemed to be the holder of a valid practising certificate and to be a practitioner member of the Bar Association.

4.8 The Commission does not believe that there is any reason for making a distinction between private and government attorneys in this matter. It recommends that all attorneys who wish to practise in the Islands should be called the Bar and should have a practising certificate. However, government attorneys would not be required to apply for practising certificates but would be deemed to have practising certificates as of right once the Attorney-General certifies that the person is a government attorney.[12]

4.9 In considering the matter of practising certificates the issues as to what constitutes the practise of law and therefore who will be regulated by the Law were also considered by the Commission. As noted in the Harvard Journal of Law and Technology-

[12] 9 (3) An attorney-at-law who is employed by the Government so long as he remains employed as such by the Government shall be deemed to be the holder of a valid practising certificate.

" In determining whether one is engaged in the practice of law in the real or virtual world is deceptively complicated …….At the outset, it seems obvious that appearing in court as the representative of another implicates the practice of law. However, as numerous courts have noted, the practice of law involves a much broader spectrum of activities.".[13]

4.10 The Department of Justice and the Federal Trade Commission in 2002, in responding to the American Bar Association's proposed model definition of the practice of law noted-

> "Defining the practice of law has been a difficult question for the legal profession for many years. The emergence of new technologies such as the Internet has expanded the number of ways in which legal advice and information can be disseminated, which has increased the complexity of the task.
>
> The boundaries of the practice of law are unclear and have been prone to vary over time and geography.[14] While almost all states (with the exception of Arizona) currently have statutes that purport to define the practice of law, in reality these statutes tend to be vague in scope and contain broad qualifiers. For example, the Texas UPL statute states that "the definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law."[15] These types of open-ended statutory definitions give courts and bar agencies scant guidance when they attempt to apply UPL statutes to specific facts.".

4.11 As both Departments pointed out "[l]awyers historically have used the unauthorized practice of law statutes to protect against perceived incursions by real estate agents, bankers, insurance adjusters, and other groups that seemed to be providing legal services.".[16]

4.12 The current Law does not define the practice of law, as is the case in jurisdictions such as the Bermuda and the Bahamas. In Georgia, U.S.A the practice of law is defined as-

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[13] Volume 14, Number 2 Spring 2001- Schwarz

[14] See, e.g. State Bar Association V. Arizona Land Title and Trust Co., 366 P.2d 1, 5-11 (Ariz.1961) (en banc) (describing history of the regulation of the practice of law)

[15] Tex. Gov't Code Ann 81.101 (b)

[16] *Possible Anticompetitive Efforts to restrict competition on the Internet*: Federal Trade Commission Public Workshop (Oct. 9, 2002) (statement of Catherine J. Lanctot)

(a) the preparation of legal instruments of all kinds whereby a legal right is secured;
(b) the rendering of opinions as to the validity or invalidity of titles to real or personal property;
(c) the giving of any legal advice; and
(d) any matters taken for others in any matter connected with the law".[17]

4.13 In Jamaica and under the draft bill of the British Virgin Islands broad definitions are given which depend on the interpretation of the provisions of the Law. Thus for example under section 2 of the Legal Profession Act of Jamaica it is provided that "practise as a lawyer" means practise as barrister or a solicitor or both as provided or recognized by law…". Similarly under the BVI Legal Profession Bill, it is provided in clause 2 that to "practise law" means to practise as a legal practitioner or to undertake or perform the functions of a legal practitioner, as recognised by any law."[18] The Commission does not find such open-ended definitions useful in determining who practises law and have looked instead at the definitions in Kansas, Ontario and Nova Scotia[19] and have agreed that the term "practise law" –

(a) means to apply legal principles and judgement with regard to the circumstances or objectives of a person that requires the knowledge and skill of a person trained in the law, and includes any of the following conduct-

[17] GA. Code Ann 15-19-50 (2000)

[18] See also Barbados and Trinidad

[19] See for example the Legal Profession Act of Nova Scotia-

> "16 (1) The practice of law is the application of legal principles and judgement with regard to the circumstances or objectives of a person that requires the knowledge and skill of a person trained in the law, and includes any of the following conduct on behalf of another:
>
> (a) giving advice or counsel to persons about the persons legal rights or responsibilities or to the legal rights or responsibilities of others;
>
> (b) selecting, drafting or completing legal documents or agreements that affect the legal rights or responsibilities of a person;
>
> (c) representing a person before an adjudicative body including, but not limited to, preparing or filing documents or conducting discovery;
>
> (d) negotiating legal rights or responsibilities on behalf of a person.".

(i) giving legal advice to another on any matter arising under or relating to the laws of the Islands;
(ii) representing another person before a court, judicial or quasi-judicial tribunal except where otherwise permitted by any law including, but not limited to, preparing or filing documents or conducting discovery;
(iii) preparing legal documents that are intended to have legal effect or to create legal relations between persons; and
(iv) holding oneself out to another, either within or without the Islands as qualified or authorised to practise law as a Cayman Islands attorney-at-law; and

(b) does not apply to-
(i) a person acting on his own behalf whether in relation to a document, a proceeding or otherwise where permitted by law;
(ii) the director of a company acting on behalf of the company whether in relation to a document, a proceeding or otherwise where permitted by law;
(iii) the preparation of a will which does not have trust provisions;
(iv) the preparation any document relating to the sale, purchase or lease of land where no charge is involved;
(v) the preparation of a letter or power of attorney;
(vi) the transfer of stock containing no trust or limitation;
(vii) the preparation or drawing of any instrument by a public officer or the employee of a company or firm for his employer in the course of his employment
(viii) the engrossment of any instrument by an person in the course of his employment; or
(ix) the carrying out of any duty by any professional accountant or any person licensed under any regulatory law (as defined in the Monetary Authority Law (2004 Revision) which includes the drawing or preparing of a memorandum or articles of association of a company.".

4.14 The Commission further defines "legal advice" as advice to a person with respect to the legal interests, rights or responsibilities of the person or of another person, or on any matter involving the application of legal principles to rights, duties, obligations or liabilities.

4.15 In order to ensure that the Court is not licensing attorneys with questionable professional backgrounds, the Commission also proposes that an attorney-at-law who applies for a practising certificate each year should provide information relating to his status as an attorney at-law in other jurisdictions. When an attorney applies for his annual practising certificate each year he should provide the Court with a document setting out –

(a) his current residence and office addresses; and
(b) the bars of all jurisdictions to which he is admitted; and

(c) whether he has done or committed any act or thing which could cause or did cause his name to be struck off the roll in jurisdictions in which he is admitted; or

(d) that to the best of his knowledge, information and belief his name still remains on the roll of the jurisdictions in which he is admitted.

4.16 The draft Bill provides in clause 47 that where a certified copy of a judgment or order demonstrates that an attorney-at-law admitted to practice in the Islands has been struck of the Roll by another court, upon the filing of the certified copy of a judgment or the order the court in the Islands shall strike the attorney-at-law off the Roll.

4.17 The Bill in clause 48 also deals with removal from the roll on consent or resignation from the bar in other jurisdictions. The clause provides that an attorney-at-law admitted to practice in the Islands shall, upon being struck of the Roll on consent or resigning from the bar of any other jurisdiction while an investigation into allegations of misconduct is pending, promptly inform the Clerk of the Court of such action. An attorney-at-law admitted to practice in the Islands who is struck of the Roll on consent or who resigns from the bar of any other jurisdiction shall, upon the filing with the court of a certified copy of the judgment or order accepting such disbarment on consent or resignation, cease to be permitted to practice in the Islands and shall be stricken from the Roll in the Islands.[20]

5. ELIGIBILITY TO PRACTISE AS AN ATTORNEY-AT-LAW IN THE CAYMAN ISLANDS

5.1 Sections 3 and 4 of the Legal Practitioners Law (2003 Revision) deal with the qualifications to practise law in the Islands. The Law provides that a judge may admit to practice as an attorney-at-law in the Islands any person who –

(a) (i) is entitled to practice at the Bar of England and Wales or the Bar of Northern Ireland; and

(ii) having received a certificate of call from either of those Bars, has either-

(A) served twelve months pupillage in England, Wales or Northern Ireland; or

(B) served the term of articles in the Islands required by the Third Schedule of the Legal Practitioners (Students) Regulations (2003 Revision);

[20] Compare the provisions of the Rules Governing Attorney Discipline in the U.S. Court of Appeals for the eleventh circuit; the model federal rules of disciplinary enforcement by the American Bar Association Standing Committee on Professional Discipline and Center for Professional Responsibility

(iii) is a member of the Faculty of Advocates of Scotland or a solicitor of the Supreme Court of Judicature of England, Scotland or Northern Ireland;

(iv) is an attorney-at-law of the Supreme Court of Jamaica;

(v) is a Writer to the Signet of Scotland or a solicitor admitted to practise in Scotland; or

(b) satisfies a judge that he is entitled to practice in any court of any of the Commonwealth and possesses a qualification comparable as to standard law, practice and procedure with those specified in paragraph (a); or

(c) is qualified to practice as an attorney-at-law under regulations made under section 20.

5.2 Section 4 of the Law provides for the limited admission of attorneys for the purposes of any specified suit or matter. An attorney may be admitted for a suit or matter where he has been instructed by an attorney-at- law in the Islands or where the Clerk of the Court has certified that it is not possible to assign the services of an attorney-at-law to a person to whom a legal aid certificate has been granted under the Legal Aid Law.

5.3 Persons who satisfy the requirements of section 3 shall be enrolled by the Clerk of Court[21] by having their name entered on the Court Roll. Under section 12 enrolled persons having paid the prescribed fee and having satisfied the Clerk of their immigration status, will be issued with an annual practising certificate. Thus persons admitted to practice as attorneys-at-law[22] in the Cayman Islands, excluding those who are admitted under section 4, must have an annual practising certificate.

5.4 Section 15 of the Law exempts the Attorney-General and any person holding public office in the Attorney General's Chambers from the provisions of this Law. This would include persons appointed as Crown Counsel, visiting prosecutors, and other attorneys working in the Legal Department. It is questionable whether attorneys working for the Law School are covered by this exemption as they are not directly involved with advocacy or law making.

5.5 Under section 14, the Clerk of Court will strike off the Court Roll any person, unless they possess Caymanian status, who has not been in possession of an annual practising certificate during the preceding twenty-four month period.

5.6 The Cayman Islands Law Society and the Caymanian Bar Association have requested that the Law be reviewed to provide for the grant of practising certificates to non-resident attorneys who are employed by certain local firms who retain "satellite offices" in jurisdictions such as London, Hong Kong and Dubai.

[21] Clerk of Court" means the officer appointed under section 9 of the Grand Court Law (1995 Revision) to be the Clerk of Court;

[22] See exceptions at paragraph 4

5.7 The above request generated substantial debate in light of the provisions in the draft Bill of 29th January 2007 which had set out the categories of persons who are entitled under the current law to apply for admission. The current categories comprise Caymanians, the spouses of Caymanians, persons with a valid work permit who have indicated an intention to reside in the Islands for the period of the practising certificate and persons who work with the Government. Such provisions merely clarified the status quo.

5.8 The critical issue is whether attorneys practising Cayman Islands law in the satellite offices should have a "residential" qualification in the Cayman Islands in order to allow them to do so. The purpose of the residential qualification is to ensure that there is some nexus to the jurisdiction which will allow for greater quality control for admission to practise and monitoring of professional conduct (or misconduct). The Commission noted that many of the jurisdictions surveyed by the staff of the Commission in researching the issue as to whether practising certificates should be granted to non-residents have either a citizenship or residential requirements. For example, in Ontario a person must either be a permanent resident or citizen; non-Bermudians must be resident for at least one year in order to be admitted; in Guernsey there is a three year residence requirement and in Jersey there is a two year residence requirement unless, during the two year qualifying period as an attorney, a person has practised Jersey law for a period of six months or less in a firm outside of the Jersey which deals mainly with Jersey Law.[23]

5.9 One young local professional who made a submission to the Commission has argued that a young professional would, if practising certificates were issued to non-residents, have to compete with an unlimited number of foreign attorneys. It was felt by him that the effect of allowing attorneys overseas to hold Cayman based certificates is simply a method of keeping a Cayman workforce outside of the Cayman Islands and without the necessary immigration controls. The issue of the lack of knowledge of local law and familiarity with the regulatory environment was also noted.

5.10 The Commission's concerns with the proposal by the Law Society and the Bar Association may be summarised as follows-

- The absence of any substantial nexus between the non-resident attorney and the jurisdiction. The only nexus advanced is employment with a recognised law firm. Under the proposals by the legal associations the recognised law firm itself need not be substantially established in the Cayman Islands. This would have implications for future employment of graduates of the Cayman Islands Law School (Caymanian and non-Caymanians alike) as well as the potential for the development of "brass plate" law firms based in the Cayman Islands.

[23] See also Jersey, New York, California, St. Lucia

- The lack of supervisory/regulatory oversight. Under the proposals of the associations professional misconduct by non-resident attorneys may go undetected by the local authorities as there is no provision for cross border reporting by and to the regulatory oversight bodies in the various jurisdictions in which the non-resident attorney may be practising.

- While the associations suggested that the partners of the recognised law firm may be subject to discipline under the code of conduct of the associations for allowing the non-resident attorney who is suspended or struck off to continue in the firms' employment, there is no express obligation on the partners to report any misconduct or sanctions abroad. Even where a potential act of misconduct comes to the attention of the Complaints and Disciplinary Committees there may be substantial difficulties encountered in gathering and evaluating evidence from abroad.

- Lack of knowledge of Cayman Islands law. This is an essential tool for protecting the public (clients) as well as the local and international reputation and standing of persons admitted to practise in the Cayman Islands. While there may be some informal training by some of the law firms, there is no indication that this is either mandatory or done across the board for all law firms.

5.11 After in-depth research and discussions with the associations who represent the legal profession, the Commission concluded that objectively a case could be made for the issuing of practising certificates to non-resident attorneys. In these days of globalisation, internet access and telecommuting, it is quite legitimate to argue that an attorney-at-law can properly live and work in a foreign jurisdiction while practising the law of the jurisdiction in which he has been admitted to practice and from which he holds a current practising certificate. Some jurisdictions currently allow for this, for example, the UK (although with significant differences). For this to work in a professionally acceptable manner, however, there must be certain checks and balances.

5.12 The Commission is of the view that the discussion on this matter from those advancing the need for such a regime had not focused sufficiently on the professional responsibility aspects of this arrangement, but tended to emphasise the commercial aspects of the imperatives of expansion of law firms abroad. While the commercial developments are obviously important they must be balanced with a responsible and credible set of requirements for professional accountability and disciplinary oversight.

5.13 Issuing a practising certificate to a non-resident attorney must involve more than providing a mere "flag of convenience" to such a professional to operate under the mantle of the Cayman Islands jurisdiction. There must be substantial and

substantive links between the profession and the jurisdiction, which involves a transparent and credible system of licensing, monitoring and discipline where professional misconduct is detected. To do otherwise would open the jurisdiction to potential significant reputational damage if one such professional were to be engaged in misconduct, which resulted in major fraud, money laundering, terrorist financing or other financial scandal. This potential danger could threaten the reputation of the Cayman Islands as a "major international legal jurisdiction".

5.14 Pursuant to the above considerations, the Commission recommends certain minimum conditions for an acceptable system of licensing of non-resident attorneys. The following are such conditions-

- to ensure a substantial nexus with the jurisdiction the definition of a recognised law firm should apply to firms where the majority of partners or persons holding equity interests in the firm are Caymanian or persons ordinarily resident in the Islands who practise primarily in the Islands. Alternatively, at least half of the attorneys employed by the firm must be ordinarily resident or practise primarily in the Islands;[24]

- a partner of the firm will be required to report on any significant unresolved complaint or disciplinary action against the non-resident attorney outside of the Cayman Islands that comes to his knowledge; a failure to so report will render him liable to discipline for professional misconduct;

- the non-resident attorney (as will be the case for all the attorneys) will be required to file an annual certificate of good standing (if available) or affidavit certifying that he has not been the subject of disciplinary sanction by any disciplinary body outside of the Cayman Islands that would be considered professional misconduct in the Cayman Islands, before a practising certificate can be issued. The giving of false information will be an offence and grounds for a finding of professional misconduct;

- the Complaints Committee may, if it deems necessary, carry out onsite visits to the jurisdiction in which the non-resident is practising to interview complainants and witnesses, inspect relevant accounts and hold discussions with the partners in overseas offices and their disciplinary counterparts on the matter under investigation. The costs of these visits are to be borne by the recognised law firm.[25]

- The non-resident attorney, like the resident attorney, will be subject to

[24] See definition of "recognised firm" in clause 2 of the Bill

[25] See Part C of Schedule 5 of the Bill

rules of conduct set out in Schedule 5 to the Law. Such rules would include provisions similar to those set out in the Solicitors' Overseas Practice Rules 1990 of the UK (modified for the purposes of this jurisdiction) including provisions relating to the treatment of trust accounts.

5.15 In considering educational requirements for non-practising attorneys who may have never worked in the Islands the Commission felt that it would be in the best interests of the profession that all attorneys who were not qualified locally should, at the date of application for admission, have knowledge of certain aspects of the laws of the Cayman Islands. It is therefore proposed that all such attorneys must undertake basic training and evaluation in relevant Cayman Islands law. This would involve for example, undertaking of a set of core courses and examinations relating to the legal system and rules of practice in the Islands, as well as specific areas involving the regulatory laws, company law, anti-money laundering, terrorism financing and confidentiality laws. The Courts, on an application for admission, would need to be satisfied that the applicant has undertaken relevant courses and passed relevant examinations approved by the Legal Advisory Council for this purpose.

5.16 Alternatively, applicants could be required to serve for a period of four months under the supervision of an attorney who is generally admitted to practise in the Cayman Islands, who is of more than five years standing at the Bar and who would provide instruction in relevant Cayman Islands law. "Relevant Cayman Islands law" for this purpose shall include the Proceeds of Criminal Conduct Law (2005 Revision) the Money Laundering Regulations (2005 Revision), The Confidential Relationships (Preservation) Law (1995 Revision), the Terrorism Law, 2003, any replacement of these laws and such other statutes or aspects of law that will be relevant to the intended areas of practice indicated by the applicant. The Bill at clause 3 provides that applicants with 5 or more years call to the Bar may request exemption from these educational and supervision requirements from the Legal Advisory Council.

5.17 The Commission believes that the recommendations relating to the non-resident attorneys will maintain the integrity of the Cayman Islands legal profession while addressing the concerns of the non-resident attorneys employed by offices of locally based firms.

6. CODE OF PROFESSIONAL CONDUCT

6.1 Schedule 5 of the Bill provides for a Code of Professional Conduct which will be a part of the Law. The Commission noted that in many jurisdictions such codes form either a part of the principal Law or are regulations made thereunder. This enables the attorney-at-law to readily ascertain his obligations to the court, to his client and to the public. In drafting the Code the Commission took into account a draft Code previously prepared by the Cayman Islands Law Society. The

Commission also considered the draft codes of jurisdictions such as the British Virgin Islands, Canada, Barbados, St. Lucia, Trinidad, some states in the United States as well as the Solicitors' Overseas Practice Rules, 1990 of the UK.

6.2 Clause 23 of the Bill provides that a breach of any of the rules in Part A of the Code may constitute professional misconduct and a breach of any of the rules in Parts B and C shall constitute professional misconduct. Part A of the Code deals with the conduct of an attorney as an attorney and in relation to the profession. The Code provides, among other things that an attorney must preserve his independence in the discharge of his professional duties and should seek at all times to maintain his integrity and the honour and dignity of the profession. An attorney should not lightly refuse a retainer against a fellow attorney who is alleged to have wronged his client or committed any other act of professional misconduct. It is further provided that an attorney should not seek to attract the client of another attorney.

6.3 Paragraph II of Part A of the Code deals with the attorney's duty to the Islands as a whole and to the general public. It is provided, for example that an attorney should where the needs of the society require, promote and encourage the modernisation, simplification and reform of the laws. Part A also regulates the attorney's relationship with his clients, his relationship with the court and his role in the administration of justice.

6.4 Parts B and C of the Code contains mandatory provisions and specific prohibitions. Part B prohibits the practice of law without a practising certificate, soliciting business unless at the request of a person and the charging of unfair and unreasonable fees. Part B also seeks to regulate advertising by the profession. Paragraph 58 provides that an attorney-at-law shall ensure that any advertisements to any or any communications with any person relating to his services or the services of the attorneys-at-law in his firm are consistent with the maintenance of proper professional standards and in so doing the following shall apply-

(a) the advertisement or communication must not be false, misleading or deceptive or likely to be so;
(b) the advertisement or communication may indicate a field or fields of practice in which the attorney-at-law is prepared to take instructions;
(c) if any advertisement or communication contains or refers to testimonials, endorsements or the like about an attorney-at-law or the services offered, the attorney-at-law must be able to show on enquiry that such testimonials or endorsements were not provided for monetary or other reward;
(d) the advertisement or communication must not disparage any other attorney-at-law;
(e) the attorney-at-law must not consent to nor permit being mentioned in any advertisement or other promotion by a third party which is misleading in relation to the legal services offered.

An attorney is also prohibited from claiming in any advertisement to, or any other communication with, any person, to be a specialist or to have a special expertise in any field or practice unless such claim is true.

6.5 Part C of the Code regulates the management of client accounts. For example paragraph 92 provides that an attorney-at-law shall keep any money held by him on behalf of clients separate from any other funds and in an account at a bank or similar institution subject to supervision by a public authority. It is further provided that an attorney-at-law shall at all times keep, whether by written, electronic, mechanical or other means, such accounts as are necessary-

(a) to record all the dealings with money dealt with through any such account for clients' money as is specified in paragraph (1) of this rule;
(b) to show separately in respect of each client all money received, held or paid by the attorney-at-law for or on account of that client and to distinguish the same from any other money received, held or paid by the attorney-at-law; and
(c) to ensure that the attorney-at-law is at all times able without delay to account to clients for all money received, held or paid by the attorney-at-law on their behalf.

6.6 In order to ensure that attorneys comply with Part C of the Code it is provided in clause 50 of the Bill that, by 31st December of each year, each firm and recognised firm is required to deliver to the Clerk of the Court a signed accountant's report. Such report should not only indicate whether the firm is complying with Part C of the Code but it also whether or not the composition of a firm and a recognised firm has changed. The format of the report will be as set out in Schedule 8 of the Bill. Annexed as Appendix B are draft regulations which will regulate the qualifications of an accountant, the duties of an accountant, accounting periods to be covered by a report and any change in the composition of a firm or recognised firm.

7. CONCLUSION

7.1 In arriving at the recommendations and final draft Bill the Commission considered legislation in many other jurisdictions such as the following-

- Barbados
- St. Lucia
- Bermuda
- The British Virgin Islands
- Jamaica
- Trinidad
- Canada (particularly Ontario and Nova Scotia)

- The United States of America (particularly New York, Kansas and California)
- Jersey (Channel Islands)
- Guernsey
- Hong Kong
- Anguilla
- Dubai
- England and Wales
- Ireland
- Isle of Man
- New Zealand
- Singapore

7.2 Although the laws of other jurisdictions have been extensively reviewed and considered, the proposals reflected in this report are based on the Commissioners views as to what is appropriate for the Cayman Islands at this time. The Commission took into account not only the professional duties and responsibilities expected of lawyers practising in, from and with the authority of this jurisdiction (which is of course paramount in legislation of this sort) but also, the relevant economic and social circumstances of the Islands. The Commission sees this Bill as a step forward in the regulation of the legal profession locally. The legislation must however be kept under review in coming years to ensure that it keeps abreast with the needs of the society and if not further changes should be considered accordingly. If enacted, the Bill can only serve to enhance the Cayman Islands as a jurisdiction which effectively monitors its attorneys and, by so doing, protects the rights of persons who use legal services in the Islands.

Langston R.M. Sibblies
Chairman of the Law Reform Commission