INCOMPETENT SERVICE AND PROFESSIONAL RESPONSIBILITY[1]

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The author discusses the ways in which statutory powers may be used by governing bodies to reduce the number of cases in which incompetent service is offered by a solicitor to his client. He sets out a "reasonable lawyer" standard for competence and argues that the governing body or a committee of the governing body should take an active role in supervising competence. The theoretical problem of solicitor-client privilege is discussed, along with the practical problems of implementation of a policing duty and the application of appropriate sanctions.

I. INTRODUCTION

A. Historical Background

The legal profession is coming to recognize that it has a responsibility for the maintenance and improvement of the quality of services rendered by lawyers. This has not always been so: until very recently the governing bodies of the profession concerned themselves only with standards of conduct, i.e., ethical standards, and not with standards of performance, i.e., competence, and did not perceive that failure to provide competent service may itself be unethical.

Perhaps the first sign of the profession's concern with competence was the burgeoning of continuing legal education in Canada, commencing in 1950 with the establishment of the series of annual lectures of the Law Society of Upper Canada, or, more accurately with its prototypes, the lectures provided by the same Society for veterans returning from World War II. It is probably true to say, however, that in its inception, and even today, continuing legal education is seen primarily as a service to those who want it rather than as part of the legal profession's effort to improve the quality of legal services in Canada.

Two formal acts of recognition of the profession's responsibility occurred in 1973. In Quebec, the Professional Code enacted in that year provided for investigation by professional governing bodies of the competence of their members. In British Columbia, a Special Joint Committee on Competency of the Law Society and the B.C. Branch of the C.B.A. made extensive recommendations for the exercise by the Law Society of jurisdiction over competence, which were followed by legislation. Then in 1974, the Canadian Bar Association adopted the Code of Professional Conduct which accepted the American view that a lawyer has an ethical duty to render competent service, and the Code has since been approved by several of the governing bodies of the profession. In 1975, the Law Society of Alberta formally approved a Committee report recognizing its responsibility in the field, and in 1977 a Special

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1. This paper is based upon POLICING INCOMPETENCE, a paper prepared by me for the Conference on Quality of Legal Services, October, 1978. I am much indebted to the work of a committee composed of H. G. Field, Q.C.; J. W. Beames, Q.C.; Barrie Chivers; and Professor Bruce Elman and to a paper prepared for the same Conference by Professor Elman under the committee's aegis entitled "Ensuring Competency in the Legal Profession: The Use of Statutory Powers."

Committee on Competence of the Law Society of Manitoba, usually called the Matas Committee, made wide-ranging recommendations for the promotion and control of competence the substance of which has since been approved by the benchers of the Law Society. There has also been much activity on the part of other governing bodies which need not be detailed here.

All these different strands were drawn together at a Conference on the Quality of Legal Services which was held at Ottawa in October 1978 under the auspices of the Federation of Law Societies of Canada in conjunction with the Canadian Bar Association and with the assistance of the Canadian Institute for the Administration of Justice. Participants in the Conference came from all parts of the country and included officers of the governing bodies, practitioners, continuing legal education professionals, academic lawyers, and judges. The Conference identified the ways in which the legal profession may best discharge its responsibility for the maintenance and improvement of the quality of legal services.

B. Scope of this Paper

The legal profession through its governing bodies may take positive steps to improve the general level of competence of the profession by voluntary or mandatory continuing legal education or by recognition of a formal scheme of specialization. These are, however, beyond the scope of this paper which deals with ways in which statutory powers now held or to be obtained by the governing bodies may be used to reduce the number of cases in which incompetent service is given, i.e., ways in which the governing bodies may police incompetence. It will involve a discussion of the ethical duty to provide competent service and the enforcement of that duty, the identification of incompetent lawyers and ways of dealing with them, therapeutic and punitive approaches to the problem of a lawyer who has given incompetent service, and related problems. It will also deal briefly with the relationship between the policing of incompetence and the operation of compulsory errors and omissions insurance plans and with the special problems of disability by reason of health or addiction to alcohol or other drugs.

II. WHAT IS COMPETENCE?

When we talk of "competence" we should know what we mean by the word. That is a plausible proposition, particularly to lawyers, who tend to enjoy semantic controversies, but it requires some examination.

The principal definition of "competent" in Webster's New Collegiate dictionary is "having requisite or adequate ability or qualities". The principal definition of "incompetent" is "lacking the qualities needed for effective action". That appears to be as well as any dictionary will do for us, and better than others consulted.

Adapting those definitions to the present context, competence would mean the state of having ability or qualities which are requisite or adequate for performing legal services undertaken and "incompetence" would mean the state of lacking the qualities needed to give effective legal services undertaken. These definitions suggest that competence or incompetence are states which do or do not exist. If so, it may be thought that talk of the *improvement* of competence is misplaced; a lawyer is either in a state of competence or incompetence and all that is needed is to

move each lawyer who is in a state of incompetence to a state of competence where he may thenceforth remain undisturbed. It is hoped, however, that it will instead be recognized that there is a continuum extending from extreme incompetence at the one end to very great competence at the other and that what the profession should be doing is taking measures to see that the condition of the lawyer performing each service is as far as possible towards the latter end and in any event is closer to it than some point determined as the one at which competence becomes incompetence. So long as competence and incompetence are thought of as being relative, the definitions set forth above may appear adequate for a consideration of ways of improving the competence of the profession by education, etc.

There is a greater problem when the discussion turns to ways of policing competence and incompetence: it is one thing to design measures to bring about a relative change in the qualities called competence and incompetence, but it is quite another to determine what standard should be applied to decide whether a lawyer is competent and whether it is satisfied in a given case. The questions then are: what is meant by "requisite," "adequate," and "effective," i.e., against what standard are they to be tested?

The definition given in Manitoba by the Matas Report is as follows:

> Competence is 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.

Under this definition, since competence must be demonstrated, it exists only through its effects, whether those effects are the services provided or the satisfaction of examiners. The effects are to be tested by what at first blush appears to be collective professional opinion but upon analysis looks more like the assessor's view of what collective professional opinion should be. The definition is adapted from the standard of quality of legal service prescribed by the Rule in Chapter II of the Code of Professional Conduct, i.e., "a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation." The latter standard is, of course, inapplicable to a discussion of the meaning of competence since it is defined in terms of competence.

It is difficult to avoid the feeling that there is an element of circularity in the Rule in Chapter II. The Rule does not define competence, so that it must be taken that competence is the ability or capacity to provide legal services which satisfy a standard of some kind; but what appears to be the prescribed standard is defined in terms of competence.

In the case of an investigation of competence or incompetence, competence will be established or refuted by evidence of the quality of services actually rendered or by evidence of ability to render services as determined by examination. If the Manitoba view is accepted (and it is difficult to see how another would be better), the standard of services would be that which lawyers generally would reasonably expect of a lawyer providing the service. In order to form their reasonable expectation, the hypothetical generality of lawyers must be taken to have in contemplation "a lawyer" whose ability is hypothetically determined by some relation to the experienced abilities of actual lawyers, i.e., their competence. If this avoids circularity, it is because it is not so much a definition of competence as the prescription of a standard by which to measure it, i.e., the reasonable expectations of lawyers generally.

It is submitted that if definition causes difficulty, the difficulty is brought on by undue attention to words. It is enough for this discussion that a lawyer is competent to undertake a legal service if he is capable of providing a quality of service which satisfies the appropriate standard; and that the standard is what would be considered satisfactory by lawyers generally. The adjudicating body will have to decide from its own knowledge and from the evidence whether that standard is met.

It is obvious that these propositions leave difficult questions unanswered. For example, is the standard the same in a small country point as it is in a major population centre? Is it the same for one to whom specialized work is referred because he is considered to be expert in the field? Answers to these questions may, however, be left to be worked out. The process of working them out will be much the same process as that which is gone through every day by the courts in connection with the standard of the reasonable man and even the average legal practitioner, and it will be much the same process as that which is gone through every day by disciplinary bodies of the legal profession who must deal with "unprofessional" or "unbecoming" conduct defined according to such vague standards as its consistency or otherwise with the image of the legal profession in the eyes of the public.

They also leave difficult factual questions to answer as to which of the following is the cause of any given failure to provide adequate legal service:

1. Competence or incompetence as a state or condition. Incompetence by reason of disability is part of this.
2. Incompetence to perform a specific legal service, as reflected in the poor quality of that service.
3. Intentional failure to exercise care in a particular case, e.g., to omit preparation for a trial which is known to the lawyer to be desirable.
4. Negligence, which is a failure to exercise a duty of care in a legal sense.
5. Inability to cope with circumstances, e.g., the lawyer who takes on too much, or who doesn't have appropriate procedures through which to exercise his legal competence.

When we say that lawyer Jones is competent, we do not mean that he is universally competent or even competent in all legal matters; such a statement would be absurd. What we do mean is that he is generally observed to exercise intelligence and skill in what he undertakes, including intelligence and skill in deciding what to undertake and what not to undertake. We may still consider him competent if we observe him to exercise intelligence and skill, while recognizing that he lacks organization.

Lawyer Jones, though competent, can be negligent. That may be true in the sense that he is so careless that most people would consider him blameworthy. It may be true only in a strictly legal sense; e.g., a lawyer who maintains and carefully follows an adequate system of guarding against the expiration of limitation periods may nevertheless find that his system has slipped up and he is legally negligent notwithstanding the care that he has put into devising the system and its operation.

Lawyer Jones, though generally competent, may undertake something which he is not competent to do. That may result from his desire to obtain

a fee or to retain his client, or it may simply result from the fact that he is ignorant of the difficulties involved.

Incompetence as reflected in poor legal services may be caused by one or more of a number of factors:

1. Lack of knowledge of law or legal principles. The tendency is to consider this the primary cause, an assumption which should not be made without careful examination.
2. Lack of knowledge of procedures.
3. Lack of special skills, i.e., the skills of negotiation and cross-examination.
4. Lack of the organizational skills necessary to have an efficiently operating office, including such pedestrian things as a recall system and a properly operated system to guard against missed limitation periods.
5. Lack of mental capacity, i.e., mental incompetence, senility or addiction to drugs or alcohol.
6. Lack of capacity to handle lawyers' work.
7. Lack of motivation to do good work.[2]

III. RESPONSIBILITY OF THE LEGAL PROFESSION FOR COMPETENCE OF ITS MEMBERS

The encouragement of ethical conduct and the discouragement of unethical conduct is one of the professed aims of the legal profession and is one of the purposes for which the law confers upon it the extensive right to practise law and the power to regulate its own conduct. In the past, the encouragement of competence and the discouragement of incompetence were not thought to fall within the scope of the responsibility of the profession except the powers relating to the qualification of those entering the profession. There are at least two great reasons for saying that the profession should on principle assume responsibility here. One is that it is unethical for a lawyer to undertake to give service which he is not competent to undertake, a proposition which will be elaborated later in this paper. The second is that incompetent legal service is as injurious to the public interest and as difficult for the public to detect as is unethical legal service of other kinds. There are other reasons as well. Incompetent service nowadays is more and more likely to bring the profession into disrepute, and the public is less and less willing to accept on faith the claim of the profession that the special privileges of self-regulation and exclusion of others from the practise of law are in the public interest. Both principle and self-interest therefore require the profession to undertake responsibility for the competence of its members.

IV. USE OF STATUTORY POWERS TO CONTROL INCOMPETENCE

A. The Lawyer's Ethical Duty to Provide Competent Service

A practising lawyer, by the very fact that he practices, holds himself out as having the knowledge, skill and judgment of a lawyer. He knows that a client consults him for that reason, and by undertaking work for the client he impliedly undertakes to have and apply the knowledge, skill

2. This analysis owes much to work being done for the A.L.I.-A.B.A. Committee on Professional Education, Douglas E. Rosenthal, Reporter.

and judgment necessary for the work. If he does not have it and does not intend to get it, he is in automatic and immediate breach of an ethical duty to the client.

The ethical duty to give competent service has not traditionally been enforced by the governing bodies of the legal profession in Canada, and it was not until its expression in the Code of Professional Responsibility that it was generally perceived as an ethical duty. While the Code has been adopted by several governing bodies, the implications of the Rule in Chapter II have not yet been effectively grappled with.

The first requirement of the Rule is that the lawyer must be "competent", though explanatory note 3 suggests that it is enough that he honestly believes that he is competent. The word "competent" is not defined, but some things can be gathered about it. It is competence in relation to the work undertaken. It "has to do with the sufficiency of the lawyer's qualification to deal with the matter in question." It includes knowledge and skill and the ability to use them effectively in the interests of the client." It includes an understanding of the relevant legal principles and an adequate knowledge of the practices and procedures by which such principles can be effectively applied. The Rule does not impose an absolute requirement that the lawyer be competent when he undertakes the work, but, if not, he must honestly believe that he can become competent without undue delay, risk or expense to the client; another way of putting it is that if he has the capacity to acquire whatever knowledge or skill he needs to give adequate service, and if he intends to do so, he is really competent at that time. Unlike the American Discipline Rule 6101 the Rule does not speak of associating another lawyer with him in case of need, but there is nothing in it to suggest that a lawyer cannot in a proper case supply deficiencies in his own competence by so doing or by taking advice.

The second requirement, in effect, is that the lawyer, being competent, must give the client the benefit of his competence: he must serve the client in a conscientious, diligent and efficient manner. The distinction is between having a skill, on the one hand, and conscientiously applying it, on the other.

Finally, the lawyer must provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation. In form this imposes an additional objective standard to which the lawyer must conform if he is not to be in breach of his ethical duty, but it may be interpreted as merely describing the standard to be applied to the first two requirements and in particular the standard by which the lawyer's competence will be determined.

There is, then, on principle and on the authority of the Code and its approval by governing bodies, an ethical duty of competence and diligence, and a standard of competence based upon the expectation of lawyers generally. The question is whether this duty should be enforced as a means of improving the quality of legal services.

There are arguments to the contrary. On the one hand the existence of a substantial problem of incompetent service is not well established by empirical evidence. On the other, enforcement would involve a substantial and expensive extension of the function of the governing body or the creation of a new agency. That extension would involve a further and substantial intrusion upon the freedom of the lawyer to conduct his

affairs as he sees fit, and it would subject him more frequently to the disagreeable and dangerous processes of investigation and adjudication.

Nevertheless, the answer suggested in this paper is that the duty should be enforced. No lawyer should be heard to say that he is not under a duty to give competent service; and once it is admitted that there is such a duty, there is today no justification for an individual to refuse to perform it or for the organized legal profession to decline responsibility for enforcing it. Indeed, those governing bodies which have adopted the Code of Professional Conduct have really answered the question, subject to their power to do so, and the same answer has been given in Quebec.

It should be noted that enforcement of the ethical duty will bear more harshly upon small firms and solo practitioners, particularly those who practise outside the major cities, who usually will not have on the premises specialists in areas in which they are not themselves experienced, and who may well perceive the new duty as a means of compelling them to send to large firms the occasional interesting and lucrative pieces of legal work which come their way. That raises questions whether a greater effort should be made to facilitate the obtaining of help by a lawyer in general practise and to ensure that lawyers to whom references are made do not hold onto the clients who are referred.

B. Policing of General Competence

This paper has so far dealt with incompetence as a failure to render a particular legal service in a way which conforms to a particular standard, namely, the standard that lawyers generally would expect of a lawyer in a like situation, and with the imposition of deterrent sanctions to prevent a repetition of that conduct. It will now turn to the policing of incompetence to render legal services as a general condition afflicting a lawyer.

An approach based upon a finding of general incompetence involves great difficulties. The supervisory process cannot be concerned with incompetence in the abstract; it can concern itself only with incompetence to perform legal services in an identifiable field of law or fields of law. It is one thing, and probably one which is difficult enough, to determine whether a particular legal service was of the quality which lawyers generally would expect from a competent lawyer in a like situation, and to determine whether the lawyer who performed a substandard service was, or honestly believed he was, able to meet the standard, and conscientiously tried to do so. It is another thing, and a much more difficult one, to decide whether or not a lawyer is in a general condition of competence or incompetence with relation to the practise of law in general or in some particular field. Fields are not easily defined: the field of real estate conveyancing is a well-known field which comes to mind, but house sales are very different from commercial leasebacks and even from residential condominium sales; criminal law is another, but the typical possession of cannabis case is different from the typical murder case.

If the governing body investigates the services rendered by a lawyer in a particular case and finds that they were substandard, and if it infers from the circumstances (including the lawyer's explanation) that the reason was incompetence, the problem may be solved. It is not clear, however, just how it could in most cases decide from that one case alone the extent of the incompetence, e.g., whether it extends past the condominium sale which was the subject of the investigation to ordinary

house sales, or whether it is all-pervasive. Therefore, if the governing body is restricted in its investigation to the particular matter of which it is aware, a series of investigations and determinations which will fortuitously mark out the area of incompetence will be needed if the governing body is to be able to prescribe the remedial steps or punitive sanctions which will meet the circumstances.

The governing body could be given power to enter at any time upon an investigation of the lawyer's competence. That appears to be the effect of the Quebec legislation. It may be that common law traditions in the other provinces militate against this approach. It will be noted that the draft legislation attached to the 1973 report of the British Columbia Special Joint Committee on Competence appears to contemplate the initiation by a competence committee of a formal investigation into the competence of a member, commenced by a citation stating the nature of the question to be inquired into, but with no prior condition, such as a finding of sub-standard service or reasonable grounds for belief in the existence of a state of incompetence. The British Columbia legislation actually passed however appears to require as a condition precedent to the exercise of the new powers a determination that a member has incompetently carried out legal duties undertaken by him, and the 1976 Report of the Special Committee of the Law Society of Manitoba approved the principles of the British Columbia legislation.

The British Columbia legislation, however, may permit the governing body, where a charge of incompetent service is being investigated, to go beyond the facts of the particular case. The question is whether the services were "incompetently carried out," and what the lawyer has done in other cases in the same field of law may be relevant to the determination of the question whether the sub-standard service arose from incompetence or from some other cause such as lack of attention to the file. Whether or not it authorizes them to examine other cases, the legislation clearly authorizes the benchers, once a finding of incompetent service has been made in one case, to require a lawyer to submit to an examination which will disclose that a state of incompetence exists, either for the practise of law generally or in respect of any field of law in respect of which "a determination was made under sec. 48(b1)" (sec. 49-1a-f). Though there may be difficulties in equating a finding of in-competent service in a given case with incompetence in a field of practice, what seems clear is that the statutory plan requires proof of facts showing incompetence, which then confers the further power to require the lawyer to be examined about his competence. This appears to be a defensible half-way house between, on the one hand, allowing the governing body of its own motion and without demonstrated grounds to engage in a comprehensive investigation of a lawyer's competence, and, on the other, confining the governing body to consideration of specific instances proven by something like an adversarial system.

There is one other way in which the scope of the investigation might be broadened. If there is a question whether particular services are sub-standard, and a further question whether the cause is incompetence, the way in which the lawyer handles the rest of his business may be relevant. An examination of his other files may well show either that the incompetent service was really an isolated case of inadvertence or that it was part of a pattern of incompetent work; or it may show that the lawyer did or did not know better than to omit a necessary procedure. It may be

doubtful however, that a governing body investigating a particular complaint could sustain against challenge a power to inquire routinely into a lawyer's other affairs in order to obtain "similar fact" evidence. The fact that the examination would usually involve a breach of solicitor and client privilege would be likely to militate against a liberal interpretation of such a power by the courts, though the privilege is a special subject which will be dealt with later in this paper.

C. Therapeutic Approach

The 1973 report of the Special Joint Committee on Competency of the Law Society of B.C. and the B.C. Branch of the CBA is of much interest here. The Committee, while recognizing that the British Columbia Legal Professions Act provided a procedural code for matters of discipline which might apply to matters of competence, thought that there should be a sharp distinction between the disciplinary jurisdiction and the jurisdiction over competence. They saw a difference between culpable conduct and conduct arising from inexperience, ignorance, professional arrogance, senility or addiction to alcohol or drugs; and they thought that the latter required remedial sanctions and an attitude of concern and guidance rather than punishment. (It should be noted that the Code of Professional Conduct, with its translation of the duty to be competent into a matter of ethics, was then in preparation but had not been issued in its final form.) The Act was duly amended to provide additional sanctions, but left the inquiry into competence in the same place as the inquiry into professional conduct generally, that is, in the hands of the Benchers and the Discipline Committee, and it made no special provision for a therapeutic approach.

The British Columbia Joint Committee perceived the need for sanctions against incompetence which might be experienced as punitive, including the ultimate sanction of withholding a practising certificate, and the British Columbia legislation provided them, though the most extreme sanction provided was suspension. The Manitoba Report agreed in principle with the sanctions proposed by the B.C. legislation except for the untrammelled power to suspend. The Manitoba Committee recommended that the encouragement of competence and the discouragement of incompetence come under a separate standards committee, with the result that the supervision of competence would, until adjudication, be separate from the disciplinary function.

The idea of a helpful rather than a punitive approach is attractive. From a moral or philosophical point of view, it may be thought that the incompetent lawyer should not be punished for a condition that he has not deliberately brought about, but should rather be helped to get himself out of it. From a humanitarian point of view it is better to help than to punish. From the point of view of the public interest, raising the lawyer's level of competence will protect his clients and will avoid the loss of his potential legal talents which would be brought about by disbarment. These considerations have already led governing bodies, sometimes on an *ad hoc* basis, sometimes by the adoption of more formal policies, to try to persuade lawyers to take corrective action.

There are problems with this approach. The view that an incompetent lawyer is the helpless prisoner of a condition which he did not bring about is inconsistent with the view of the lawyer as a responsible being who is subject to ethical duties, including the ethical duty not to undertake work which he is not competent to do. The institutional good Samaritan may be

seen by the object of its benevolence as no different from the institutional policeman to which he is accustomed. The voluntary arrangements which it tries to make may be experienced by the lawyer as punitive, however they are intended. And, since it cannot be assumed that the helpful approach will succeed, it will be necessary to ensure that the voluntary approach does not compromise any later punitive approach, and the lawyer's right to due process must not be prejudiced. However, it appears that efforts should be made to overcome the problems; indeed some governing bodies already have procedures intended to persuade lawyers to overcome their problems before they have reached the stage at which formal punitive measures are required.

D. Choice and Structure of Supervisory Body

The view put forward by this paper is that the governing body or a committee of the governing body should be the body which supervises competence.

The governing body is the appropriate supervising body for the following reasons:

1. It is in general familiar with the service being rendered and able to give guidance in the field. It will not be as perfectly familiar with standards of competence as with standards of ethical conduct in general, but it is relatively so in relation to other bodies which might be constituted outside the profession and it possesses the capacity to become more so as required.
2. There is a close connection between general ethics and their enforcement on the one hand and requirements relating to competence and their enforcement and supervision on the other. If an attempt is made to separate the two there will be confusion, jurisdictional questions, overlapping of efforts, matters falling between two stools, and similar matters being treated differently. A governing body which exercises the discipline power is therefore more suitable to supervise competence after admission to practise than any other body inside or outside the legal profession.
3. The governing body is elected and therefore has a legitimacy in the profession which a non-elected body would not have.
4. Clients' confidential information should not come into the possession of two bodies if that can be avoided, and if the disciplinary and competence functions are divided that is likely to be the result.

E. Procedures and Procedural Problems

If a lawyer is charged with giving incompetent service, the adjudicating body will have to determine the facts from evidence, and it will have to decide either from evidence or from its own expert knowledge whether or not the services were up to the appropriate standard. That is not unlike the usual discipline process, though in discipline proceedings it is a standard of ethical conduct that will normally be applied. If the question is one of general competence, the facts will be determined either by examination of the lawyer or by evidence of his handling of a number of matters, and, again, the governing body, by itself or with the help of a board of examiners, will have to decide whether the standard of performance so established is up to an appropriate professional standard.

The adoption of a helpful or therapeutic approach would give rise to some procedural problems. These would not be too great if it is the

adjudicating body which takes that approach after a formal hearing and a decision on the merits; flexibility in its powers will enable it to defer imposing punitive sanctions until the possibilities of retraining and voluntary restrictions on practise have been exhausted. It is necessary, however, to work out very carefully the consequences of such an approach if it is followed at the complaint stage when its benefits, if it succeeds, are likely to be the greatest.

It seems desirable that the governing body or one of its committees should be able to talk to the lawyer and explore his problems with him. In some cases the lawyer will welcome the help of the governing body, and in those cases matters are likely to be worked out without difficulty. In others, however, as has been said already, the lawyer may not be able to distinguish between the institutional Good Samaritan and the institutional policeman, and he may regard a helpful suggestion of retraining in the same light as a punitive sanction. In the latter cases what is most important is not the fact that the governing body is walking softly but rather the fact that it has a big stick, and the ability to discontinue the helpful approach and turn to the punitive approach must be preserved. That means that care must be taken on the one hand to see that the lawyer's right to due process in the punitive proceedings is not prejudiced, and, on the other, to see that any failure to protect his rights while following the helpful approach does not provide grounds to upset the later imposition of punitive sanctions. These considerations suggest firstly that matters of competence be dealt with in the first instance by a committee of the governing body not involved in the usual discipline process, and secondly that any communications made by the lawyer to that committee or its officials be privileged from disclosure during any discipline proceedings. They also suggest that the adjudication on matters of competence should not be in the hands of that committee but rather in the hands of the usual adjudicating body.

F. Sanctions

The usual disciplinary sanctions are reprimands, fines, suspension and disbarment. These may be appropriate to some cases of breach of the ethical duty to provide competent and conscientious service, but they will not be the best corrective in others, and they will not be appropriate to many cases of general incompetence. If the lawyer's problem is lack of knowledge of law or procedures in a given area of law, it may be that the adjudicating body should have power to direct him to take instruction in formal courses or otherwise. If it is lack of judgment or skill which cannot be acquired through study it may be that the adjudicating body should have power to direct him to work only under supervision until the lack has been remedied. If he is competent in some areas but not in others, it may be that the adjudicating body should have power to direct him to restrict his practise to the areas in which he is competent, either by defining the areas in which he can practise or those in which he cannot. If the incompetence is pervasive and irremediable, it may be that the restriction would also have to be pervasive to be effective, i.e., disbarment or a universal and indefinite suspension.

The first question then, is whether the usual disciplinary sanctions (reprimands, fines, suspensions from practise, and disbarment) are to apply to cases of incompetence. The answer will depend upon the view that is taken of the nature and purpose of the process.

As has been said, a lawyer by undertaking work, represents that he is or will become competent to do it, and comes under a duty to do it competently. On that view of things, the usual sanctions have their place. If deterrence is the basis of punishment, that kind of conduct can be and should be deterred. If desert is the basis, that kind of conduct deserves it. If consideration is to be given to the feelings of the victimized client and of the community in general, that kind of conduct is as reprehensible as many other kinds. There may be debate about the *severity* of the sanctions to be imposed but, in most cases there is no reason why they should not be of the same kind as the sanctions for inexcusable delay, lying to a client, trickery, and so on.

However, if the adjudicating body concludes that, the situation calls for remedial action rather than punitive sanctions, or in addition to them, remedial powers should be available, and the following might be considered:

1. The power to investigate the competence of a lawyer to perform legal services in a given field or fields or in general;
2. The power to require a lawyer to demonstrate his competence by examination;
3. The power to require a lawyer to undergo training or courses of study;
4. The power to require a lawyer to restrict his practice to specified fields of practise or to exclude his right to engage in specified fields of practise;
5. The power to require a lawyer to practice only under supervision;
6. The power to suspend a lawyer from practice in order to compel adherence to orders under items 1 to 5;
7. A general power to suspend once the rendering of incompetent service has been established.

G. Solicitor and Client Privilege

The question of the invasion of the confidentiality of client's information is not fundamental to the questions we have been discussing: it would be possible to institute all the measures under discussion with or without the supervising body having power to examine a file regarding a client, or to obtain information orally from the lawyer. However, on the one hand, denial of the power would often draw the teeth of the supervising body, while a grant of the power would trench upon a value which is fundamental to the right to counsel and therefore to the reason for existence of the legal profession.

It should be noted at the outset that what is in issue in this part of the paper is the client's right to confidentiality: solicitor-client privilege is the client's privilege and not the lawyer's, though it is the lawyer's duty to respect it and assert it unless it is overborne by some rule of law based on some countervailing value. It is implicit in any decision to provide for formal regulation of competence or incompetence that the lawyer's right to the privacy of his professional affairs from inspection by the regulatory body must give way to the public interest in the competence of lawyers just as it gives way to the public interest in other aspects of lawyers' conduct.

While the legislation across the country has not been researched on the point, it may be said with some confidence that every disciplinary body

investigating a complaint or charge of unethical conduct now has the power to examine a client's file and to obtain from the lawyer information about a client's affairs and that it does so as a matter of routine. The mere fact that the legislation exists does not necessarily make it good, but it is probably sufficient to justify it by saying that the protection of lawyers' clients against unethical conduct by lawyers is an objective sufficiently important to justify the disclosure of clients' information to those involved in the discipline process, who are lawyers, employees of the disciplinary body or official reporters who are obliged and accustomed to keep the information confidential. There is a theoretical danger to the client of further unauthorized communication, but one which must be balanced against the protection given to clients generally by the discipline process. (It may be noted parenthetically that if proceedings are removed into court by appeal or otherwise the danger becomes an actuality and that it may be that steps should be taken to protect confidentiality under those circumstances.)

Assuming that the present practise of disciplinary bodies is acceptable, should the body adjudicating on matters of competence have the same power? The question should be addressed first in connection with the enforcement of the ethical duty to provide competent service.

The previous discussion suggests that the duty will be enforced much like other ethical duties, the only substantial difference being in the broader range of sanctions available. If the process is much the same, and if it is carried on by much the same body, there would seem to be only two possible reasons for concern. One is that there would be a quantitative increase in the number of cases in which confidentiality is trenched upon; however, the need for protection of the client against incompetent work may be thought to justify such a quantitative increase. The other is that there may be thought to be a qualitative difference between the enforcement of ethical duty to give competent service and the enforcement of other ethical duties so that enforcement of the latter justifies the invasion of confidentiality while the former does not; however, the enforcement of this ethical duty is as important as the enforcement of others in which confidentiality gives way. It would be most strange and unsatisfactory if the disciplinary body could look at the client's file to see whether the lawyer had neglected it in a way which was culpable for other reasons, but would have to avert its eyes when it began to suspect that the delay arose because the lawyer had culpably undertaken to do the work when he was not competent to do so.

It is necessary also to consider the question of confidentiality in connection with a general investigation into the competence and incompetence of the lawyer under the second procedure discussed above. It is one thing for the supervisory body to look at a file which is the subject of a specific investigation. It is something else to say that the supervising body, merely because it suspects that a lawyer is incompetent, should have the power to go into his office and inspect such of his files as it thinks desirable. Assuming that there is to be a power of supervision of competence there appear to be four positions any one of which could be taken:

1. The supervising body should have the power to examine the lawyer's files at will.
2. The supervising body should have power to apply either *ex parte*, or

on notice to the lawyer, to a judge for an order permitting it to examine the files.

3. The supervising body should be entitled to approach the lawyer's clients to obtain their consent to an examination of their files.
4. The supervising body should not have power to examine any file except in the course of an investigation of a specific complaint.

The adoption of any of these positions would raise problems. The first exposes clients to too great a risk and goes further than is necessary. The third would require an explanation to the lawyer's clients that his competence is under investigation and would be likely to destroy his reputation without a trial. The fourth would make a general investigation difficult or impossible.

The second position also has drawbacks. It is not clear what criteria the judge should or would employ upon an application for permission to examine a lawyer's files, and in the absence of criteria the requirement of an application may be no safeguard at all. While it is to be hoped that the judge would not permit wholesale fishing expeditions, the supervising body would by the nature of things, be unable to describe the specific files it wants; this problem would be somewhat reduced if the governing body could investigate other files only in connection with a specific charge of incompetent service in a particular matter. A requirement of notice of the application to clients would be impractical and self-defeating but without it a client, whose interests are the most important ones affected, would not have an opportunity to oppose the invasion of the confidentiality of his information. Notwithstanding these drawbacks, it is suggested that this position is the best balance between the interest in solicitor-client confidentiality and the interest in the protection of clients against incompetence, bearing in mind on the one hand the great importance of the protection of the public against incompetent legal work and, on the other, the comparatively small risk to any client that the breach of confidentiality will cause him injury. This is in accordance with the view of the majority of the Manitoba Committee.

Having said that, it is acknowledged that any invasion of the solicitor-client privilege is a serious matter and one which any responsible lawyer approaches with trepidation. A substantial minority of the Manitoba Committee took the view "that the unique role of confidentiality enjoyed by a client, in his dealings with his solicitor, should not be weakened in any way" and that the client's information should not without his consent be disclosed to the Standards Committee which would be responsible for the regulation of competence. The Report does not say whether the minority thought a specific file should not be available if a charge of the breach of the ethical obligation is being investigated or has already been proved.

In balancing the interest in confidentiality against the interest in regulating competence, one important consideration, which has already been mentioned, is that the risk of damage to the client from unauthorized disclosure, while it exists, is minimal because the information is communicated only to persons accustomed to respect confidentiality. In order to reduce the risk further, however, the majority of the Manitoba Committee, however, thought that further steps should be taken for the client's protection:

1. That a breach of confidentiality by a member of the Standards

Committee should be considered a matter of professional misconduct. (If this is thought suitable, possibly some sanction could also be imposed on other persons, such as members of administrative or clerical staff, who see the information in the course of their duties).

2. That if a client does suffer damage from an unauthorized breach of confidentiality the Law Society's reimbursement fund would pay compensation.
3. That original information found in any files should not be compellable in any other legal proceedings (though the Committee recognized that provincial legislation could not prevent its use in criminal proceedings under federal jurisdiction).

H. Errors and Omissions Insurance Plans

The legal profession in many parts of Canada has assumed responsibility for seeing that its members are able to obtain errors and omissions insurance, and for seeing that they do obtain it to a minimum level, usually $100,000. The governing bodies have made arrangements for group plans and, except for the Law Society of Newfoundland and the Bar of Quebec, have made adherence to them compulsory for lawyers in private practice. The governing bodies of the western provinces and Ontario, and the Chamber of Notaries, have established self-funded basic plans coupled with stop-loss arrangements with insurance carriers, and three of the Maritime Provinces are considering a similar arrangement.

The existence of these plans provides an additional motive for the supervision of competence by the legal profession. Indeed, the insurance consultant retained by the Federation of Law Societies has recommended measures for the protection of the plans which are the sort of measures suggested in this paper for consideration for the protection of the public.

In one way, the existence of the plans makes the prevention of incompetence more difficult: a lawyer who knows that his insurer will pay for his mistakes is under one less constraint to guard against them, and there is some reason to suspect that at least some lawyers have been more careless as a result of the plans. The question for consideration, however, is whether the governing bodies should use their powers under the plans to assist in the policing of competence and the prevention of incompetence.

The first question to be resolved, and one which has not so far been answered unanimously, is whether or not information obtained in the administration of the plans can properly be communicated to and used by the organisms involved in the supervision of competence and imposing sanctions against incompetence. The most important element in the question is ethical: is it right to compel a lawyer to join the plan, to compel him to report claims, and to compel him to make disclosure *uberrimae fidei,* and then to use the information against him in a process which is or will appear punitive? The answer suggested by this paper is yes; the lawyer accepts a position which is privileged and protected by law; he does so upon the basis that he will practise honourably and competently; and the sanctions imposed for incompetence relate only to that position and to those obligations. There is also a practical element in the question: will the possibility of sanctions cause lawyers to conceal claims and to resist the full disclosure which is necessary if claims are to be properly settled or resisted? The suggested answer is that these adverse consequences should be guarded against, but, to the extent that they

cannot, they must be accepted. The benefits of the free flow of information are likely to outweigh these disadvantages, and the efficient supervision of the competence of lawyers in the public interest must outweigh any loss to the plan in a particular case.

The next question is whether financial sanctions should be imposed through the plans upon lawyers whose incompetence gives rise to claims. The principle of protection of the public suggests an affirmative answer, and so do insurance principles, though here the line will have to be drawn between the single isolated act of inadvertence, which can afflict anyone, and the negligent act which flows from culpable inattention or incompetence. The financial sanction could be either an increased premium or an increased deductible; the latter seems likely to be both administratively easier and more effective as a deterrent, though there are strong arguments for saying that if a large deductible cannot be collected from the lawyer the plan may have to pay the client anyway. The nature of any such financial sanction would be a matter for each individual plan.

The ultimate sanction in this field would be to refuse the incompetent lawyer membership in the plan. Insurance principles would suggest that that be done, but the legal profession, having taken control of the plans, can hardly transfer to his clients the burden of a lawyer's incompetence on the grounds that it has been found too heavy for the legal profession, through the plan, to bear. There is an obvious solution to that, namely, to suspend or disbar the lawyer at the same time.

Obviously, the governing body cannot properly disbar a lawyer merely to save money for the legal profession's errors and omissions insurance plan. However, the incompetence of the lawyer which creates a danger to the plan creates the same danger for his clients and if the interests of the plan call for the removal of the incompetent lawyer from practice it necessarily follows that the interests of his clients also call for it. The somewhat similar relationship between sanctions against dishonesty and the compensation funds maintained by the governing bodies has not given rise to any defensible suggestions of conflict.

I. Disability

Most of the discussion so far has dealt with lawyers who are responsible for their own conduct. Some of the discussion has suggested that some lawyers may be in a state of professional incompetence that should be treated as something like a disease which is curable by self-help, education or training, or avoidable by restriction of practise. Even in the few cases where professional incompetence is incurable as flowing from innate lack of capacity, the lawyer in the usual case is a rational being and can be dealt with as such. But what if he is not rational because of mental infirmity or addiction to drugs or alcohol?

There is clearly no point in treating senility or other mental infirmity, or conduct flowing from them, as offences to be punished. It is equally clear, however, that the public must be protected against them, and that a lawyer afflicted by them must be removed from practise while he remains under their influence. The governing body should therefore have statutory power to require a lawyer to submit to examination to determine whether his ability to practise is adversely affected by mental disability, including senility, and power to suspend him from practise while the investigation is carried on and while the condition, if it exists, continues. The governing

body itself, while it may have special expertise in deciding whether services are up to standard, has none in deciding whether lawyers are incompetent because of mental incompetence or addiction to alcohol or drugs, and there is a question whether it should be the tribunal which makes such decisions. Under British Columbia's sec. 49(1a)(g) and (h) the suspending power is vested in the benchers, but the power of deciding whether the lawyer's competence to practise is affected by disability is vested in a board of examiners appointed by them. Open questions are whether that is an appropriate approach, whether the qualifications of the tribunal should be specified, and whether as in the British Columbia Act, the onus should be upon the lawyer to satisfy the examining board of his competence or whether lack of competence is something to be established by positive evidence. Something which should be emphasized is the necessity of ensuring that the lawyer has full procedural safeguards and access to the courts.

It is quite possible to take no special steps with regard to the problem of alcoholism and drug addiction, but merely to apply the usual disciplinary sanctions to the overt conduct which flows from the condition. That seems to have been the objective result of the profession's activities in the past, though it may be that informal affirmative steps have been taken in individual cases. Disciplinary sanctions may affect the conduct of rational beings who calculate the pleasures and pains likely to flow from a certain course of action, but they are not likely to affect the conduct of one who has lost his capacity to control it. Disbarment will of course remove the danger to the public from the lawyer's incompetence as a lawyer; but, imposed indiscriminately, it will act unfairly. It will also act against the public interest if the lawyer's talents could have been salvaged, and it will make it more likely that the lawyer will be a permanent charge on the public. Apart from such practical considerations, compassion suggests that the profession should not cast aside its afflicted members until it is clear that rehabilitation is not possible.

It has been suggested[3] that the profession should make efforts to grapple with the problem by education about the dangers of alcohol and drug abuse; by reporting drug addiction and alcoholism; by a compassionate and therapeutic approach to the lawyer who has an alcohol or drug problem; by persuading him to accept voluntary referral to appropriate facilities and voluntary restrictions on his professional activity during treatment. It is still necessary to provide for suspension during the continuance of the condition for the protection of the public against the consequences of the lawyer's alcoholism or drug addiction. In some cases, the suspension may also be what is needed to bring the lawyer to a realization of his condition, but it is dangerous to rationalize the imposition of such a serious sanction on the basis that it is a favour to the lawyer.

V. CONCLUSION

For reasons given earlier in this paper the legal profession should assume responsibility for the maintenance and improvement of the competence of its members. The positive ways in which it might maintain

3. Parker "Disability as a Form of Incompetence" a paper prepared for the Federation of Law Societies of Canada, 1977.

and improve competence in general, i.e., education and formal specialization, have not been discussed in the paper. The use of powers conferred or to be conferred by law, however, have been discussed. While the associated problems are great, they can be surmounted; the profession has already recognized the need to surmount them and has taken its first hesitant steps to do so. It may be forecast with some confidence that its pace will be accelerated within the next few years and that it will adopt a coherent and integrated plan for the carrying out of the responsibility.