

RECENT DEVELOPMENTS IN THE LIABILITY OF LAWYERS TO CLIENTS AND THIRD PARTIES: THE NIGERIAN PERSPECTIVE

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In this paper, we have tried to look at the liability of lawyers to their clients and third parties by paying particular attention to the duties imposed in a lawyer in Nigeria under the Rules for Professional Conduct (2007). We also, in the paper, alluded to the fact that there are currently no legislation specifically targeted on the damages that could be awarded to clients and third parties that suffer from any negligent professional conduct of a lawyer in Nigeria. We make the case for the urgent reform of the Nigerian legislation in this regard.

INTRODUCTION

The practice of law in Nigeria is older than many of the other professions in the country. However, lawyers, like other professionals all over the world, are away from making mistakes that could affect professional liability, in the discharge of their duties to their clients, liabilities that sometimes further affect third parties. The Utopian day may never come when lawyers and other professionals will be totally above the commission of professional mistakes.

The focus of this paper is to look briefly at the concept of legal practice in Nigeria, that is "who can be regarded as a legal practitioner", the duties of lawyers to their clients and third parties, both in civil and criminal cases, the different instances where liability will be imputed, measure of damages where such liability arises, the exceptions, means of seeking redress where the act complained of does not give rise to a liability but is a misconduct in a professional sense and the possibility of limiting lawyers liability for professional negligence.

Part 1 of the paper defines who a lawyer is in the Nigerian context and the requirement for becoming a lawyer in Nigeria. Part II identifies the duties imposed on a lawyer in Nigeria under the Rules for Professional Conduct (2007) while Part III briefly describes the measure of damages a lawyer will be responsible for, in the event that he is found to have acted negligently. Part IV explains the general duty of the Nigerian lawyer, touching on specific cases

where a lawyer will be found liable, the exceptions, the rationale for the exemptions and the remedy for a breach that amounts to misconduct. Part V briefly examines the possibility of extending a lawyer's liability for professional negligence and also considers the duty of counsel to third parties.

1. WHO IS A LAWYER? THE NIGERIAN DEFINITION

In Nigeria, a lawyer is someone who has been called to the Nigerian Bar. Section 24 The Legal Practitioners' Act, CAP 207 LFN Act defines a "Legal Practitioner" as "a person entitled in accordance with the Legal Practitioners Act to practice as a barrister and solicitor either generally or for the purpose of any particular office or in essence", an individual may be entitled to practice in any area of the law in any court or he may be entitled to practice only for the purpose of a particular office or for the purpose of a particular proceeding.

A *Entitlement to Practice Generally*

An individual is allowed to practice generally if:

- (1) He has been called to the Bar by the Benchers;¹
- (2) He produces a certificate of call to the Bar to the Registrar. Section 7(1) Legal Practitioners Act.

Under the first head the conditions to be fulfilled by an individual aspiring to be called to the Nigerian Bar by the Body of Benchers are²:

- (1) He is a citizen of Nigeria³;
- (2) Production of a qualifying certificate to the Benchers;
- (3) Satisfying the Benchers that he is of good character.

Under the second head, a qualifying certificate will only be issued to an individual aspiring to be a lawyer upon the fulfillment of the following:

- (1) Nigerian citizenship⁴;
- (2) Successful completion of a course of practical training in the Nigerian Law School.⁵

B *Entitlement to Practice for the Purpose of a Particular Office*⁶

Those that fall into this category are:

(1) The office of the Attorney General, Solicitor-General or Director of Public Prosecution of the Federation or of a state;

(2) Such office in the public service of the Federation, or of a state as the Attorney General of the Federation or of a State, as the case may be, may by order specify, shall be entitled to practice as a barrister and solicitor for the purpose of that office.⁷

C Entitlement to Practice for the Purpose of a Particular Proceeding⁸

This head is applicable to people from jurisdictions outside Nigeria and to be allowed to practice as a Lawyer in Nigeria under this head the following are required:

(1) An application must be made to the Chief Justice of Nigeria by or on behalf of the person wishing to so practice;

(2) He must, in the opinion of the Chief Justice of Nigeria, be entitled to practice as an advocate in any country where the legal system is similar to that of Nigeria;

(3) It must, in the opinion of the Chief Justice of Nigeria, be expedient to permit that person to practice as a barrister for the purpose of the proceedings described in the application.

Where the above conditions are met, the Chief Justice of Nigeria will issue a warrant authorizing such person, upon the payment to the Registrar a fee not exceeding 50 naira, to practice as a barrister for the purposes of those proceedings.⁹

II. DUTY OF LAWYERS TO CLIENTS

By virtue of the Section 20 of the Legal Practitioners' Act, the General Council of the Bar has the power to make rules for the professional conduct of lawyers. Pursuant to the power, there is the *Rules for Professional Conduct 2007* which guides the conduct of lawyers in Nigeria. Under the Rules for Professional Conduct, the first duty of a lawyer is a duty to the court by virtue of Section 1 of the Rules. The duties of the lawyer as relating to his clients will be discussed one after the other hereunder.

Duty to accept brief:

It is the duty of a lawyer to accept any brief, subject to the payment of or agreement on proper professional fees, in the court in which he professes to practice provided the proper professional fee is offered unless there are special circumstances which justify his refusal.¹⁰ The duty of counsel as provided under this rule is otherwise called the *Cab Rank Rule*.¹¹ However, a lawyer is not absolved from bringing questionable action or arguing questionable defences or giving questionable advice on the ground that he is only following his client's instructions.¹²

Other special circumstances that may justify his refusal, at his discretion to accept a brief, include personal interest, conflicting interest, religious ground, etc.. Refusal on other grounds may amount to unprofessional conduct.

Duty to take full instruction:

This is an extension of the duty to accept brief under Rule 24. A lawyer must always take full instructions from his client, and also obtain full knowledge of the client's cause, as well as, ascertain all the facts before advising thereon. Interruption is advised to be at a minimal level. Further to this is the duty to follow client's instructions. It is the duty of lawyer to follow all the client's lawful instructions and he will be held responsible for any loss which may ensue as a result of his disobeying them.

Duty to thoroughly investigate and marshal facts stated by client:

This duty includes interviewing of potential witnesses for his client or for the opposing side. It is inadvisable that counsel should meet his client's witnesses for the first time in court. A lawyer should thoroughly investigate and marshal the facts. Subject to the rule dealing with communications with the opposite party, he may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of the opposing counsel or party. He should avoid any suggestion calculated to induce any witness to suppress evidence or deviate from the truth. He should avoid taking any action calculated to secrete a witness. However, except when legally required, it is not his duty to take affirmative action to disclose any evidence or the identity of any witness.¹³ A lawyer should not participate in a bargain with a witness either by contingent fee or otherwise as a condition of his giving evidence, but this does not preclude the payment of reasonable and non-contingent compensation for actual loss of time and expenses of persons who cannot afford or will not appear and testify for the statutory fees; nor does it preclude payment of non-contingent fees to expert witness.¹⁴

Duty to be dedicated and devoted to the cause of the client:

It is the duty of a lawyer to devote his attention, energy and expertise to the service of his client and, subject to any rule of law, to act in a manner consistent with the best interest of the client.¹⁵ He should consult with his client on all questions of fact which do not fall within his discretion, keep the client informed of the progress and any important development in the cause or matter as may be reasonably necessary, warn his client against any particular risk which is likely to occur in the course of the matter and respond as promptly as reasonably possible to request for information by the client.¹⁶ However, in discharging this duty, it is incumbent upon a lawyer to maintain and to adhere to the extant and immutable interests of truth and justice. A lawyer is an officer of the court and owes a duty to the court; he is a helper

in the administration of justice and not the mouthpiece of his client or his tool¹⁷. Therefore, He must not unjustly make a charge of fraud, that is, without cogent evidence. He must produce all the relevant authorities, even those that are against his case before the court.

Duty to advise client candidly and honestly:¹⁸

A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. A lawyer should avoid giving bold and confident assurances to clients, especially where the employment may depend upon such assurance, whenever the controversy will admit of fair settlement, the client should be advised to avoid or end the litigation. A lawyer shall inform the client that his claim or defence is hopeless, if he considers it to be so. Where an action is statute-barred and counsel did not advise his client not to take the action, he could be damnified in costs. He could also be liable for damages in negligence.¹⁹

Duty to disclose conflicting interest²⁰:

It is the duty of a lawyer, at the time of retainer, to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel. A lawyer will not be permitted to act against his former client, when he has obtained confidential information while acting for him which would be improper and prejudicial to use against him in the service of an adversary. Where Counsel receives brief from both parties, he should not accept one where he has gained knowledge of the other. A lawyer should not act in a case in which he had previously adjudicated as a judge or in which he had advised or dealt with when holding a public office. Conversely, a judge should not preside over a case in which he had previously served as counsel or rendered legal advice, unless he had fully disclosed this to the parties.²¹

Counsel should not represent himself in litigation, since objectivity and detachment can hardly be maintained. This is because in maintaining the highest tradition of the Bar, a lawyer should present and argue his case, dispassionately, rather than being emotional. This is hardly possible where a lawyer represents himself. A lawyer should not act as counsel in a case in which he may be required to give evidence. This is however a rule of practice, not a rule of law.

Fiduciary relationship:

A lawyer shall not do any act whereby for his personal benefit or gain, he abuses or takes advantage of the confidence reposed in him by his client.²² A legal practitioner should not buy his client's property as well as act as solicitor in the case. A legal practitioner should accept no compensations, commission, rebates or other advantages from a person against whom he has been retained without the knowledge and consent of his client after full disclosure.²³ A

solicitor has absolutely no right to convert the client's property in his possession to his personal use. He can only do whatever is covered by his instructions. A legal practitioner must fully disclose to his client, the compensation he has obtained for or on account of the brief. He must also disburse such money only on the instructions of his client.

Duty to preserve confidential communication:

All oral or written communications made by a client to his lawyer, in the normal course of professional employment are privileged.²⁴ The legal practitioner must preserve his client's confidence and must not disclose any confidential communication made to him by his client, without the client's knowledge and consent²⁵ The duty does not determine with the end of the proceedings for which the lawyer is retained, nor by the withdrawal of the retainer. It lasts forever, unless waived by the client.²⁶ The duty also extends to his employees, associates and others, whose services are utilized by him.²⁷ The duty does not, however, apply to information that conceals fraud, crime or the innocence of an individual. Furthermore, a distinction must be drawn between legal advice given, after a wrongdoing has been committed, which would normally attract privilege, and advice given with the intention of furthering a criminal purpose before a wrongdoing, which does not.

Duty to appear in litigation on behalf of his client until conclusion of the case:

A lawyer can only withdraw from employment, once assumed, for good cause and after reasonable notice to the client.²⁸ 'Good Cause' includes where the client insists upon an unjust or immoral cause in the conduct of his case, or if he persists over the lawyer's remonstrations in presenting frivolous defence, or if he deliberately disregards an agreement or obligation as to fees and expenses.

Duty in criminal cases:²⁹

Duty of prosecuting counsel:

The primary duty of a lawyer engaged in public prosecution is not to convict but to see that justice is done.³⁰ The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is unethical and savours of unprofessional conduct.³¹ He shall make timely disclosure to the lawyer for the defendant or to the defendant if he has no counsel, of the existence of evidence, known to the prosecution or other government lawyer, the degree of the offence or reduce the punishment. A public prosecutor shall not institute a criminal charge, if he knows it is not supported by probable evidence.³²

Duty of defending counsel:

Where a lawyer undertakes the defence of a person accused of a crime, he shall exert himself, by all fair and honorable means, to put before the court, all matters that are necessary in the interest of justice, but he shall not stand or offer to stand bail for a person for whom he or a person in his law firm is appearing. A confidential disclosure of guilt alone does not require a withdrawal from the case. However, if the accused who has confessed, insists that he shall give evidence (of innocence) or that such positive evidence to establish, falsely, his innocence shall be called, the lawyer must refuse to represent him.³³ There is, however, no impropriety in fighting to show that the prosecution's evidence has fallen short of proof; that is entirely different from being party to putting before the court, a positive defence known to be false.³⁴

Where the lawyer accepts a brief for the defence in a murder trial, he shall be deemed to have given a solemn undertaking, subject to any sufficient unforeseen circumstances, that he will personally conduct the defence provided his fee is paid.³⁵

Duty in civil cases:

Where a case is hopeless in civil litigation, a lawyer must decline to bring the action. Where litigation is advised, counsel should refrain from making bold and confident assurances of victory in court.

III. MEASURE OF DAMAGES

A lawyer is exempted from the liability aforesaid, in so far as it concerns the conduct of proceedings in the face of any court, tribunal or other body by a lawyer.

The lawyer has a duty to devote to the clients business that reasonable care and skill to be expected from, a normally competent and careful practitioner. In other words, the lawyer, in Nigeria, has the same measure of duty of care as set out under the Common Law.

The measure of damages where a counsel is negligent, is the difference in the pecuniary position of the client from what it would have been, had the lawyer acted without negligence. Counsel may also be ordered to pay personally part of the costs awarded against his client, incurred as a result of dereliction of his duty to the court.

IV. GENERAL DUTY OF CARE OF THE NIGERIAN LAWYER

In Nigeria, there is no distinction between a barrister and a solicitor. Once a person has been called to the Nigerian Bar, he is qualified to practice as a Barrister and Solicitor of the Supreme Court of Nigeria. Therefore, generally, there is no distinction in liability owed by solicitors, to that owed by barristers in Nigeria. The exemption, as earlier alluded to, is limited

to the immunity of a barrister for work of advocacy in the face of the court. However, where a lawyer acts as a solicitor, he will be liable for misstatements and wrong legal opinions that cause loss to the client. The general duty of care of the Nigerian lawyer is to avoid a breach of contract or a breach under the rules of negligence and tort. Other than this, he is exempted from liability in the conduct of proceedings.

However, to make a lawyer liable to pay damages for negligence, one must come under the common law principles of negligence under the law of torts as there are no specific statutory provisions for damages for breaches that do not amount to misconduct.

A Cases of Liability

Instances where liability will be imputed to a legal practitioner will be liable in damages for negligence in the discharge of his professional duties include:

- (1) Giving wrong advice.
- (2) Bringing an action that is statute barred.
- (3) Delay in instituting proceedings that leads to the action becoming statute-barred, unless client neglected to give lawyer instructions or to put lawyer into funds.³⁶
- (4) Delay in entering an appearance or serving defence that leads to default judgement being obtained against his client.
- (5) Failure to prosecute a case, with due diligence that leads to the case being struck out for want of prosecution.
- (6) Bringing an action against wrong parties; et cetera. Exceptions

Where lawyer is acting without remuneration he may not be liable under any of the above heads³⁷.

There is no liability for negligence committed when conducting a case in court e.g. failure to call a witness or to cross-examine a witness.³⁸

B Rationale for Exemption from Liability

- (1) The need for lawyers to be fearless and independent in conducting their clients' case in the court.
- (2) The possibility of a case being retried all over again in order to sustain an action in negligence against the counsel.

(3) The need to forestall endless litigation, as every lawyer who loses a case, will invariably be sued by the client.

(4) Counsels are by the calling of their profession regarded as responsible men, on whom the vice of negligence or inadvertence is a rare attribute.³⁹

C Remedy for Breach that Amounts to a Misconduct

By virtue of Section 11 of the Legal Practitioners Act, a breach that amounts to misconduct attracts disciplinary procedure by the Legal Practitioners Disciplinary Committee, which is an organ of the Body of Benchers, and a finding of guilt may lead to any of the following:

- (1) Striking out the person's name off the roll or;
- (2) Suspending the practitioner from practice by ordering him not to engage in practice as a legal practitioner for such period as may be specified in the direction;
- (3) Admonishing the practitioner, and any such direction may, where appropriate, include a direction requiring the refund of moneys paid or the handing over of documents or any other thing as the circumstances of the case may require;

(4) Possibility of Extending a Lawyer's Liability for Professional Negligence:

Under Nigerian Laws, there are no specific statutory provisions yet, that apportion any type of damage for the breach of any of these duties by a lawyer. This is an area of the Nigerian law that needs urgent reform. There is a general feeling among those that patronize legal services in Nigeria that lawyers cannot be made liable in negligence. This feeling is fueled by clear cut legislation that spells out the limits, extent and the plenitude of the immunity of legal practitioners in Nigeria. Undoubtedly, the Nigerian Bar Association, in conjunction with other stakeholders have a heavy responsibility to fast track the reform of our law in this regard. There is an urgent need to meet up with best practices in this area.

D Duty of Counsel to Third Parties

This is another area of the Nigerian law that calls for urgent reform. As it is now, a third party that has suffered from the negligence of a lawyer may be met by a successful defence under the privity of contract.

However a third party that has been misled by the legal opinion of a lawyer may have his remedy in the tort of misstatement, if he is able to show that such a misstatement led to loss to him.

CONCLUSION

As earlier alluded to, the legal profession has, since time immemorial, regarded as a profession of highly qualified people and therefore, expected by the end users of the services to have the lowest level of negligent discharge of duties.

With the fact of being human, it will be unavoidable for an individual to occasion mishaps from time to time. While we await legislations to be promoted in the area of expanding the liability of lawyers to their clients, the safest means of ensuring that a lawyer is not liable in negligence, is to exhibit the highest level of proficiency and dignity in the discharge of the duties, which have been indentified above.

NOTES

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- 1 The Body of Benchers is the controlling body in the Nigerian Legal Profession that is responsible for the formal call to the Bar of persons seeking to become legal practitioners. See S.3(1) Legal practitioners' Act
- 2 Section 4(1) Legal Practitioners Act
- 3 Note that non-citizens may now also be called to the Bar if they satisfy conditions (ii) and (iii) above. See Decree No. 9 of 1992
- 4 Note also that a non-citizen of Nigeria may now be entitled to have a qualifying certificate issued to him by the Council stating that he is qualified to be called to Bar if, except when the Council otherwise directs, he had successfully completed a course of practical training in the Nigerian Law School. See the Legal Education (Consolidation etc.) Amendment Decree No. 8 of 1992.
- 5 This requirement can also be waived, either partially or fully. See Sections 2(a) & 2(b) Legal Education (consolidation) Act 1976.
- 6 See Section 2(3) Legal Practitioners Act.
- 7 See by Legal Practitioners Act. (Entitlement to practice as Barrister and Solicitors) Federal Officers Order 1992.
- 8 See section 2(2) Legal Practitioners Act
- 9 See *Awolowo v. Usman Sarki*, Minister of Internal Affairs and the Attorney-General of the Federation 1962 LLR 177; (1966) N.S.C.C. 209.
- 10 See Rule 24(1) of the Rules for Professional Conduct.
- 11 This name is derived from the belief that the Legal profession is like a Cab Rank where the Cab Driver is obliged to take whichever passenger boards his vehicle once it is his turn on the rank, regardless of the race or pedigree of the passenger.
- 12 See Rule 24(2) of the Rules for Professional Conduct.
- 13 See Rule 25(1) of the Rules for Professional Conduct.

- 14 See Rule 25(2) of the Rules for Professional Conduct
- 15 See Rule 14 of the Rules for Professional Conduct.
- 16 See Rule 14 (a)-(d) of the Rules for Professional Conduct.
- 17 See *Rondel v. Worsley* (1966) 3 WLR 950.
- 18 See Rule 14 (2) (e) for Professional Conduct.
- 19 See *Bello Raji v. X. A Legal practitioner* (1946) 18 NLR 74 where the Supreme Court held a legal practitioner liable in damages to the client for acting with gross carelessness by filing a statute barred action.
- 20 See Rule 17 of the Rules for Professional Conduct.
- 21 See Rule 6 (1) & (2) of the Rules for Professional Conduct.
- 22 See Rule 23 of the Rules for Professional Conduct.
- 23 See Rule 54 of the Rules for Professional Conduct.
- 24 See Rule 19 of the Rules for Professional Conduct.
- 25 See Section 170(1) Evidence Act.
- 26 See Section 169(3) Evidence Act.
- 27 See Rule 19(4) of the Rules for Professional Conduct.
- 28 See Rule 21(1) (2) (3) of the Rules for Professional Conduct.
- 29 See Rule 37 of the Rules for Professional Conduct.
- 30 See Rule 37(4) of the Rules for Professional Conduct.
- 31 See Rule 37(6) of the Rules for Professional Conduct.
- 32 See Rule 37(5) of the Rules for Professional Conduct.
- 33 See Rule 15(3) (f) of the Rules for Professional Conduct.
- 34 See Rule 37(3) of the Rules for Professional Conduct.
- 35 See Rule 37(2) of the Rules for Professional Conduct.
- 36 *Bello Raji v. X. A legal practitioner* (1946) 18 NLR 74.

- 37 See Section 9(2) of the Legal Practitioners Act.
- 38 See the case of *Rondel v. Worsley* (1967) 1 Q.B. 4477 ALL E.R. 993.
- 39 *Imo Broadcasting Corporation v. Iwueke* (1995) 1 N.W.L.R. (pt 372)