
Lawyers' Duty of Professional Confidence to Clients under the Nigerian Legal System: An Overview

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ABSTRACT

The legal profession is one of the most regulated professions in Nigeria and the world at large. This is because of the sensitive nature of the professional services rendered by lawyers to their clients. In the course of rendering these services, information are made available to legal practitioners by their clients and in order to ensure security of this information, the laws have imposed a duty of professional confidence on Lawyers. This duty is so important that, except in permitted circumstances, a Lawyer is under no obligation to disclose whatever transpired between him and his client. He also has the duty to ensure that the information is not used to his personal advantage or to the advantage of another person who may be interested in such information. This is in furtherance of the duty of the Lawyer to act in the best interest of his client and not do anything that will jeopardize the interest of his client(s).

1.0 INTRODUCTION

The Rules of Professional Conduct for Legal Practitioners 2007 (RPC) is one of the laws regulating the conducts of lawyers in Nigeria. The Rules set out the professional duties of lawyers when dealing with clients, courts and fellow lawyers. Under the rules, a lawyer being a minister in the temple of justice is required to uphold and observe rule of law, promote and foster the cause of

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justice, maintain professional conduct, and not to engage in any conduct which is unbecoming of a legal practitioner.¹

A lawyer has the duty to accept brief from a client and this duty is encapsulated under the Cab Rank Rule; which simply connotes that a lawyer has the duty to take a brief brought to him by a client. Although, this duty is limited to civil and criminal litigation, it does not extend to the solicitor's work of a lawyer.² But in any case, where the professional services of lawyer is required by a client, either as a Barrister or Solicitor, certain professional duties and responsibilities arise on the part of the lawyer and these duties are strictly regulated by law. One of these duties is duty of professional confidence to client which is under consideration in this paper.

It is against this background that the writer seeks to examine the duty of professional confidence a lawyer owes his client, the scope and limitation of such duty viz-a-viz the position of law in Nigeria.

2.0 LAWYERS DUTY OF PROFESSIONAL CONFIDENCE

The lawyer-client relationship has been characterized as one of confidence as it is built on trust. This duty constitutes part of the broader foundation of lawyer's fiduciary duties when dealing with their clients. It obliges the lawyer (either as Barrister or Solicitor) to respect the confidentiality of the clients' affairs. This is because, in the course of the relationship, information are obtained about the client's affairs which may be confidential and must not be used for either the personal or professional benefit of the lawyer or other party, especially if not authorized by the client.³

¹ Rule 1 of the Rules of Professional Conduct for Legal Practitioner 2007

² Rule 24 RPC.

³ Duty of Confidentiality, available at; www.wikipedia.org/wiki/duty_of_confidentiality (accessed 3rd March, 2017)

The rationale for this duty is to maintain full and frank disclosure between the lawyers and their clients. It enables the clients to disclose certain information to the lawyer which ordinarily, they would not disclose but for the lawyer-client relationship.

The position of law under the Rules of Professional Conduct is that; a lawyer when dealing with his client is duty bound to ensure that all forms of communication; either oral or written between him and his clients in the course of discharging his professional services to the clients are privileged communication. The obligation which falls on the lawyer under this duty is to uphold the confidentiality and secrecy of any information obtained from clients.⁴

The RPC clearly provides thus:

Except as provided under sub-rule (3) of this rule, all oral or written communications made by a client to his lawyer in the normal course of professional employment are privileged⁵

From the above provision, it can be deduced that, the duty on the lawyer is limited to when acting in the course of his employment as a lawyer by the client. Thus, it does not extend to communications which fall outside the scope of the lawyer's employment. In support of this position, the new Evidence Act of 2011 under section provides thus:

No legal practitioner shall at any time be permitted, unless his client's express consent, to disclosure (sic) any communication made to him in the course and for the purpose of his employment as such legal practitioner by or on behalf of his client, or to state the content or condition of any documents with which he has become acquainted in the course and for the purpose of his

⁴ A. Obi Okoye "Law in Practice in Nigeria (Professional Ethics and Skills)" Second Edition 2015.

⁵ Rule 19(1) of the Rules of Professional Conduct for Legal Practitioners 2007

professional employment or to disclosure (sic) any advice given by him to his client in the course and for the purpose of such employment:⁶

Additionally, under the International Principles on Conducts for Legal Practitioners, a lawyer is required at all times to maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise or required by law and/or applicable rule of professional conduct. Thus, a lawyer shall not knowingly; reveal a confidence or secret of his client or use a confidence to the disadvantage of the client.⁷ This is because; the primary obligation of the lawyer is to always act in the best interest of his 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 interests of his client.⁸ Also, the lawyer has the obligation not to use a confidence or secret of his client to the advantage of himself or of a third party unless the client consents after full disclosure.⁹

Therefore, in an event that the need arises prompting the lawyer to use a particular client's confidence for personal or professional advantage for himself or another client, there is an obligation on such lawyer to give a full disclosure to the former client in order to obtain the consent of such client. The owner of the confidence has an absolute discretion to consent either orally or in writing.

It is, however, suggested that such consent should be in writing and duly executed so that, the client does not deny same in the future. The whole essence of this is to ensure that a lawyer does not do anything that will amount to an abuse or taking advantage of the confidence reposed in him by his client.

⁶ Section 192(1) *Evidence Act* 2011

⁷ Rule 19(2)(a)& (b)

⁸ Rule 14(1) RPC.

⁹ Rule 19(2)(c)

This provision can be interpreted to mean that; whenever a lawyer discloses any information about the client to the disadvantage of his client, it will amount to acting against the interest of the client which in effect is a breach of the rule requiring the lawyer to always act in the best interest of the client.

The above appears to be the general principle of confidentiality of information or communication received from clients. A privilege communication is a private statement that must be kept in confidence by the recipient for the benefit of the communicator. In other words, a communication that is protected by law from compelled disclosure in a legal proceeding, or that cannot be used against the person who made it.¹⁰ Privileged communication exists because; the society values the privacy or purpose of the client-lawyer relationship. One can affirm that, the reason for this privilege is to allow clients to be free with their appointed lawyers.

The principles of confidentiality and professional secrecy have two main features. On the one hand, there is the contractual, ethical and frequently statutory duty on the part of the lawyer to keep client secrets confidential. The statutory duty is sometimes in the form of an evidentiary attorney-client privilege; this differs from the lawyer's obligations under the rules of professional conduct.¹¹

There is also a duty of confidentiality between the client and the lawyer and this duty is imposed on the client to ensure that such communication between him and his legal practitioner is not disclosed and he shall also not be compelled to disclose same. This position is supported by the clear provision of the section 195 of the Evidence Act 2011, which provides to the effect that:

No one shall be compelled to disclose to the court any confidential communication which has taken place between him

¹⁰ Black's Law Dictionary, 9th Edition page 316.

¹¹ IBA, International Principles on Conduct for the Legal Practitioners

and a legal practitioner consulted by him, unless he offers himself as witness in which case he may be compelled to disclose such communications as may appear to the court necessary to be known in order to explain any evidence which he has given but no others.

It is important to note that such obligation extends beyond termination of the relationship. This is because, the Evidence Act provides further that; the obligation stated in this section continues after the employment has ceased.¹² The confidentiality of the communication is protected to the extent that lawyers cannot be compelled to disclose any communication without the express consent of their clients or provision of the law.

3.0 EXCEPTIONS TO THE RULE

It is trite in law that, to every general rule, there is exception(s). The above discussion presupposes that the duty of professional confidence is not absolute i.e. there are permitted circumstances under which the lawyer will be able disclose any communication while acting for his client or after. Thus, under the RPC, a lawyer may depart from this duty under the following circumstances which shall be considered in seriatim:

- A lawyer may reveal confidences or secrets with the consent of the client or clients affected, but after a full disclosure to them.¹³ As earlier noted, in an event that the need arises prompting the lawyer to reveal or use a particular client's confidence for personal or professional advantage for himself or another client, he is allowed by the law to do so freely.

However, he has the duty to inform his client of his intention to reveal or disclose and such disclosure must in full details so as to obtain the consent of such client. The owner of the confidence has an absolute discretion to

¹² Section 192(3) Evidence Act 2011

¹³ Rule 19(3)(a) RPC 2007

consent either orally or in writing. It is however suggested that such a consent should be in writing and duly executed so that, the client does not deny same in the future. Once the client's consent has been obtained, the lawyer may proceed to reveal such information.

- Where the rules of law or a court of competent jurisdiction orders the disclosure of confidence by the lawyer, there is an obligation on the lawyer to disclose. Under this, a lawyer is duty bound to disclose whatever secret or confidence his client kept in his case where a provision of a law requires him to do so. A good example is the provision of the Money Laundering (Prohibition) Act 2011 (as amended) which states to the effect that;

Where a transaction-

- (a) Involves a frequency which is unjustifiable or unreasonable;
- (b) Is surrounded by conditions of unusual or unjustified complexity;
- (c) Appears to have economic justification or lawful objective; or
- (d) In the opinion of the.....Designated Non-financial Institution involves terrorist financing or is inconsistent with the known patter of the account or business relationship, that transaction shall be deemed suspicious.....¹⁴

According to the interpretation section of the Act, Designated Non-Financial Institution is defined to include a Legal Practitioner.¹⁵ Thus, where a legal practitioner in the course of his employment notices any of the listed circumstance, he has the obligation to make a report to the Economic and Financial Crime Commission. Failure to make such report attracts a penalty of a

¹⁴ Section 6(1) Money Laundering (Prohibition) Act 2011 (as amended)

¹⁵ Section 25 Ibid

sum not less than N1, 000,000.00 and suspension of license.¹⁶ A lawyer is therefore duty bound to make a report to the EFCC in order not to be liable under this Act.

However, the above position does not represent the position of the law as it relates to obligations on lawyers to report to the EFCC. This is because, the above provisions have been declared null and void by virtue of the decision of the Federal High Court in *Nigerian Bar Association v. Attorney General of Federation & Anor.*¹⁷ The court held that the aim of the section 5 of Money Laundering Act has been taken care of under section 192 of the Evidence Act, 2011, Legal Practitioners Act and Rules of Professional Conduct for Legal Practitioners. The court added that the punishment imposed under section 5 can hardly be imposed on lawyers because of the cumbersomeness of the procedures involved in the suspension and revocation of licenses possessed by legal practitioners under the LPA.

Justice Gabriel Kolawole of Federal High Court Abuja held further that the sanctions for non-compliance with Section 5 of the MLA include banning the legal practitioner from engaging in legal practice. He held that the LPA has already made provisions for the manner in which a legal practitioner can be disciplined where his conduct falls below prescribed standards of the rules guiding the profession. The court held that since the Minister of Trade and Commerce neither issued the Call to Bar certificate nor entered the name of any legal practitioner in the Roll, he had no right to disqualify any legal practitioner.

Undoubtedly, from the above, the legal profession is a self-regulatory body which is not subject to disciplinary proceedings by external bodies. In the NBA's case above, the court ordered that Legal Practitioners be deleted from section 25 of Money Laundering (Prohibition) Act 2011 (as amended) and that section

¹⁷ Unreported Suit No: FHC/ABJ/CS/173/2013.

5 as it applies to legal practitioners is illegal. In law, this decision of the court is binding and valid until set aside by a court of higher or superior jurisdiction.¹⁸

On the other hand, a lawyer is duty bound to disclose confidences or secrets of his clients if a Court of law orders him to so do. He does not choose whether or not to obey or comply with the court's orders even if it appears to the lawyer that the order was made without jurisdiction. This is because; an order of the court once given must be complied with even if given without jurisdiction. In support of this argument, the Court while commenting on the need to obey or comply with the orders of the court, has these to say in the case of *Kolawole v Attorney General of Oyo State*¹⁹ citing with approval the decision of the apex Court per Achike J.S.C (as he then was) in *Oba Amos Babatunde & Ors v Mr Simon Olatunji & Anor* (2000) 2 NWLR (PT 646) 557 at 572 that:

Matters pertaining to judicial orders or judgments, for that matter, are not generally treated with arrogance or levity. Speaking for myself, it is rather officious and treading on a perilous path for one to arrogate to oneself the right to choose and pick between court orders in terms of whether they are valid or null and void. In fact, since there is a strong presumption in favour of the validity of court's order, it behooves everyone to keep faith with the order of the court. It makes no difference the ex facie it appears that the court made that order is without jurisdiction because at the end of the day, an order of the court subsists and must be obeyed until set aside by a court of competent jurisdiction. To therefore, disobey an order of the court on the

¹⁸ M. Otoide, "Are Legal Practitioners Obligated to Comply with the Money Laundering (Prohibition) 2011?"

¹⁹ (2006) 3 NWLR Pt 966 50

fancied belief that the said order is null for any reason whatsoever-even if subsequently turns out that the order in fact is proved to be null is risky and unadvisable decision because, until the said order is finally determined to be null and void by a court, the order subsists in the string attaching to it unmitigated. Therefore, sheer commonsense as well as prudence demands that every order of the court should be accorded with due respect and no attempt made to flout the order on the flimsy reason that it is null and void.

The above dictum gives credence to the fact that, orders of the court are sacred and must be obeyed by all persons including the legal practitioners who are ministers in the temple of justice. Thus, where a court has ordered that certain information within the knowledge of a lawyer be disclosed, there is a mandatory obligation on such lawyer to disclose same without hesitation even if it will amount to disclosing confidential information about his client(s).

- Where a client discloses an intention to commit a crime to his lawyer, the lawyer is duty bound to report such information to a relevant agency in order to prevent the commission of crime.²⁰ This becomes necessary because, there is a duty imposed on any person to report the commission or an intention to commit a crime to the appropriate agency especially the police saddled primarily to prevent the commission of a crime. In addition to the provision of the Rules, the *Evidence Act* also provides that any communication made in furtherance of an illegal purpose or any fact observed by the legal practitioner in the course of his employment as such, showing that any

²⁰ Rule 19 (3)(c) RPC 2007

crime or fraud has been committed since the commencement of his employment.²¹

- Confidences or secrets necessary to establish or collect the professional fee of a lawyer are not privileged²². This is because, client-attorneys relationship is purely contractual and as such, the lawyer is entitled to be paid adequate remuneration for his services to the client. The fee serves as the consideration for professional services rendered to the client. Therefore, where an issue arises as to whether or not a lawyer is entitled to be remunerated, he can disclose whatever information about his client for the purpose of establishing his professional fee for the services rendered.²³

Also, where it is to defend the lawyer, his employee or associates against an accusation of wrongful conduct, any communication or information with the lawyer are not privileged²⁴, otherwise, the lawyer may have to face the consequences of wrongful professional misconduct; such as suspension, striking off the name from the roll, warning or caution.²⁵

In the final analysis, the Rules imposes an obligation on a lawyer to exercise reasonable care to prevent his employees, associates and others whose services are utilized by him from disclosing or using confidences or secrets of a client, but a lawyer may reveal the information allowed by sub-rule 3 through an employee.²⁶ It can be gleaned here also that the lawyer will be vicariously liable for such unjustifiable disclosure by his employees or associates under his

²¹ Section 192(1)(a-b)

²² Rule 19 (3)(d) RPC 2007

²³ The Legal Practitioners Act under Sections 16-18 has made copious provisions for the procedures of recovering professional fees from a client by a legal practitioner.

²⁴ Rule 19 (3)(d) RPC 2007

²⁵ Section 12 of *Legal Practitioners Act* (as amended 2014)

²⁶ Rule 19(4) RPC 2007

employment; thus, it is not a defence that the disclosure was not by the act of the lawyer.

Consequently, where a lawyer discloses any communication or information between him and his client, without an express consent of his client or any provision of law, he shall be liable for professional misconduct. In support of this position, *Rule 55 RPC* provides to the effect that; if a lawyer acts in contravention of any of the rules in these Rules or fails to perform any of the duties imposed by the Rules, he shall be guilty of a professional misconduct and liable to punishment as provided in *Legal Practitioners Act, 1975*.²⁷

4.0 CONCLUSION

The paper has been able to examine the provisions of the Rules of Professional Conduct 2007, *Legal Practitioners Act*, and *Evidence Act* among others by looking at the concept and scope of professional confidentiality in lawyer-client relationship in Nigeria. It is observed that; the right and duty of a lawyer not to disclose the information received from and advice given to clients is not absolute but an indispensable feature of the rule of law and an element essential to public trust and confidence in the administration of justice and the independence of the legal profession as a noble profession.

Also, the decision of the court in NBA's case has made a landmark departure from what the law used to be under the Money Laundering (Prohibition) Act 2011 (as amended) by excluding lawyers from the list of persons under obligation to disclose financial dealings of clients to the EFCC. The implication of this decision is that; lawyers are no longer legally bound to report to EFCC and it excludes lawyers from being subjected to the control of non-professionals. However, it is submitted that, that does not exclude the obligation to disclose such information

²⁷ Rule 55 RPC 2007 and Section 12 of the *Legal Practitioners Act* (as amended 2014)

of client if such it is furtherance of committing fraud or any other crimes as clearly stipulated under other law.