

## THE LEGAL PRACTITIONERS ACT: A CODE FOR REGULATING THE CONDUCT OF LAWYERS IN NIGERIA \*

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### Abstract

The legal practitioner is an expert whose services and expertise are required by members of the public. He is expected to maintain the highest standards of professional conduct, etiquette and discipline in the discharge of his duties. In addressing himself as a legal practitioner he represents to those who depend on his professional advice and other services that he has the requisite acumen and expertise. For this reason, under the general common law and the rule in *Hedley Byrne & Co Ltd v. Heller & Partners Ltd*, the lawyer can be held liable for professional negligence. This paper will address “the Relationship between a Lawyer and the Client” in the Context of the Legal Practitioners Act and Case Law as negligence in handling of a client’s affairs may be of such a nature as to amount to professional misconduct and if sued by the client will warrant prosecution and punishment of the Legal Practitioner. This is because 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 his client. He shall consult with his client in all questions of doubt; and keep the client informed of the progress and any important development in the matter as may be reasonably necessary and warn his client against any particular risk which is likely to occur in the course of the matter.

**Keywords:** *Nigeria, lawyer, professional ethic*

### Introduction: Meaning of Professional Ethics?

*In different parts of the world, dozens of ethics centres and programmes are established and devoted to the study of business ethics, legal ethics, bioethics, medical ethics, engineering ethics, and computer ethics. These centres are designed to examine the implications of moral principles and practices in all spheres of human activity on our lives. Ethics can be viewed from two angles, normative and prescriptive.*

First, ethics refers to well-based standards of right and wrong that prescribe what humans ought to do, usually in terms of rights, obligations, benefits to society, fairness, and specific virtues. Ethics, for example, refers to those standards that impose the reasonable obligations to refrain from rape, stealing, murder, assault, slander, and fraud. Ethical standards also include those that enjoin virtues of honesty, compassion, and loyalty while ethical standards include standards relating to rights, such as the right to life, the right to freedom from injury, the right to choose, the right to privacy, and right to freedom of speech

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and expression. Such standards are adequate standards of ethics because they are supported by consistent and well-founded reasons. Secondly, ethics refers to the study and development of personal ethical standards, as well as community ethics, in terms of behaviour, feelings, laws, and social habits and norms which can deviate from more universal ethical standards. So it is necessary to constantly examine one's standards to ensure that they are reasonable and well-founded. Ethics also means, then, the continuous effort of studying of our own moral beliefs and conduct, and striving to ensure that we, and our community and the institutions we help to shape, live up to standards that are reasonable and solidly-based for the progress of human beings. <sup>1</sup>“Ethics are moral standards that help guide behaviour, actions, and choices. Ethics are grounded in the notion of responsibility (as free moral agents, individuals, organizations, and societies are responsible for the actions that they take) and accountability (individuals, organizations, and society should be held accountable to others for the consequences of their actions). In most societies, a system of laws codifies the most significant ethical standards and provides a mechanism for holding people, organizations, and even governments accountable.”<sup>2</sup> The word ethics means rules of conduct pertaining to a particular class of human action. Therefore ethics of the legal profession refers to the actions of members of the Bar in the discharge of their duties and obligations and in the exercise of their rights and privileges. In Nigeria an allied thing to professional ethics and is professional etiquette which includes: decency, elegance and dignity that are to be observed by members of the profession. There should be no petty rivalry among lawyers and they shall always be bound by a bond of great sense of brotherhood and friendliness.<sup>3</sup>

### **1.1 Ethics of the Legal Profession in Nigeria**

The legal profession is a noble profession and practitioners by their calling are regarded as ministers in the temple of justice saddled with the responsibility of assisting the courts and the state in the administration of justice. The profession is thus regulated all over the world by certain ethical codes of behaviour or ethics commonly referred to as the rules of Professional Conduct for Legal Practitioners. These rules were drawn with the intention of instilling in members a high sense of discipline, honesty and responsibility so as to maintain the honour, integrity and reputation of the profession. In Nigeria, an indebt and comprehensive ethical rules of professional conduct in the legal profession were first drafted and adopted by the General Council of the Bar in 1980. The rules were made by the General Council of the bar in 1967 and amended in 1979 and published in the Federal Government Official Gazette dated 18 January, 1980 on the 7<sup>th</sup> of February, 2007 the existing rules were reviewed and a new set of rules was made for the profession.<sup>4</sup>

The legal profession in Nigeria stands out as the oldest of the professions being practiced by the practitioners of these disciplines having existed in the country since 1876. The Supreme Court ordinance of 1876 was the first piece of legislation that gave birth to the

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<sup>1</sup> Tengku Mohd T. Sembok, *Ethics of Information Communication Technology (ICT)*, paper presented at the “Regional Meeting on Ethics of Science and Technology”, 5-7 November 2003, Bangkok, pp. 243-244.

<sup>2</sup>*Ibidem*. See also, K. C. Laudon, C.G. Traver, and J.P Laudon, *Information Technology and Society*, 1996, p. 513.

<sup>3</sup>K. Gururaja Chari, *Advocacy and Professional Ethics: In Retrospect and Prospect*, Wadhwa and Co., Allahbad, 2005, p. 476.

<sup>4</sup> A.J. Beredugo., *Nigerian Legal system*, 3<sup>rd</sup> edn, Malthouse Limited, Surulere, 2009, p. 215-216.

In Nigeria, the extant Rules of Professional Ethics are encapsulated in the Rules of Professional Conduct for Legal Practitioners, dated 7th day of February, 2007. The Ethics as contained in the Rules of Professional Conduct are geared towards maintaining the highest standards of professional conduct, etiquette and discipline. See also C.A. Agbebaku & Livewell Osahon Omoregie, “Teaching Ethics and Values in the Legal Profession: The Nigerian Perspective”, available online at <http://www.ialsnet.org/meetings/teaching/papers/Agbebaku.pdf>, accessed on 30 May, 2012. See also the preamble to the first Rules of Professional Ethics codified by the then General Council of the Bar at its General Meeting in Lagos on the 25th December, 1967 and subsequently amended by the meeting of the Council held in Lagos on the 15th January, 1979.

profession in Nigeria. The ordinance provided for two types of people that could practice law in Nigeria at that time being the professionally qualified and local attorneys.<sup>5</sup>

The professionally qualified consist of persons who went through the basic legal education programme, passed the relevant examinations and got admitted into the English Bar to practice either as Barristers or Solicitors. Such professionally trained and qualified lawyers who wish to practice in Nigeria were automatically enrolled in the Supreme Court of Nigeria as legal practitioners. The Local attorneys were laymen because there were people who had no formal training or education in law, but were licence by the chief Justice of Nigeria to practice Law in the Country based on acquired experience in law and practice. This appointment then was necessitated by the obvious shortage of professionally qualified lawyers in the country at that time and their service was needed in the administration of justice but such appointed was discontinued in 1914 and since then, legal practice has been restricted only to professionally trained and qualified lawyers.<sup>6</sup> From here the author will look into the meaning of Legal Practitioner from the Nigeria Perspective.

### **1.2 Meaning of a Legal Practitioner under the Nigerian Legal Practitioner's Act**

The legal profession in Nigeria is rightly identified with British Colonial rule and introduction of the British system of courts in 1862 though unlike in England where the profession is separated, in Nigeria it is fused.<sup>7</sup> The Legal Practitioner's Act defines a Legal Practitioner as a person entitled in accordance with the provisions of this Act to practice as a barrister and solicitor either generally or for the purpose of any particular office or proceeding.<sup>8</sup> Therefore a legal practitioner in Nigeria is a person qualified to practice as a barrister and solicitor.<sup>9</sup> A Barrister is a legal practitioner whose duty is to represent a person in a court of Law and advocate on-behalf of such person, usually called a client. He is the professional advocate with right of audience in every court. As a consultant and advocate, the professional duties of a barrister include: the drafting of legal opinions on issues of facts and law, the settling of pleadings, and conducting cases in court to a logical conclusion in accordance with the rules of procedure and evidence while solicitors are legal practitioners who are consulted on issues, such as, the making of wills, administration of estates, formation of companies, drawing up of leases and conveyances, registration of land instruments, writing of contractual agreement and similar issues. In England, the solicitor has no business with advocacy in the court, except in the lower courts, the solicitor is consulted first to take instruction from the client and prepare the pleadings. He could then approach a barrister to represent the client in court at the trial proper.<sup>10</sup>

### **1.3 Categories of Legal Practitioners in Nigeria**

There are three main types of Legal Practitioners in Nigeria viz:

(a). **Lawyers Entitled to Practice Law Generally:** By virtue of section 2 of the Legal Practitioners act, a person is entitled to practice law generally as a barrister and solicitor if, and only, he has been called to the Nigerian Bar<sup>11</sup> and his name enrolled in the Supreme Court.<sup>12</sup> They are private practitioners who practice either as barristers or solicitors or both.

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<sup>5</sup>A. J. Beredugo, *op cit.*, p. 203.

<sup>66</sup> *Ibidem*

<sup>7</sup>J. O. Asein, *Introduction to Nigerian Legal System*, 2<sup>nd</sup> ed., Ababa Press Ltd, Surulere, 2005.

<sup>8</sup>Section 24 of the Legal Practitioners Act, 16 May, 1975 as amended by the Legal Practitioners (Amendment) Act (formally Decree) No. 21 of 1994) (Cap L.11 Laws of the Federation of Nigeria 2004).

<sup>9</sup>A.J. Beredugo., *op cit.*, p. 204.

<sup>10</sup> *Ibidem*

<sup>11</sup>Section 4(1) of the Legal Practitioners Act provides that subject to the provisions of this section, a person shall be entitled to be called to the Bar if, and if- (a) he is a citizen of Nigeria; and (b) he produces a qualifying certificate to the Benchers; and (c) he satisfied the [body] of Benchers that he is of good character. Note that citizenship is no longer essential by virtue of Legal Education (Consolidation Act etc) (Amendment) Decree No. 8 and of 1992 and LPA (Amendment) Decree No.9 of 1992.

<sup>12</sup> Section 2(1) of the Legal Practitioners Act, 16 May, 1975.

The term general practitioners' also include in-house solicitors working in private or public institutions and agencies.<sup>13</sup>

(b). **Lawyers Entitled to Practice by Virtue of their office:** These are lawyers either in full time employment of the state or federal civil service or occupying and exercising the functions of designated legal office in the civil or public service. The Legal Practitioner Act provides that any person occupying and functioning as Attorney General, Solicitor General, Director of Public Prosecution either of the State or of the Federation are entitled to practice as Barristers and solicitors by virtue of their office.

(c). **Lawyers Entitled to Practice in Particular Proceedings:** These are lawyers from countries but whose legal system is similar to that of Nigeria. Such foreign lawyers can apply for and be warranted by the Chief Justice of Nigeria to practice as barristers and solicitors for the purpose of a particular proceeding.<sup>14</sup>

#### **1.4 Discipline in the Legal Profession in Nigeria**

In all countries of the world, the legal profession pays a high premium to the maintenance of discipline among its members. Consequently, provisions are made in the Legal Practitioners Act to discipline Lawyers whose conduct falls below the ethical standards of behaviour expected of a legal practitioner. There are four professional offences provided for by Section 12 of the Legal Practitioners Act for which a legal Practitioner can be punished by the Legal Practitioner Disciplinary Committee: (i) infamous conduct in any professional respect; or (ii) being convicted of any crime which is incompatible with the status of a legal practitioner by any court of competent jurisdiction in Nigeria; or (iii) obtaining enrolment by fraud; or (iv) for any act that is generally regarded as incompatible with the status of a legal practitioner.<sup>15</sup>

A legal practitioner who commits acts considered to be infamous conduct in a professional respect is liable to be tried by the Legal Practitioners Disciplinary Committee. The type of conduct that qualified as infamous conduct was not stated in the Legal Practitioners Act but in the case of *Allison v. General Council Medical Education and Registration*<sup>16</sup> infamous conduct in relation to professionals was described as conduct "regarded as disgraceful or dishonourable by his professional brethren of good repute and competence". In *M.D.P.T. v. Okonkwo*<sup>17</sup> the court held that a charge of infamous conduct must be of a serious infraction of acceptable standard of behaviour, or ethics of the profession, a conduct that is so disreputable and morally reprehensible as to bring the profession into disrepute if condoned or left unpunished.<sup>18</sup>

A legal practitioner who has been convicted of any criminal offence by a competent court in Nigeria can also be tried by the Legal Practitioner Disciplinary Committee and disciplined under the Legal Practitioners Act. Under this provision therefore the offence need not be committed in professional respect. However, the conviction must have been by a court in Nigeria and there must not be an appeal against the conviction pending in any appeal court.<sup>19</sup>

A person who obtains enrolment by fraud under section 12(1)(c) of the Legal Practitioners Act is liable to be tried by the Legal Practitioners Disciplinary Committee and discipline under the Legal Practitioners Act. The enrolment must be by misrepresentation of facts and if the true facts have been known he would not have been enrolled and this provision may be invoked. This act of misrepresentation covers any condition that must be fulfilled to be called to the Bar since this is a precondition for enrolment under section 4(1) and 6(1) of

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<sup>13</sup>A. J. Beredugo., *op cit.*, p. 204.

<sup>14</sup>*Ibidem*, p. 207.

<sup>15</sup>See Section 11 of the Legal Practitioners Act of 16 May, 1975.

<sup>16</sup>(1894) 1 Q.B 750.

<sup>17</sup>(2001) 7 NWLR (Pt. 711) 206.

<sup>18</sup> See also The Nigerian Law School, *Course Handbook on Professional Ethics and Allied Matters*, Bar Part II Course 2003/2004, Council of Legal Education, Abuja, 2003, p. 53.

<sup>19</sup>A. J. Beredugo., *op cit.*, p. 212.

the LPA. This provision also covers cases where a person obtained admission to the Nigerian Law School by fraudulent misrepresentation of academic status e.g by producing forged law degree certificate or representing that he/she passed a law degree when he did not.

Finally, by virtue of section 12(2) of the Legal Practitioners Act, all residual cases where conduct complained of could bring the legal profession into dishonour or disrepute such as seduction of a client's wife, habitual drunkenness in public and taking part in street brawl would appear likely to bring the profession into dishonour or disrepute.<sup>20</sup> These are behaviours or acts generally regarded as incompatible with the status of a legal practitioner.

### **1.5 The Legal Practitioners Disciplinary Committee**

Section 10 of the Legal Practitioners Act establishes the Legal Practitioners Disciplinary Committee charged with the duty of considering and determining cases where it is alleged that a person whose name is on the roll has misbehaved in his capacity as such or should for any other reason be the subject of proceedings under the Act.<sup>21</sup> The Committee consist of the Attorney General of the Federation of Nigeria as the Chairman, the attorney Generals of the thirty six states in Nigeria and twelve legal practitioners of not less than ten years standing appointed by the Benchers on the nomination of the Nigerian Bar Association.<sup>22</sup>

### **1.6 Supreme Court of Nigeria and the Regulation of the Conduct of Lawyers**

The Supreme Court of Nigeria is also vested with some disciplinary powers over the conduct of Lawyers on its roll. Section 13 of the Legal Practitioners Act provides that were it appears to it that a person whose name is on the roll has been guilty of infamous conduct in any respect with regards to any matter of which the court or any professional other court of record in Nigeria is or has been seized, it may if it thinks fit, after hearing any such other persons as the court considers appropriate, direct appropriate disciplinary measures as contained in section 11 of the Act, and cause the notice of the direction to be published in a federal gazette.<sup>23</sup> In similar circumstance, the Chief Justice of Nigeria under section 13(2) of the Legal Practitioners Act, where it appears to him that a certain legal practitioner should be suspended from practice, either with a view to the institution of disciplinary proceedings are pending, may in his discretion, after affording the practitioner in question an opportunity of making representation in the matter give each direction as suspending that person from practice for such a period as may be stated in the direction.<sup>24</sup> By implication, the Chief Justice of Nigeria may suspend a legal practitioner with a view to instituting, or during the pendency of, disciplinary proceedings against such legal practitioner.<sup>25</sup>

### **1.7 Penalties in View of Professional Misconduct of a Nigerian Lawyer**

Section 11 of the Legal Practitioners Act provides that where a Legal Practitioner is adjudged guilty by the disciplinary committee for infamous conduct in professional or any other respect or; convicted by any court in Nigeria for an act that is incompatible with the status of a legal practitioner; or obtained enrolment by fraudulent means, the Disciplinary Committee may if it thinks fit, give a direction: (a) ordering the Registrar of the Supreme Court to strike off the name of the person from the roll of Practitioners in Nigeria; (b) suspend that person from practice as a legal practitioner for such period as may be specified in the direction; or (c) admonish that person.<sup>26</sup> Though where a legal practitioner is adjudged guilty of misconduct not amounting to infamous conduct but qualifies as a conduct that is

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<sup>20</sup>Nigerian Law School, *Course Handbook on Professional Ethics and Allied Matters*, Bar Part II Course 2003/2004, Council of Legal Education, Abuja, 2003, p. 55.

<sup>21</sup>J. O. Asein, *Introduction to Nigerian Legal System*, 2<sup>nd</sup> edn., Ababa Press Ltd, Surulere, 2005, p. 207.

<sup>22</sup>*Ibidem*

<sup>23</sup>A.J Beredugo., *op cit.*, p. 213.

<sup>24</sup>See Section 13(2) of the Legal Practitioners Act of 16 May, 1975.

<sup>25</sup>J.O Asein, *op cit.*, pp. 276-277.

<sup>26</sup>Admonish mean to reprove gently but earnestly, to counsel (another) against something to be avoided; caution and to remind of something forgotten or disregarded, as an obligation or a responsibility.

incompatible with the status of a legal practitioner, the disciplinary Committee can either suspend or admonish the person. It cannot order his name to be struck off.<sup>27</sup>

### **1.8 Professional Etiquette and Negligence of a Legal Practitioner to the Client**

Professional etiquette is an act of professional good manners which is by tradition and convention observed in the profession. A breach of professional etiquette generally does not attract the same sanction as a breach of the rules of professional conduct.<sup>28</sup>

The Rules of Professional Conduct (RPC) in Legal Profession is the body of rules which guides the attitude of lawyers or the manner in which they conduct their professional legal services. In Nigeria the rules were first made in 1967 while minor amendments were done in 1980 and 1982 but were still filled with many lacunas. In 2005, the Attorney General of Nigeria came up with a revised draft Rules of Professional Conduct which was formally approved by the General Council of the Nigerian Bar<sup>29</sup> in the meeting of the Council held on 20 November, 2006 and published as the Rules of Professional Conduct for Legal Practitioners as Statutory Instrument (S.I) No.6 in the Federal Republic of Nigeria Official Gazette No. 11 Volume 94 of 24 January, 2007 with the commencement date of 2<sup>nd</sup> January, 2007.<sup>30</sup> Rule 55 of the Rules of Professional Conduct provides that if a lawyer acts in contravention of any of the rules or fails to perform any of the duties imposed by the rules, he is guilty of professional misconduct and liable to punishment as prescribed under the section 12(1) of the Legal Practitioners Act.<sup>31</sup> The issue now is that does professional misconduct amount to negligence of a legal practitioner to his client?

Negligence is the failure to exercise the standard of care that a reasonable prudent person would have exercised in similar situation; any conduct that falls below the legal standards established to protect others against unreasonable risk of harm except for conduct that is intentionally, wantonly or wilfully disregarding of others rights. The term denotes culpable carelessness which means negligence that is though not intentional, involves disregard of the consequences likely to result from one's actions.<sup>32</sup> The law imposes on all persons the duty to exercise care, skill and foresight of a reasonable man... the conduct which a reasonable man would avoid on the ground that it involves undue risk of harm to another.<sup>33</sup> The liability is no different from any other under the fault principle. However, in substance, there are two special characteristics. First, where a professional skill is concerned, the test for a breach of duty is not governed by the reasonable man test as such; but it is governed by the standard of the reasonable person exercising that professional skill.<sup>34</sup> The test is the standard of the ordinary skilled man exercising and professing to have that professional skill. An accountant, architect, lawyer or doctor need not possess the highest expert skill; all he or she needs to exercise is the ordinary skill of an ordinary competent man exercising that particular act.<sup>35</sup> In Nigeria, to think that a Legal Practitioner who is incompetent is immune from being sued over the way and manner he or she conducted a case in court or negligently handled a professional duty entrusted onto him or her is a fallacy because the functioning of the tort of negligence and the legal profession has been codified in the Legal Practitioners Act. This is in

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<sup>27</sup> Section 11(2) of the Legal Practitioners Act of 16 May, 1975.

<sup>28</sup> J.O. Orojo, *Professional Conduct of Legal Practitioners in Nigeria*, Mafix Books Limited, Yaba, 2008, p.127.

<sup>29</sup> *Ibidem*, Section 12(4) of the Legal Practitioners Act as amended now provides that, "it shall be the duty of the Bar Council to make rules from time to time on professional conduct and such rules to be published in the gazette and distributed to all the branches of the Nigerian Bar Association".

<sup>30</sup> *Ibidem*, p. 129. See Federal Republic of Nigeria Official Gazette No. 11, Volume 94 of 24/1/2007 at B.57.

<sup>31</sup> Rule 55, Rules of Professional Conduct for Legal Practitioners as Statutory Instrument (S.I) No.6 in the Federal Republic of Nigeria Official Gazette No. 11 Volume 94 of 24 January, 2007.

<sup>32</sup> Bryan A. Garner (ed), *Black's Law Dictionary*, West Publishing CO., 7<sup>th</sup> edn 2000, p. 846.

<sup>33</sup> K. Gururaja Chari, *Advocacy and Professional Ethics: In Retrospect and Prospect*, Wadhwa and Co., Allahbad, 2005, p. 482.

<sup>34</sup> *Bolam v. Friern Hospital Management Committee* (1957) 1 WLR 582, See also *Phelps v. Hillingdon LBC* (2000) 3 WLR, 776, p. 809.

<sup>35</sup> Geoffrey Samuel, *Law of Obligations and Legal Remedies*, 2<sup>nd</sup> edn., Cavendish Publishing Limited, London, 2001, p. 483.

a bid to regulate the conduct of lawyers in Nigeria and to see that they hold firmly to the tenants of the profession.

### **1.9 Lawyers Duty of Skill and Care to the Client**

Every Legal Practitioner is under professional obligation and duty to willingly accept briefs from clients without discrimination provided proper fees are offered and the case is within his area of practice and expertise and he is not otherwise engaged. Once a brief is accepted, a counsel is under an obligation to diligently and faithfully, pursues the matter to its logical conclusion. In this wise, counsel owes entire devotion in learning and ability to the interest of his client. Furthermore counsel is also required to give honest and sincere advice to his client and exhibit professional competence in handling of client's matters, otherwise he may be held liable for negligence.<sup>36</sup> Since the decision in decision in *Hedley Bryan v. Heller & Partners*,<sup>37</sup> there is a temptation to treat all cases of professional liability as falling into the category of tort. For, it is often the case that the act complained of is misleading or incompetent professional advice and, thus, the problem appears at first sight to be one of professional misstatement. Such an analysis is not wrong because the relationship between the professional lawyer and his client is governed by a contract. Thus any breach of the duty will be a breach of an implied term of the contract and this implied term<sup>38</sup> has its source in Section 9(1) of the Legal Practitioners Act of 1975 which provides that subject to the cases referred to in that section, "a person shall not be immune from liability for damages attributable to his negligence while acting in his capacity as a legal practitioner, and any provision purporting to exclude or limit liability in any contract shall be void ". To avoid liability, therefore, he must perform his duties with due care and diligence. Since the lawyer holds himself out as a person having special skill, he should also, execute such skill honestly, carefully, and with maximum devotion. He is bound to discharge his duties with a care and diligence equal to that of required of solicitors of competent skill and care.<sup>39</sup>

In Rule 14 of the Rules of Professional Conduct dealing with "Representing a client competently", it was provided that: "A lawyer shall not: (a) handle a legal matter which he knows or ought to know that he is not competent to handle, without associating with him a lawyer who is competent to handle it, unless the client objects; (b) handle a legal matter without adequate preparation; (c) neglect a legal matter entrusted to him; or (d) attempt to exonerate himself from or limit his ability to his client for his personal malpractice or professional misconduct".<sup>40</sup> While the old rule under section 14(c) provides that: "the lawyer owes entire devotion to the interest of his client, warm zeal in the maintenance and defence of the client's rights and the exertion of his utmost learning and ability to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavour or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of every remedy and defence that is authorized by the law of the land, and he is also entitled to expect his lawyer to assert every such remedy or defence. It must however be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of a lawyer does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicanery. He must obey his own conscience and not that of his client".<sup>41</sup>

### **1.10 Duty of Care Required of a Legal Practitioner in Discharge of His Duties**

These duties have been classified as contractual, tortuous or even fiduciary in nature.

<sup>36</sup> A. J. Beredugo., *op cit.*, p. 216.

<sup>37</sup> (1964) A.C 465.

<sup>38</sup> Geoffrey Samuel, *op. cit.*, p. 482.

<sup>39</sup> J.O. Orojo., *op. cit.*, p. 175.

<sup>40</sup> Rule 14, Rules of Professional Conduct for Legal Practitioners as Statutory Instrument (S.I) No.6 in the Federal Republic of Nigeria Official Gazette No. 11 Volume 94 of 24 January, 2007.

<sup>41</sup> Rule 14(c) Rules of Professional Conduct for Legal Profession, Legal Practitioners Act Cap. 207 Law of the Federation of Nigeria 1990.

### 1.10.1 Examining the Contractual Duty of a Lawyer

Rule 18 of the Rules of Professional Conduct for Legal Practitioners deals with the contractual relationship of the lawyer and his client<sup>42</sup>. It provides that: (1) A Client shall be free to choose his lawyer and to dispense with his services as deems fit; provided that nothing in this rule shall absolve the client from fulfilling any agreed or implied obligation to the lawyer including the payment of fees. (2) the lawyer shall ensure that important agreements between him and the client are, as far as possible, reduced into writing, but it is dishonourable and a misconduct for the lawyer to avoid performance of a contract fairly made with his client whether reduced into writing or not. The essence of this relationship is the retainer of the client. The clients instructs or briefs his lawyer about his case and ones the lawyer accepts the brief and the clients pay the initial fee as charged by the lawyer, the contractual relationship commences and the lawyer is expected to discharge a professional service to the client using the best of his talent. The retainership may be written or oral or may be inferred from the conduct of the parties. It is in the interest of the parties that, at least, the nature of the retainer should be recorded, e.g., in the attendance note which every legal practitioner ought to keep, e.g., in the attendance note which every legal practitioner ought to keep. When a retainer is given it creates a contractual relationship which includes the duty on the part of the legal practitioner to protect the interests of the client and to carry out, by all proper means, the client's instructions in respect of the matter or service in question.<sup>43</sup>

### 1.10.2 Liability for Negligence

The legal practitioner may be liable on the tort of negligence based on the principle the case of *Donoghue v. Stephenson*<sup>44</sup> and *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*<sup>45</sup> This is because the client will obviously be in the contemplation of the lawyer requiring him to exercise reasonable skill and care so as not to injure the client.<sup>46</sup> It should be noted that the relationship between the lawyer and his client is one of confidence. By this fiduciary relationship owed to the client means that lawyer must make full disclosure of any interest in any matter on which he has been brief and he must not make a secret profit from the instruction of his client.<sup>47</sup> It is not always the duty of a counsel to win his client's case beyond a fair analysis of evidence touching on those matters. Counsel must however, be devoted to his client cause and should do all that is within his learning and ability to ensure that his client is not denied the benefit of any remedy or defence that may be permitted under the law. He should object promptly to any irregularity in the proceedings. He is expected to restrain his client from all forms of improprieties and should withdraw if his client so persists.<sup>48</sup> A legal practitioner may only withdraw from his client service as a counsel for good cause without jeopardising his client's case. He may so withdraw to safeguard his honour or self respect and were his client insists on an unjust or immoral course or persists over his counsel's remonstrance in presenting frivolous defences or deliberately refused to pay his fees or expenses etc.<sup>49</sup>

A legal practitioner like any other individual is liable for any wrong committed in his private capacity. He may therefore be sued in tort, contract or be prosecuted for criminal

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<sup>42</sup>Rule 18 of the Rules of Professional Conduct for Legal Practitioners as Statutory Instrument (S.I) No.6 in the Federal Republic of Nigeria Official Gazette No. 11 Volume 94 of 24 January, 2007.

<sup>43</sup>J.O. Orojo., *op. cit.*, p. 177.

<sup>44</sup>(1932) A.C. 562.

<sup>45</sup>(1963) 3 All E.R 575.

<sup>46</sup>J.O. Orojo, *op. cit.*, Note that the Fault Principle finds the party that is to blame before compensating the victim in personal injury cases. This then implies that if fault cannot be attributed, there can be no attribution of liability, so for example a victim of an accident may not receive compensation.

<sup>47</sup>*Ibidem*, p. 178. See also J.O. Asein, *op cit.*, pp. 284-285.

<sup>48</sup>See Rules 14 and 15 of the Rules of Professional Conduct for Legal Practitioners as Statutory Instrument (S.I) No.6 in the Federal Republic of Nigeria Official Gazette No. 11 Volume 94 of 24 January, 2007. See also J.O Asein, *op cit.*, p. 285.

<sup>49</sup> See J.O. Asein, *op cit.*, p. 286.



offences. His professional liability is limited to common law. The extent of his liability is contained in Section 9 of the Legal practitioners Act.<sup>50</sup> He owes himself a duty of care and diligence and may be held liable on appropriate cases for failure to discharge that duty.<sup>51</sup> Thus as a general rule, a legal practitioner is liable for any damage attributable to his negligence while acting in his professional capacity. A counsel who handles the case of his client carelessly or negligently and thereby creates a situation that causes an injury on the client paces himself at the risk of being sued for professional negligence. This is the decision in the case of *Ayua v. Agbaka*<sup>52</sup> and any such liability may not be limited or excluded by contract.<sup>53</sup>

### 1.10.3 The Duty of Skill and Care in Advising the Client and Avoidance of Delay

It is the rule that a legal practitioner who failed to advise his client against an action which has become statutes barred, he was considered negligent in the performance of his duty.<sup>54</sup> But where there was obviously no good cause or where the legal practitioner advised in favour of an action which was unreasonable and speculative.<sup>55</sup> Though, no one expects that the Legal Practitioner will not make an honest mistake. As Abbott C.J. pointed out in *Montrou v. Jeffresy*,<sup>56</sup> “No attorney is bound to know all the law. God forbid that it should be imagined that an attorney or a counsel or even a judge is bound to know all the law, or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious might fall into” it is sufficient if they have “espoused the interests of their clients in order to defend them as if they were the parties concerned”. Sometimes, the beach may be the giving of wrong advice. Whether the legal practitioners can be held to be in breach of his duty or not will depend on the nature of the subject matter on which the advice was given. If the point is a common one where the law is clear, he is more likely to be in breach of his duty.<sup>57</sup>

At times lawyers are found wanton when they delay in taking action on a clients brief and this undesirable habit militate against the principle of due diligence in the execution of his professional duties to his client. Where the delay is of a gross nature, it will constitute a professional offence. No doubt, if a legal practitioner by his unreasonable delay or neglect causes loss to the client, he may be liable in negligence to the client.<sup>58</sup>

### 1.11 What Amounts to a Reasonable Standard of Skill and Care in the Performance of a Legal Practitioner’s Duty

Though a lawyer is expected to exercise a reasonable skill of duty and care in the performance of his duty but this is not absolute. He is required to exercise the skill in duty and care that is reasonable in the circumstance. A lawyer cannot be expected to know all the law but he is expected to know where to find the law in respect of the matter which he undertakes to handle. The skill and care of the ordinary lawyer cannot be judged by the standards of exceptionally good lawyer. The test is what the reasonable competent practitioner would do

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<sup>50</sup>Section 9 of the Legal Practitioners Act, 16 May, 1975 as amended by the Legal Practitioners (Amendment) Act (formally Decree) No. 21 of 1994) (now Cap L.11 Laws of the Federation of Nigeria 2004).

<sup>51</sup>J.O. Asein, *loc. cit.*, p. 295.

<sup>52</sup>(1997) 7 NWLR 659

<sup>53</sup>J.O. Asein, *op cit.*, at 295. However a legal practitioner is not so liable where he renders his services gratuitously or the damage complained of is in the conduct of proceedings *ex facie curiae*. By implication a legal practitioner may be liable for negligence in respect of his conduct as a solicitor, the conduct of a case in court is left at his absolute discretion and he is not liable for any negligence in that capacity as a barrister. See the cases of *Usun v. Anwan* (1947) 18 N.L.R 144 and *Bello Raji v. X (A Legal Practitioner)* (1964) 18 N.L.R 74. *Rondel and Worsley* (1967) 1 Q.B 443 (1969) 1 A.C. 191.

<sup>54</sup> See *Bello Raji v. X (A Legal Practitioner)* (1964) 18 N.L.R 74.

<sup>55</sup> *Cocottopoulos v. P.Z. & Co. Ltd* (1965) LLR.

<sup>56</sup> 172 E.R. 51.

<sup>57</sup> *Otter v. Church Adams Tatham & Co.* (1953) Ch. 280. Though if the point on which the advice is given is a difficult or recondite one, the practitioner is not likely to be in breach of duty. See also J.O Orojo., *op. cit.*, p. 181.

<sup>58</sup> J.O. Orojo., *op. cit.* Such negligence may arise in a practitioner’s failure to process the papers in connection with a sale of property or with an investment or has to pay a higher price. Loss may also arise because, as a result of failure to file an action in good time, an action becomes statutes-barred.

having regard to the standard usually adopted in the profession.<sup>59</sup> On this issue, the Supreme Court in Nigeria observed in *Orizu v. Anyaegbunam*, held, as follows: “we think there is need to remind members of the legal profession who are obliged to prosecute or defend claims in court on behalf of their clients that *vis-a-vis* their clients, the advocate or counsel involved in such duties... undertake to bring to the exercise of it a reasonable degree of care and skill. He does not undertake... that, at all events, he shall gain the case, nor does he undertake to use the highest of skill... but advocate undertakes to bring a fair, reasonable and competent degree of skill....<sup>60</sup>

An advocate must in the discharge of his professional duty refrain from asserting his personal belief; he must however not compromise his conscience for a plate of pottage. Above all, a counsel also owe his client the professional duty to refrain from improprieties, where the client is however not bent or persists in these acts, the Legal Practitioner should terminate the relationship.<sup>61</sup> A counsel must preserve his client confidence, and must not expose or disclose to other persons facts disclosed to him by his client in confidence. In preserving his client’s confidence, a legal practitioner must refrain from formulating a defence to questionable transaction or putting up a false claim; this kind of conduct is unethical and could be responsible for the prejudice in some quarters against Legal Practitioner’s.<sup>62</sup>

### **1.12 Exceptions to Liability for Negligence in the Performance of a Legal Practitioner’s Duty**

Since a Legal Practitioner has a duty of care and diligence in the performance of his duty, it means that if he fails in the discharge of that duty, i.e., if he is negligent and the client suffers loss thereby, he will generally be liable to the client for the loss and this is subject to Section 8 of the Legal Practitioner Act 1975 which provides as follows: (1) Subject to the provisions of this section, a person shall not be immune from liability for damages attributable to his negligence while acting as a legal practitioner, and any provision purporting to exclude or limit the liability in any contract shall be void. (2) nothing in the forgoing section shall be construed as preventing the exclusion or limitation of the liability aforesaid in any case where a legal practitioner gives his services without reward either by way of fees, disbursements or otherwise. (3) Nothing in subsection 1 of this section shall affect the application to a legal practitioner of the rule of law exempting barrister from liability aforesaid insofar as that rule applies to the conduct of proceedings in the face of any court, tribunal or other body”<sup>63</sup>.

### **1.13 Exceptions to the Provision of Section 8(1) of the Legal Practitioner’s Act 1975**

Under section 8(1) of the Legal Practitioners Act, 1975, it is clear that the Legal practitioner is liable for negligence in the careless conduct of his professional assignment since he is bound to discharge his duties with a care and diligence equal to that required of solicitors of competent skill and care but there are exception to this rule under section 8 (1) of the LPA are where the service is give gratuitously and, secondly, where barristers are exempted from liability in the conduct of proceedings *ex facie curiae*.

**(a) Free Legal Services:** where a Legal Practitioner gives a gratuitous service, the contract of service, if any will be without consideration and will therefore not be enforceable. In the case of a lawyer he will therefore not be liable on the contract for the contractual duty of skill and care. However having undertaken to give the service, he will owe a duty of skill and care to the client independent of contract. This is the position of section 9(2) of the Legal

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<sup>59</sup>*Ibidem*, p.178. See the case of *Midland Bank v. Hott Stubbs & Kemp* (1979) Ch. 384 as per Oliver J. pp. 403-405

<sup>60</sup>*Ibidem*, p.179.

<sup>61</sup>Sonia Akinbiyi, *Ethics of Legal Profession in Nigeria*, Augustus Publication, Sango-Ota, 2003, p. 181.

<sup>62</sup> *Ibidem*. See Rules 14(a)-(c) of the Rules of Professional Conduct for Legal Practitioners as Statutory Instrument (S.I) No.6 in the Federal Republic of Nigeria Official Gazette No. 11 Volume 94 of 24 January, 2007.

<sup>63</sup> J.O. Orojo., *op. cit.*, pp.197-198.

Practitioners Act, 1975 which preserves the right of the Legal Practitioner to exclude or limit his liability in negligence. In this respect it is the position that the Legal Practitioner shall take no reward either by way of fees, disbursement or otherwise. Thus if the client refunds court fees to the Legal Practitioner, the service will not be without reward; but if the client pays the fees into the court or gives it to the legal practitioner to be paid to the court, the service will still be without reward.<sup>64</sup>

**(b) Immunity of Barristers Conducting Litigations in Court**

It is the provision of section 9(3) of the Legal practitioners Act, 1975 provides that the liability stated in sub-section (1) of the section shall not affect "...the application to a legal practitioner of the rule of law exempting barristers from the liability aforesaid in so far as that rule applies to the conduct of proceeding in the face of any court, tribunal or other body". The rule of law referred to in section 9(3) above was developed in the from the common law by the English Court in the Case of *Rondel v. Worsley*<sup>65</sup> which is the most reliable authority on this point. At the beginning of this Appeal in the House of Lords, the arguments according to *Lord Reid*, directed to the general question of Barristers' liability. It was contended that all other professional men, including solicitors, are liable to be sued for damages if loss is caused to their clients by their lack of professional skill or by their failure to exercise due care, so why should not barristers be under thesame liability? The old age rule is that if a barrister acts honestly in the discharge of his duties, he is not liable to an action by his client for negligence, or for want of skill, discretion or diligence in respect of any act done in the conduct of cause, or in the public interest that he should be liable.<sup>66</sup>

One of the emphatic supports given to the immunity of barristers or counsel in litigation was given by Lord Denning when he observed in thesame case of *Rondel v. Worsley* cited above, "that is in my judgement, a sure ground on which to rest he immunity of a barrister. At any rate, so far as concerns the conduct of a cause in court. It is so that he may do his duty fearlessly and independently as he ought, and to prevent him being harassed by vexatious action such as this present one before us. It is the ground on which the judge cannot be sued for an act done in his judicial capacity, however corrupt...and on which a witness cannot be sued for what he says in giving evidence, however perjured... and which an advocate cannot be sued for slander for what he says in court however malicious."<sup>67</sup> "It is a fearsome thing for a barrister to have an action brought against him, to have his reputation besmirched by a charge of negligence. To have the case tried all over again, but this time with himself, the counsel, as the defendant. To be put to all the anxiety and, I would add, all the costs of defending himself, even though in the end he should win". "Faced with this prospect, a barrister would do all he could to avoid rather than risk it; he would forever be looking over his shoulders to forestall it. He would be tempted to ask every question suggested by the client, however irrelevant, to call every point, however bad, to prolong the trial inordinately, and in case the client should be aggrieved and turn round him and sue him for negligence". "If a barrister is to be able to do his duty in court fearlessly and independently, he must not be subjected to the threat of action for negligence."<sup>68</sup>

Though the immunity given to the Legal Practitioner in section 8(3) of the Legal Practitioners Act of 1975 only protects him against an action in court. If his negligence even in conducting proceedings in the face of the court amounts to unprofessional conduct, the legal practitioner may be dealt with accordingly by the Legal Practitioners Disciplinary Committee or the Supreme Court as the case may be.<sup>69</sup>

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<sup>64</sup> *Ibidem*

<sup>65</sup> (1967) 3 All E.R 993.

<sup>66</sup> J.O. Orojo., *op. cit.*, p. 199.

<sup>67</sup> *Ibidem*, p.201.

<sup>68</sup> *Ibidem*

<sup>69</sup> *Ibidem*, p. 204.

### 1.14 Damages as a Consequence for Breach of Legal Duty by a Practitioner

An action may be brought for damages against a legal practitioner by a client who suffers loss as a result of his negligence. This is the usual remedy but the alternative is for the Legal Practitioner to pay for the cost of the action in an appropriate case.

### Conclusion

This paper has shown that a Legal Practitioner in Nigeria can be charged for negligence in the conduct of his duties where he failed to exercise due diligence in the performance of clients duty for which professional fees have been advanced and the client suffers a loss as a result of his negligence. The statutory authority to that effect is section 9(1) of the Legal Practitioners Act, 1975 which provides; “that a person shall not be immune from liability for damage attributable to his negligence while acting in his capacity as a legal practitioner, and any provision purporting to exclude liability to any contract shall be void”. Though in the course of this academic inquiry, it was also noted that legal Practitioners in Nigeria are also protected by some level of professional immunity from being sued by his client for negligence and this is provided under section 8(3) of the Legal Practitioners Act, 1975 but such immunity is limited to action of the Legal Practitioner in the course of representation in a litigation in court and were his action in this respect amounts to professional misconduct in the face of the court, necessary legal action will be taken against the Legal Practitioner for professional misconduct<sup>70</sup> which falls under the purview of the Legal Practitioner Disciplinary Committee and the Supreme Court of Nigeria.

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<sup>70</sup> See Section 12 of the Legal Practitioners Act, 1975 which sets down what amounts to unprofessional conduct of a Legal Practitioner in Nigeria.