DOCUMENTING CLIENT'S INSTRUCTIONS AND TRANSACTIONS*

ABSTRACT

The paper navigates the essence of the duties a lawyer owes his client in carrying out the client's instruction. It grounds the duty largely on the equitable fiduciary nature of the relationship and emerging professional code of ethics which are designed to make the legal profession as noble as designed. Importantly, it examines the disciplinary mechanism that follow from breach of the duty and why the recent decision in *Aladejobi* on discipline of lawyers is unfortunate. It recommends a reversal of the ratio in the case and a purposive interpretation of the disciplinary procedure against erring lawyer.

Introduction

The 21st century legal practitioner[1] must make serious efforts in documenting his clients' instructions, transactions and relationship documents to avoid conflicts with his clients on the nature and extent of instructions. I have deliberately adopted a methodology of quoting judicial decisions as far as possible, in explaining the duties and relationship between the legal practitioner and their client(s) to arm the reader with relevant authorities on some of the matters referred to in the paper.

Definition of terms

From the topic, four words stand out which denotes the essence of this paper. The words are 'Documenting', 'Client', 'Instructions' and 'Transactions'.

From the ordinary English dictionary, there is no serious dispute as to the meaning of "documentation", "instructions" and "transactions", but of more interest in this gathering is, the question, who is a 'Client'.

A 'client' is defined to include;
" (a) in relation to contentious business, any person who is a principal or on behalf of another person retains or employs or is about to retain or employ, a solicitor (legal practitioner [LP]) and any person who is or may be liable to pay a solicitor's costs;
(b) in relation to non-contentious business, any person who, is a principal or on behalf of another, or as a trustee or executor, or in any other capacity, has power, express or implied, to retain or employ, retains or employs or is about to retain or employ a solicitor (LP), and any person for the time liable to pay a solicitor (LP) for his services any costs"[2]

A Client is an individual, corporation, trust or estate that employs a professional to advice or assists it in the professional line of work. A person who employs or retains an attorney, or counselor to appear for him in court, advice, assist, and defend him in legal proceedings and to act for him in any legal business.[3]

Documentation is neither a noun nor a verb capable of particular definition. According to the English Dictionary, the word 'documentation' refers to a written material which provides proof. Documentation is the process of classifying information. It is the material that provides official information or evidence or that serves as a record.

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[1] A legal practitioner was defined by the Supreme Court in *Okafor & Ors v. Nweke & Ors* (2007) 10 NWLR (pt. 1043) 521 at 530-532 as a person whose name is on the Roll; "The Legal Practitioner Act (LPA) 2004 defines legal practitioner thus: subject to the provisions of this Act, a person shall be entitled to practice as barrister and solicitor if, and only if, his name is on the roll". While section 24 LPA defines a legal practitioner as "a person entitled in accordance with the provisions of this Act to practice as a barrister or as a barrister and solicitor, either generally or for the purposes of any particular office or proceedings".

[2] Solicitors Act 1957, s.86(1)] (see Words and Phrases Judicially defined – Vol. 1) 268

[3] Black's Law Dictionary, 6th ed., 254.

Documenting Client's instructions therefore simply means the act of taking down/writing client's instructions for the purpose of executing same. And after the execution, the legal practitioner as his duty must keep the document of the transaction for record purposes, for likely future use by either the client or any person/authority that is entitled to it.

Public Perception of Legal Practitioners

Before delving into the paper, it is good we look into how we are perceived as lawyers and how the rank order of grievances has shifted over time, but certain grievances are constant. The first involves character defects associated with lawyers. Some think lawyers are greedy, while others simply consider lawyers as "dishonest and unethical"; very few think we are "caring and compassionate". These views are well captured in anti-lawyer humorous jokes and quips such as "a lawyer is a learned gentleman who rescues your estate from your enemies and keeps it for himself" or "how do you know when a lawyer is lying? His lips are moving".[4]

We may simply laugh at these jokes but they also carry with them the innermost feelings of society against our profession borne out of the fact that, at the end of litigation and our dealings with clients, only the lawyers seemed to have won at all.

Nature of Duty

Duty of a legal practitioner:

A legal practitioner is a minister of justice. He is sometimes referred to in a rather expressive manner as a minister in the temple of justice. His first duty therefore is to act in the interest and promotion of justice.[5] That is what sustains his profession and makes it honourable. That is how he earns and maintains his esteem. That does not mean he should compromise his duty to his client. That will lose him not only his respect but his reward. But he must not knowingly mislead the Court or perform such disreputable act against the cause of justice. It is unethical to do so. Such behaviour is liable to be punished in an appropriate disciplinary action. In very serious cases, it could amount to the pervasion of the course of justice. That is punishable by judicial process as a crime.[6]

A. Duties to a Client

aa. Contractual Duties

i. **Formation of the retainer:** The *fons et origo* of a legal practitioner's duties is the retainer (or contract[7] of engagement) between himself and the client. The retainer may be written, oral, or inferred from conduct. A legal practitioner engaged by a lender to give independent advice to a potential mortgagor will generally be the agent of that borrower, and not the lender.[8] In some cases it may not be clear precisely who instructs the legal practitioner.

Rule 18(2) of the Rules of Professional Conduct, 2007 (RPC) provides that "the lawyer shall ensure that important agreements between him and the client are, as far as

[4] See Keynote Address by Hon. Justice Lawal Gummi (extra-judicial) to Nigeria Bar Association National Executive Council Meeting in Abuja on 9th June, 2011 where most of the jokes were sourced.
[5] See Rule 1 of RPC "A lawyer shall uphold and observe the rule of law, promote and foster the cause of justice, maintain a high standard of professional conduct, and shall not engage in any conduct which is unbecoming of a legal practitioner"
[6] Per Uwaifo, J.C.A in *Seismograph Serv. v. Mark* (1993) 7 N.W.L.R (pt. 304) 203 at 215-216.
[7] *Edozien v. Edozien* (1993) 1 NWLR (pt 272) 678 at 702 per Karibi-Whyte JSC - "It is well settled that the relationship between counsel and client arises from contract. The contract is with respect to the service which counsel has agreed and undertaken to render in respect of his client. The general accepted view is that counsel acts on the general instructions of his client. He must adhere to any special instructions given by or on behalf of his client. Counsel however, as a general rule has complete control over how these instructions are to be carried out".
[8] See *Royal Bank of Scotland v. Etridge (No.2)* [1998] 4 All E.R 705.

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". [9]

ii. **Implied Retainer:** In a situation where the parties act as if the relationship of the legal practitioner and client exists even in the absence of express agreement to that effect, the court will readily hold that there is an implied retainer to be inferred from the parties' conduct. However the facts of the case must be closely examined.[10]

The need for writing: Where the retainer is oral, the legal practitioner comes under a duty (for the benefit of both parties) to record the terms in a letter to his client at the outset. At the very least, the nature of the retainer should be recorded in an attendance note. If the Legal practitioner neglects this precaution and later there is a dispute as to what he was instructed to do, he will begin at a disadvantage. Section 20 LPA 2004 indicates what record the legal practitioner should keep for account purpose. "If the Solicitor does not take the precaution of getting a written retainer, he must take the consequences".[11]

If a legal practitioner considers that the services he is to perform for a client are only limited ("special retainer")[12], this should also be put in writing to avoid misunderstanding. Similarly, it is prudent for the legal practitioner to record in writing the advice that he gives during the retainer. Thus as an example, a solicitor should record in an attendance note and write to the client if he is not going to give tax advice in a commercial transaction. In *Hurlingham Estates Ltd v. Wilde & Partners,*[13] where the legal practitioner did not make a note, Lightman J, rejected his plea that he had agreed with the client not to give tax advice. He stated that any such limitation would require the client's full informed consent.

If one attempts to list all the duties assumed by a legal practitioner upon his retainer, the list in most cases is liable to run to considerable length, unless it is confined to the most basic steps involved in the particular business which the legal practitioner undertakes. In practice, the legal practitioners' failure to carry out some necessary step is normally treated as a breach of the general duty implied in the retainer. In most cases it is submitted that this is the correct approach, although the duty of skill and care implies a number of general obligations.

iii. **Express instructions:** In some cases there may be express instructions which the court will treat as express terms of the contract.

iv. **Termination of the Retainer:** A client can determine the retainer at will. [14] In litigation, where there is an entire contract, the legal practitioner can only terminate the retainer upon reasonable notice[15] and for good cause,[16] unless there is an agreement to the contrary. The same probably applies to non-contentious matters.

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[9] See Rule 49 RPC for requirements of special and general retainers. In *Oyekanmi v. NEPA* (2000) 15 NWLR (pt. 690) 414 at 431, para C per Uwaifo J.S.C. - A legal practitioner is entitled to make a written agreement with his client in respect of any professional business done or to be done by him for a sum.

[10] See *Bean v. Wade* (1885) 2 T.L.R 157 C.A.
[11] See per Denning L.J in *Griffiths v. Evans* [1953] 1 W.L.R 1424 at 1428. See *Oyekanmi v. NEPA* (supra).
[12] Rule 49(4) defines special retainer to mean a retainer which covers a particular matter of the client
[13] [1997] Lloyd Rep.525
[14] Rule 18(1) RPC which provides a client shall be free to choose his lawyer and to dispense with his services as he deems fit provided that nothing in this rule shall absolve the client from fulfilling any agreed or implied obligations to the lawyer including the payment of fees
[15] Rule 21(3) RPC
[16] Rules 15(2)(b) and 21(2)(a)(b)(c)(d) RPC

Where a legal practitioner withdraws from employment after full fees had been paid, he shall refund such part of the fees as has not been clearly earned.[17]

v. **Continuing obligations where a retainer has been determined between a legal practitioner and a client:** Even when a retainer comes to an end, the fiduciary duties may continue. When it does, the legal practitioner will come under obligation to decline instructions from a new client on matters connected with his previous brief. The law does not allow him to use the acquired knowledge to the detriment of the client.[18]

ab. Tortious Duties.

Previously there was controversy in England as to whether a solicitor or barrister could be liable in tort for professional negligence for pre-trial work associated with litigation. This was finally laid to rest in *Henderson v. Merrett Syndicates Ltd.*[19]

However, in Nigeria, a legal practitioner cannot (shall not) exonerate himself from or limit his liability (by contract), to his client for personal malpractice or professional misconduct.[20]

Section 9 of the LPA Act 2004, provides as follows:

"(1) Subject to the provisions of this section, 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 or limit that liability in any contract shall be void

(2) Nothing in subsection (1) of this 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 barristers from the liability aforesaid in so far as that rule applies to the conduct of proceedings in the face of any court, tribunal or other body".

By virtue of the above provision, legal practitioners may be liable in tort for failure to discharge their duty of care[21] in appropriate circumstances and this liability is only limited by the exceptions stipulated under sections 9(2) & (3) of the LPA 2004; when their services are offered gratuitously and the legal practitioner had by contract limited his liability and for actual work done before the court. We submit this may also include pre-trial work – drafting of court processes, etc.[22]

With respect to immunity on work done before court, the principle enunciated in the English case of *Rondel v. Worsely*[23] has been received in Nigeria and cited with approval in a long line of cases.[24] In *Free Enterprise Nig. Ltd v. Global Transport Oceanico S.A & 1 Or,*[25] Onalaja, J.C.A stated that:

> As an advocate he is a minister of justice equally with the judge. He has a monopoly of audience in the higher courts. No one, save he, can address the Judge, unless it be a litigant in person… he owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously misstate the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is, without evidence to support it. He must produce all the relevant authorities even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions

[17] Rule 21(4) RPC.

[18] See Section 192 of Evidence Act 2011, Cap E14 2011 Laws of Federation of Nigeria.
[19] [1995] 2 A.C 145
[20] Rule 16(1)(d) RPC
[21] Rule 16 of RPC
[22] See Rule 23(4) of RPC
[23] [1967] 1 QB 443 by Lord Denning M. R
[24] See *T. Oseni v. Brossettee Nig. Ltd* [1981] Jan/March CCHCJ 310 310-320. *The Shell Petroleum Development Company of Nig. Ltd v. Chief George Uzoaru & 3 Ors* (1994) 9 NWLR (pt.366) page 51
[25] In (1998) 1 NWLR (pt. 532) at page 1 more particularly at page 21

> to his client if they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules or profession and is subject to its discipline. But he cannot be sued in a court of law…".

ac. Fiduciary Duties

In addition to the contractual duties arising from his retainer and the general duty to exercise skill and care, the legal practitioner owes fiduciary duties to his client. The relationship between a legal practitioner and his client has been described as "one of the most important fiduciary relations known to our law". However, the limits of those duties must be recognised. In *Clark Boyce v. Mouat*[26], the Privy Council said:

> A fiduciary duty concerns disclosure of material facts in a situation where the fiduciary either has a personal interest in the matter to which the facts are material, or acts for another party who has such an interest. It cannot be prayed in aid to enlarge the scope of contractual duties.

Also, in *Nigerian Bar Assciation v. Fobur*,[27] Abdullahi Ibrahim, SAN, Chairman LPDC (as he then was) said that:

> The relationship between a legal practitioner and his client is a fiduciary one and this implies that the legal practitioner must act with the utmost honesty and fairness to his client. Any form of dishonesty or fraud perpetrated against the client by the legal practitioner will amount to misconduct.

Under the Rules of Professional Conduct in the legal profession, there are enormous provisions detailing the fiduciary duties a legal practitioner owes his client, some of the relevant rules are Rules 17, 23, 50(3) and 54. I shall deal with some of these rules in detail when discussing the seven fiduciary duties listed below, which are of particular relevance to legal practitioners:

i. **Undue Influence:** A client may be induced by the undue influence of a legal practitioner to make a gift to him. It is well established that the legal practitioner-client relationship gives rise to a presumption of undue influence. It applies to other transactions as well as gifts. The presumption also applies to gifts to persons connected with the legal practitioners' by blood or contract, such as his relations. Thus a gift to the legal practitioner's son was set aside by the House of Lords in *Willis v. Barron* [28] where the defendant was the plaintiff's husband's legal practitioner rather than her own. In *Liles v. Terry*[29], the English Court of Appeal set aside a gift to the legal practitioner's wife on the basis of the presumption of undue influence. The presumption still applies even after the relationship of client and legal practitioner ends.

   The presumption of undue influence may not strictly apply in the case of gifts by will,[30] although a similar but less rigorous doctrine does exist in such cases. It is possible to rebut the presumption of undue influence by showing that the client exercised free will. Legal advice is helpful in dispelling the presumption but it is probably not essential, although some case involving the legal practitioners suggest the contrary.[31]

ii. **Personal Dealings with Clients.** In the well-known case of *Nocton v. Ashburton*[32] a solicitor was found liable for breach of fiduciary duty because he had a personal interest in the transaction his client was entering, and he also

[26] [1994] 1 A.C. 428,437 F-G
[27] (2006) 13 NWLR (pt. 996) pg 196 at 216, paras D-E
[28] [1902] A.C 271
[29] [1895] Q.B 679
[30] *Hindson v. Weatherill* (1854) 5 De G.M. & G 301
[31] See *Rhodes v. Bate* (1865) LR 1 Ch 252 at 257
[32] [1914] A.C 932

acted for the borrowers who were the other party to the transaction. A legal practitioner is not permitted to enter transactions with his client in circumstances where he has a duty to act in the interests of his client, without proof that he has given a fair price and that he has disclosed all the information he has concerning the transaction.

In *Day v. Cook,*[33] the defendant legal practitioner presented a number of transactions to the plaintiff in which he had an interest. Although the plaintiff was fully informed, the legal practitioner was held to be in breach of fiduciary duty as the transactions were not fair. The legal practitioner obtained an unjustified advantage in them.

The rule cannot be circumvented, for instance by purchasing property from the client in the name of the legal practitioner's brother when he is the real purchaser as in *McPherson v. Watt*.[34] If the he has a significant interest in a company which is entering a transaction with his client, it may be difficult to prove at least that a sale is fair and honest.

iii. **Obtaining personal benefit:** A legal practitioner may not use his client's property to obtain a personal benefit. Rule 17(2) of RPC provides that:

> Except with the consent of his client after full disclosure, a lawyer shall not accept a retainer if the exercise of his professional judgment on behalf of his client will be or may reasonably be affected by his own financial, business, property, or personal interest.

Also Rule 23(1) of RPC provides:

> 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.

In *Labode v. Otubu*[35] Onu J.S.C said:

> For an answer, I wish to stress that 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. Just as the solicitor cannot convey a right of title to the property on the defendants, he cannot by the same token pledge a title deed and property which does not belong to him.

In similar vein, Mohammed, JSC, in *Ndukwe v. LPDC,*[36] stated as follows:

> Certainly where a legal practitioner without any justification held on to his client's money, all right thinking members of the legal profession must view this misconduct with great concern not only for the protection of the public particularly clients like the 2nd respondent but also for the protection and preserving the good name of the legal profession.

iv. **Using a fiduciary position to make a personal benefit:** A legal practitioner may not make use of his fiduciary position to gain a benefit for himself.[37]

v. **Bribes and secret commissions:** A fiduciary is not allowed to accept bribes or secret commissions. In *Islamic Republic of Iran v. Denby*[38], the legal practitioner's client was the defendant in a shipping dispute. The other side paid the legal practitioner a commission to obtain a prompt and satisfactory

[33] [2000] P.N.L.R 178
[34] [1877] 3 A.C 254
[35] (2001) 7 NWLR (pt. 712) 256 at 282, para F;
[36] (2007) 5 NWLR (pt. 1026) 47-48 paras G-D
[37] Rule 17 (2) & (3) & 54 of RPC.
[38] [1987] 1 Lloyd's Rep. 367

settlement, which was described by the judge as a bribe. The court held that the client was entitled to recover the sums from him. The rule applies to secret commissions that are not bribes, such as an introduction fee. However, if the client expressly or impliedly accepts the payment's existence, he cannot later recover it from the legal practitioner. Where for instance, the legal practitioner is retained to act for a client in the purchase of a patent, and he showed a note from vendors offering him a commission from the purchaser, the English Court of Appeal held that the client's executors would not be allowed to deduct the commission from the legal practitioner's bill.[39]

Rule 54 of RPC provides that:

> A lawyer shall not accept any compensation, rebate, commission, gift or other advantage from or on behalf of the opposing party except with the full knowledge and consent of his client after full disclosure.

The LPDC case of *NBA v. Udeagha*[40] further illustrates this principle. In that case, the legal practitioner claimed to have spent substantial part of the money he collected from his client for perfection of documents on "public relations" which the he christened acceleration fee. The LPDC while "directing" *inter-alia* the Registrar of the Supreme Court to strike off the name of the legal practitioner from the Roll, also ordered him to refund the entire money collected/wrongly spent on the public relations. The LPDC at page 457, paras D-G of judgment stated that:

> This committee is convinced that what is disguised as 'acceleration charge' is nothing but gratification or bribe allegedly paid by the respondent legal practitioner to public officers. For a legal practitioner to indulge himself in the despicable act of corrupting public servants is highly condemnable especially in the spirit of the ongoing crusade of ridding the Nigerian polity of the malaise of corruption. This committee finds the respondent's defence on this matter to be preposterous, spurious and outrightly invidious and lacking any legal basis or justification whatsoever. Indeed the committee finds and holds that same amounts to a grievous act of professional misconduct. It may not even be far-fetched to say that this claim of paying acceleration charge or fee is nothing but a feeble distraction by a legal practitioner who has converted his client's money entrusted to him for a specific purpose.

vi. **Accepting inconsistent engagements:** Generally, the question of inconsistent engagement (acting for both parties in a transaction) arises in the common law context of breach of the duty of reasonable care and skill. But it may also be raised in the context of breach of fiduciary duty.[41] The common example is a case where he acts for vendor and purchaser in conveyancing transaction matters, or for lender and purchaser. In *Bristol & West Building Society v. Mathew*[42], the defendant legal practitioner acted for the plaintiff lender and the borrower in a mortgage transaction. Millet L.J analysed the fiduciary obligations owed in transactions with two clients into four categories. First, the "double employment" rule prevents a solicitor acting for two clients (with likely conflicting interests) whose interest may conflict, without obtaining informed consent. Consent was implied in the case where the solicitor acted for the lender and borrower. Secondly, there is a duty of good faith. There has to be an intention to further the interests of one client to the prejudice of the other for there to be a breach of this obligation, although the conduct need not be dishonest. Thirdly and relatedly, under the "no inhibition principle", a fiduciary must not be inhibited by his duties to one client from carrying out his duties to the other. Breach of this obligation also requires intentional conduct.

[39] *Re Haslam v. Hier-Evans* [1902] 1 Ch.765
[40] (2006) 12 NWLR (pt.994) pg 438
[41] *Moody v. Cox and Hatt*[1917] 2 Ch.71 at 79 and 81
[42] [1998] Ch.1

Finally the "actual conflict" rule requires a solicitor not to be in a position where he cannot fulfil his obligations to one client without failing the other.

In *Balogun v. Akanji,*[43] Salami J.C.A (as he then was) stated:

> The consideration of this issue can be bifurcated. Firstly, the 1st Defendant who incidentally is the 1st appellant in the instant appeal is the counsel acting for himself and on behalf of other appellants. It seems his personal interest conflicts with his professional duty to other appellants and in the best tradition of the profession he ought not to have accepted their briefs.

vii. **Confidence:** Legal practitioners owe a duty to their clients to preserve confidences, both as a matter of an implied contractual term, and as a fiduciary duty.
Rule 19(1) RPC provides that:

> 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 privileged.

Also Rule 15(3)(e) RPC stipulates that the legal practitioner shall not:

"Conceal or knowingly fail to disclose that which he is required by law to reveal."

The courts will restrain a legal practitioner from potentially breaching confidences.[44] The risk of breach of confidence is particularly challenging when firms amalgamate. In England, the Law Society has issued guidelines on conflicts arising on the amalgamation of firms of solicitors. We urge the Bar Council in Nigeria to issue similar guidelines on likely conflicts arising from firms' amalgamation.

viii. **Overriding Confidence:** The duty of confidence may be overridden in some circumstances. The legal practitioner may reveal confidences or secrets necessary to establish or collect his fee or to defend himself, or employees or associates against an accusation of wrongful conduct.[45] Confidential matters may have to be disclosed to the Nigerian Bar Association or the relevant authority to check that there is compliance with its rules in disciplinary proceedings/ investigation, etc. The duty may be negated if the lawyer has strong evidence of suspected fraud on the part of the client.[46] If such a suspicion exists, he may apply to the court for directions or withdraw from service.

B. Trust Duties

Express and Implied trusts: Normally, a legal practitioner's liability, power and duties will be governed by the trust deed. As a professional trustee acting for remuneration, a legal practitioner may have a higher standard of care than an unpaid trustee. In conveyancing transactions, money received by a legal practitioner will normally be held under an implied trust, and will be subject to the Legal Practitioners Accounts

[43] (1992) 2 NWLR (pt. 225) 591 @ 606, paras C-D
[44] *Rankusen v. Ellis, Munday & Clark*[1912] 1 Ch. 831
[45] Rule 19(3)(d) RPC.
[46] (Rule 19(3)(c) RPC

Rules.[47] A legal practitioner who dishonestly retains his client's property holds such property in constructive trust for the benefit of his client.[48] *NBA v. Koku*[49] illustrates this point. It was a case where a legal practitioner acted as an executor/trustee with two other persons. While serving in that capacity, he appointed his law firm as solicitors to the estate. The LPDC after considering all the facts stated inter-alia that:

> (i) The respondent is guilty of unprofessional conduct of acting as an Executor in respect of the Will of Mr. George W. E. Nicol (late) as well as appointing his legal firm: Messrs A. O. Koku & Co. as Solicitor to the estate left by the deceased, contrary to Section 11 of the Legal Practitioner's Act.
>
> (ii) The respondent is guilty of unprofessional conduct by causing and encouraging the early winding up of Apalagada Investment Ltd., a company belonging to the deceased which appears to be against the deceased's wishes. This is contrary to section 11 of the Legal Practitioners Act.
>
> The two cases of unprofessional conduct are not infamous but incompatible with the Status of a Legal Practitioner of the respondent's standing. We shall accordingly proceed to direct the appropriate disciplinary action against the respondent.
>
> Direction:
>
> (1) The Respondent shall pay back to the beneficiaries the amount of £20,000.00 which he wrongly collected from the beneficiaries of the estate of the deceased, Mr. G. W. E Nicol, as legal fees for services rendered by the firm of Messrs A. O. Koku & Co.
>
> (2) The respondent is suspended forthwith from engaging in Legal Practice in the Federal Republic of Nigeria for a period of three years from the date of this decision.
>
> Notice of this direction to be given to the Chief Registrar of the Supreme Court, Chief Judge of Lagos State and the Attorney General of Lagos State.[50]

Also the Supreme Court in *Iteogu v. LPDC*,[51] while confirming the direction for the refund of the sum of ₦9,500,000.00 to the petitioner by the legal practitioner said:

> … The conduct of the appellant in this matter leaves much to be desired. It is, to put it mildly unfortunate. Here is a legal practitioner; in whom much trust was reposed but who failed to live up to expectation… what would it have caused the appellant to have given his law practice a human face? Nothing, but his failure to do so has proven to be very expensive indeed. Is it not said that penny wise, pound foolish?... It is on record that when the petitioner reported the matter to the Police, the Ibaka Community duly identified the petitioner as one of them yet the appellant would not be moved. How true that those that the gods want to destroy they first make mad!![52]

C. Duties to Third Parties

It was formerly thought that legal practitioners owed no duty of care to persons who were not their clients for negligent misstatements relied upon by them. The law changed after the decision in *Hedley Bryne & Co. Ltd v. Heller & Partners Ltd*[53] which established liability for negligent misstatement relied upon by the claimant. There has been considerable uncertainty about what principles *Hedley Bryne* established, and the test to be applied for determining whether a duty of care is owed, what it is, extent of forseability, proximity and whether it is just and reasonable to impose a duty of care in the circumstance of a case.[54]

Acting as an officer of the court: It has been established for over a century that a legal practitioner acting as an officer of the court may be liable to persons who are not his clients. For example, in *Batten v. Wedgwood Coal & Iron Co.*[55] the legal practitioner who was the plaintiff's solicitor conducted a sale pursuant to the order of court. The legal practitioner failed to invest the proceeds in accordance with the court's order, with the result that no interest was earned. The defendants in the action, who would

[47] Section 20 LPA 2004 for accounts and records of clients, under Section 21 LPA 2004, money in client's account not subject to right of set-off by banks for legal practitioner private liability.
[48] Rule 23(2) RPC.
[49] (2006) 11 NWLR (pt.991) 431
[50] Ibid at 457, per Abdullahi Ibrahim SAN (Chairman as he then was).
[51] (2009) 17 NWLR (pt.1171) pg 614
[52] Ibid at 636, per Onnoghen, JSC.
[53] [1964] A.C 465
[54] See *Smith v. Bush* [1990] 1 A.C 837 at 865A,Per Lord Griffiths
[55] (1886) 31 Ch.D 346

have been entitled to the interest, recovered the amount of their loss from the legal practitioner.

Rules 26-29 of the Rules of Professional Conduct contains various rules regulating the conduct of a legal practitioner in his relationship with other legal practitioners. A breach of any of the rules may elicit disciplinary proceedings against the legal practitioner.

D. Duty of Care to the Other Side

General Considerations: Even if there would otherwise be a duty of care, additional problems arise where the claimant is the legal practitioner or client on the other side of the transaction, or on the other side in litigation.

Much of a legal practitioner's work, both in contentious and non-contentious matters, are adversarial in nature. It is the Legal Practitioner's duty to protect his own client's interests, where there is an actual or potential conflict with the interests of other parties. There are two facts which may point in the opposite direction. First, legal practitioners are officers of the court and owe duties to the court, which may conflict with instructions from the client. Second, they are expected to exercise professional restraint, when the advancement of their client's interests would involve saying or doing something that is dishonest[56] or disreputable.[57]

Non-contentious business: In the ordinary way (and consistent with the caveat emptor principle) a vendor's solicitor does not owe a duty of care to the purchaser, who can reasonably be expected to rely upon his own solicitor to investigate title and similar matters. The same result will apply for most non-contentious business. No duty will be owed even if the solicitors make misrepresentations to the other side. In *Gran Gelato Ltd v. Richcliff Ltd,*[58] Gran Gelato purchased an underlease from Richcliff. Gran Gelato's solicitors sent enquiries before contract to the second defendants, who were Richcliff's solicitors, which included an enquiry as to what might inhibit the enjoyment of the underlease. The second defendants mistakenly replied "not to the lessor's knowledge." Richcliff was found liable for the misrepresentation, which Gran Gelato had relied upon to their loss, but not the second defendants. The Vice Chancellor considered that and held:

> "In normal conveyancing transactions, solicitors who are acting for a seller do not in general owe to the would-be buyer a duty of care when answering inquiries before contract or the like."

Exceptions from the general rule: In *Al-Kandari V. J.R Brown & Co.*[59] a duty of care was held to be owed to the opposite party in litigation in very unusual circumstances. The case concerned a custody battle between the plaintiff mother and her Kuwaiti husband over their children. The solicitors acted for the husband. There was a real risk that the husband would attempt to take the children to Kuwait, although custody had been granted to the plaintiff. It was agreed by the parties that the husband's passport, on which the children were registered, would be retained by the defendants to the order of the court. To enable the children's name to be removed from the passport, it was released to the Kuwaiti embassy, which assured the solicitor's agents that it would not be given to the husband. The husband surreptitiously obtained his passport from the embassy, and kidnapped the children. The defendant solicitors were held to owe a duty of care to the Plaintiff which they breached by not informing her that the passport had been released to the embassy.

[56] Rule 15(1) &(2), 19(3)(c) RPC
[57] Rule 15 (3) (h) RPC. Rule 15(3) (h) RPC.
[58] [1992] Ch.560
[59] [1988] Q.B 665,

Under the Rules of Professional Conduct, it would seem that the requirements under Rules 19(6), 27(2) and 32(3)(h) RPC encompasses the obligation to be fair to the other side, a breach of which may result in proceedings for professional misconduct against the erring legal practitioner.

E. Duty to Court

Rule 30 of the RPC refers to the legal practitioner as an officer of the court who should not do any act or conduct himself in any manner that may obstruct, delay, or adversely affect the administration of justice. Rules 31-38 of RPC makes enormous provisions regulating how a legal practitioner should conduct himself in discharge of his duty in court. Some decided cases as to how the courts had interpreted the duty are listed below:

a. **Counsel's Duty to Refrain from Concealing Facts:**

In *Alake v State,* the court said that:

> Taking the matter most mildly, I can only hope that Counsel, a Minister standing on the temple of Justice in his capacity as an advocate, will always and as usual place all the facts of the case before the Court without let or hindrance. While nobody doubts the Constitutional right of Counsel to defend his client with all professional strength, professional know how and wisdom at his disposal, ethics of our age long profession demand that we do not withhold relevant facts from the Court, particularly when those facts form part of the appellate record...[60].

b. **Duty on Counsel to Bring to the Notice of the Court all Relevant Laws and Authorities:**

The court has also said:

"Let me repeat once more that it is a task fitted for counsel to bring to the notice of the Court all relevant laws and authorities so as to enable the Court reach a fair decision in the matter before it."[61]

c. **Counsel's Duty to be Prompt:**

"Counsel are enjoined to be prompt at all times in a case they have taken up and the Court would adjourn depending on the circumstances of each case."[62]

d. **Counsel's duty to Distance Himself from Sentiments:**

In this respect Ogundare, JSC said:

> I think it will help to draw attention to what this Court (per Sir Adetokunbo Ademola, CJF) said in *Ojiegbe v. Ubani* (1961) 1 SCNLR 389; (1961) 1 All NLR 277 at p. 279; (1961) 2 N.S.C.C 153 at p. 154
> "I think it is undesirable for a barrister to put himself into a situation in which he cannot be 'counsel', in the true sense of the word, because he is in substance the party… Mr. … would have done himself a greater justice if he had not placed himself in the invidious position of being counsel in this matter.[63]

e. **Counsel's duty to Present Case on Appeal Consistent with His Case in a Trial Court:**

Rowland, JCA on this point stated:

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[60] Per Tobi J.C.A. in *Alake v. State* (1991) 7 N.W.L.R. (pt. 205) 567 at 590 – 591.

[61] -Per Chukwuma-Eneh, J.C.A in *Tsume v. Peverega* (2001) 2 N.W.L.R (pt.698) 556 at 569 para C

[62] *Ceekay Traders Ltd. v. General Motors Co. Ltd* (1988) 3 N.W.L.R (pt. 82) p.347

[63] – Per Ogundare, J.S.C in *Adefulu v. Okunlaja* (1998) N.W.L.R (pt. 550) 435 at 452.

It would appear that the appellant presented one colour of his case before the trial Tribunal and presented another colour in this Court. This he cannot do as he cannot approbate and reprobate at the same time. Having said that, it is my well considered view that the trial tribunal as borne by the record did not cause any infraction of fair hearing. There was no miscarriage of justice in the procedure adopted by the trial Tribunal in the hearing of the petition before it - the subject of this appeal.[64]

f. **Counsel's Duty not to Manufacture Evidence:**[65]
Tobi, JCA (as he then was) on duty of counsel not to manufacture evidence said:

The contention of learned counsel is not factual. There is no such evidence before the trial Court. And counsel cannot manufacture such evidence. His professional duty does not take him that far. At best, counsel can repeat facts led in evidence in the course of his submission. Counsel cannot, based on speculation, or conjecture, manufacture evidence which he thinks is helpful to his client. That is not an ethical conduct.[66]

g. **Counsel's Duty not to Misrepresent Facts to the Court and to be Unbiased in His Comments:**
On this duty, Onu, JSC said:

Another instance of misrepresentation by the Attorney-General to the appellant's detriment can be gleaned from page 23; lines 3-7 of respondent's brief thus:… I also agree with the appellant's submission that such embellishments and unnecessary padding are manifestly unfair and contrary to the ethics of the legal profession. Facts, which are sacred and must be put before the Court in as accurate a manner as possible and must then equally be matched with comments, which are unbiased and fair.
Where for instance, counsel is drawing inferences he must make it clear that such inferences are his. [67]

h. **Legal Practitioner's Duty to Court where he has been Debriefed:**[68]
Akpabio JCA on this duty said:

"A legal practitioner from whom instructions have been withdrawn owes the Court a duty to make a final appearance to formally withdraw his representation".[69]

i. **Conduct Expected of Legal Practitioner**
Agbaje JCA, on this said:

I now turn to Rule 22[70] which deals with justifiable and unjustifiable litigations and with the provisions in this regard that a lawyer must decline to conduct a civil cause or to make a defence when it is intended merely to harass or to injure the opposite party or to work oppression or wrong to that party. [71]

j. **Obligation of Legal Practitioner to Refrain from False Claim:**
His Lordship on the obligation to refrain from false claim also said:

Rule 14 [72] emphasizes the obligation on a lawyer to refrain from the prosecution or defence of a false claim. However, Rule 14(b) [73] makes it clear that a lawyer should insulate himself in the conduct of his client's case from his personal belief (i) in the integrity of his client and his client's witnesses or (ii) in the justice of his client's cause, the lawyer's pre-occupation being with a fair analysis of the evidence touching those matters.[74]

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[64] Per Rowland, J.C.A in *Bawa v. Balarabe* (1999) 6 N.W.L.R (pt.605) 61 at 68 paras G-H.

[65] Rule 24(4) RPC
[66] Per Tobi, J.C.A in *Ugwu v. State* (1998) 7 N.W.L.R (pt. 558) 397 at 408 para B.
[67] Per Onu J.S.C in *Abacha v. State* (2002) 11 N.W.L.R (pt. 779) 437 at 523.
[68] Rule 29 of RPC
[69] Per Akpabio, J.C.A in *Okonedo-Egbaregbami v. Julius Berger* (1995) 5 N.W.L.R (pt. 398) 679 at 699 para B. Rule 2(a) of RPC
[70] (now Rule 24 of RPC)
[71] Per Agbaje, J.C.A in *Fawehinmi v. NBA (No.2*) (1989) 2 N.W.L.R (pt. 105) 558 at 619.
[72] (now Rule 15 RPC 2007)
[73] (now Rule 15(2)(b)&(3) RPC 2007
[74] Per Agbaje, J.S.C in *Fawehinmi v. NBA (No.2*) (1989) 2 N.W.L.R (pt. 105) 558 at 618.

k. **Counsel's Duty to use Words Showing Decorum, Politeness and Reverence in Relation to Judges:**[75]
Nzeako JCA, on decorum said:

> In concluding this judgment, I feel duty bound to observe that reading to the end, the brief of argument for the appellant, one could not help noting that the appeal was clutching at every straw to upset the judgment of the Court below. This unfortunately includes counsel using disrespectful and unprofessional language to ridicule, virtually insult the learned trial Judge. He state, "… the learned trial Judge chose to turn a BLIND EYE, DEAF EAR AND DUMB MOUTH… by totally ignoring all the submissions made thereon. What impudence!
>
> With respect to learned counsel for the appellant, he must earn the condemnation of this Court of the use of those unprofessional comments. Let me advise that counsel who has chosen the vocation of an advocate in our legal profession, must know at all times, whether in, or out of Court, that this demands the nicest and highest sense of honour, and complete devotion to the ideals of justice. In the process, effective use of words as the tools of a good advocate and politeness of language and demeanour must be employed. It is a breach of professional etiquette and against tradition to knowingly insult the Judge, and ridicule the Court. It is indeed unjust to indulge in such insulting language, realizing that the Judge is not in a position retaliate or defend himself. It is not becoming of barristers and solicitors of honourable profession who are gentlemen".[76]

l. **Duty of Counsel not to Walk Out on Court:**[77] On this the court has said:

> Counsel who is ill or indisposed has a duty to apply for adjournment of the case to enable him seek medical assistance. He has no right whatsoever to walk out on or from the court just like that. That is certainly a rude and unprofessional conduct, unbecoming of a legal practitioner. I condemn the conduct of the counsel.[78]

m. **Prosecuting Counsel's Duty in Criminal Cases to Fairly and Impartially Present all the Facts before the Court.**
On this the court has said:

> It cannot be too often stressed that the business of Counsel for the crown is fairly and impartially to exhibit all the facts to the jury. The crown has no interest in securing a conviction. Its only interest is that the right person should be known and that justice should be done if real evidence is available to the defence.[79]

n. **Counsel's Duty not to Abandon or Withdraw from Proceedings without Leave of Court.**[80] Bello JSC (as he then was) said:

> In criminal cases, it is the legal practitioner's duty to be present in Court throughout the trial including the return of verdict and sentence even if he intends to be mute and inactive throughout. It is a breach of his professional duty to abandon his client and to withdraw from the trial without the leave of the Court.[81]

o. **Counsel's Duty to Comply with Orders of Court made During Proceedings:**
Babalakin JSC, said: "Counsel must comply strictly with orders made during the hearing of cases".[82]

p. **Duty of the Legal Practitioner to Secure the Attendance of his Clients in Court where such Attendance is Necessary:**

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[75] (Rule 31 of RPC)
[76] Per Nzeako, J.C.A in *Alize v. Umaru* (2002) 14 N.W.L.R (pt. 787) 369 at 393-394 paras C-B.
[77] (Rule 31 of RPC)
[78] *M.M.S Ltd v. Oteju* (2005) 14 NWLR (pt. 945) 541, para D.
[79] *Odofin Bello v. The State* [1968] 1 All N.L.R. 361. See also *R. v. Superman* (1935) 25 Cr App. R. 109
[80] Rule 21 of RPC
[81] -Per Bello, J.S.C. in *Okonofua & Anor. v. The State* (1981) 12 N.S.C.C. 233 at 243.
[82] Per Babalakin, J.S.C in *Finnih v. Imade* (1992) 1 N.W.L.R (pt. 219) 511 at 534.

Per Abbott, Ag.C.J.F. in *Okotie v. C.O.P* said the lawyer is under a duty to secure the attendance of his client to court.[83]

F. Avoiding Conflicts Which may Elicit Embarrassment to the Legal Practitioner

a. Giving Evidence in a matter the Legal Practitioner Acts:[84]

A lawyer shall not accept to act in any matter if he knows or ought to reasonably know that he or a lawyer in his firm may be called as a witness unless the testimony is of a formal nature based on uncontested facts, or where the testimony is as to the nature or value of the legal services rendered to the client.[85] In *Gachi v. The State*,[86] the Supreme Court said:

> … we think it is highly undesirable that Counsel should give evidence in a case in which he is appearing professionally if his evidence is thought necessary, he should decline to appear as Counsel….

Also Rule 20(1) of RPC provides:

> Subject to sub-rule (2) of this rule, a lawyer shall not accept to act in any contemplated or pending litigation if he knows or ought reasonably to know that he or a lawyer in his firm may be called or ought to be called as a witness.

b. Swearing to Affidavit Evidence

It is not advisable for a lawyer to swear to an affidavit unless in reference to formal facts where there is no reason for substantial evidence to be offered in opposition to the testimony.[87] Ademola, CJN said:

> …We do not subscribe to the views expressed before us by Mr. Sofola, that the effect of the principle in *Horn v. Rickard (1)* with which this Court agreed is a total prohibition on counsel in a case swearing to an affidavit. The judgment in the *Horn v. Rickard case* did not say so, and as a matter of fact the affidavit sworn to by Mr. Murray, counsel in that case, was accepted by Holden J. when he said (1963 NNLR at 69): - *"I rule that there is nothing in this particular case to make the swearing of this particular affidavit by Mr. Murray abhorrent on principle"*. We feel obliged to say on this point about swearing to an affidavit, that the rule laid down in *Obadara's case (2)* is not an absolute rule. Each case must be considered on its own merits. [88]

c. Standing for Bail/Surety

– it is not advisable for the legal practitioner to act as surety because of the nature of our duty to other clients and the court.

d. Legal Practitioner as a party to an action:

The practice where Counsel is a party to an action, calls witness and examines them and subsequently, gives evidence in support of his case is to be deprecated.[89] It is not advisable for a legal practitioner to represent himself for objectivity difficulty.[90]

e. Right of Audience in Court not to be used to mislead Court:

Ogundare JSC, in *Atake v. Afejuku* said:

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[83] (1959) 1 N.S.C.C. 100 at 102.
[84] Rule 20(1) of RPC
[85] Rule 20, Rules of Professional Conduct, 2007
[86] [1965] NWLR 333 at 336.
[87] *See Obadara v. President Ibadan West District Council Grade B Customary Court*[1958] WRNCR 110, 114
[88] Per Ademola, CJN in *Dada v. University of Lagos* [1970] NCLR 542 at 545-546.
[89] *Fed. Comm. For Works & Housing v. Aturanse* CCHCJ/7/72/80
[90] *Egbe v. Adefarasin*(No.2) [1987] 1 SC1

"The invitation to legal practitioner is understandable for afterall, they are equally officers of the court with duty not to mislead the court, but to assist it in ensuring that justice is done."[91]

f. **How a legal practitioner who is a party to an action can appear and conduct his case:**
Kaibi-Whyte JSC said:

> Previously, it was the rule that a legal practitioner, who is a party to a civil suit can appear in person, though not as a legal practitioner but as a litigant conducting his case in person. Being a legal practitioner, even though a litigant, to conduct his case from the bar robed. *Newton v. Ricketts* 9 HCLC 710*, New Brunswick & Anor v. Conybeare* (1862) 9 HLC 710, 719. He cannot represent and conduct the case of a co-defendant. As a litigant he cannot appear in two capacities – i.e first in his person, and secondly as a legal practitioner in the same case. A mixture of the two characters is not permitted. [92]

However, Rule 36 (f) of RPC stipulates that the legal practitioner "cannot remain within the Bar or wear the lawyer's robes when conducting a case in which he is a party or giving evidence".

g. **Limits of Appearance of Counsel to give evidence on behalf of client:**

(1) Edozie JCA, on this said:

> It appears to me that within the rule, counsel can satisfy the technical requirement of "appearance" on behalf of his client as the legal practitioner representing him but cannot "appear" when that is tantamount to fulfilling the requirement of giving material evidence for or on behalf of his client. [93]

(2) His Lordship also said:

> The crux of the problem is that under the rule although every legal practitioner who has been engaged in a cause or matter has the duty to conduct it to conclusion, "unless for special reason", he is excused by Court, his duty does not include giving evidence on behalf of his client [94]

h. **Appearance in a case in which he a legal practitioner is a material witness:**
Brett, Ag. CJN, on this stated:

> We would here interpolate a comment on the undesirability of counsel's appearing in a professional capacity in a case in which he is a material witness. The principles underlying the rule of practice in this matter are considered by Holden J. in *Horn v. Rickard* (1963) NNLR 67 and we agree with the passage in his judgment in which he states the rule as follows:- "there would be little harm in counsel swearing an affidavit setting out formal facts required to be established to support a purely formal ex-parte application where there is no possibility of those facts being dispute, but even in such a case there would be little need for counsel himself to swear the affidavit as some member of his staff could easily depose to the same facts as a matter of information and belief. If on the other hand counsel finds himself in the position where he is the only person with the knowledge necessary to swear the affidavit, and where the facts to which he is to swear are likely to be in dispute, then he should for the purposes of that application withdraw from the case and brief other counsel". We were glad to observe that on the argument of this appeal Chief Agbaje accepted a hint given when this Court granted a stay, and did not appear as counsel.[95]

i. **Whether a solicitor convicted of fraud is a fit and proper person to practice in Nigeria:**
Ademola CJF, said:

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[91] (1994) 9 NWLR (pt.368) 379.
[92] Per Karibi-Whyte J.S.C in *Fawehinmi v. NBA (No. 1*) (1989) 20 N.S.C.C (pt. II) 1 at 34.
[93] Per Edozie, J.C.A in *P.N Emerah & Sons (Nig.) Ltd v. Dunu* (1998) 9 N.W.L.R (pt.564) 86 at 94 paras F-G.
[94] Per Edozie, J.C.A in *P. N. Emerah & Sons (Nig) Ltd v. Dunu* (1998) 9 N.W.L.R (pt.564) 86 at 94 paras G-H.
[95] Per Brett, Ag. CJN in *Obadara v. The President, Ibadan West District* (1964) 3 N.S.C.C 248 at 253

Where a legal practitioner is convicted of a criminal offence, *prima facie*, the conviction makes him unfit to continue as a practitioner. But the Court will always examine the nature of the crime and the circumstance surrounding it before deciding whether or not to strike the practitioner off the roll.[96]

j. **Champerty:**
Edozie JCA, stated:

At Common Law, champerty is a form of maintenance which occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit or other contentious proceedings where property is in dispute. An agreement by a solicitor to provide funds for litigation or without charge to conduct litigation in consideration of a share of the proceeds is champertous. The solicitor cannot recover from his client his own costs or even his out of pocket expenses. Champerty is defined in the Black's Law Dictionary as "the act or fact of maintaining, supporting or promoting another's law suit. [97]

However, a contingent fee arrangement must be distinguished from a champertous arrangement. At present, this strict concept has changed, as a more liberal approach is adopted where the arrangement is between a client and a legal practitioner. The arrangement will only be unlawful if it does not comply with the provisions of the law as set out in Rule 50 under "contingent fee arrangement. It must be noted here that such arrangement for contingent fee are limited only to civil matters. It is not allowed in criminal matters.[98] In *Oyekanmi v. NEPA*,[99] Uwaifo, J.S.C stated thus:

> A legal practitioner is entitled to make a written agreement with his client in respect of any professional business done or to be done by him for a sum: See S.15(3)(d) of the Legal Practitioners Act, 1975 (the Act). Such agreement should appear fair and ought to be such that was not made under circumstances of suspicion of an improper attempt by the solicitor to benefit himself at his client's expense: see *Scarth v. Rutland* (1866) LR 1 CP 642; *Clare v. Joseph* [1907] 2 KB 369 at 376. Such an agreement is usually jealously regarded by the court and the tendency is to lean in favour of the client and put the burden of justifying its propriety on the legal practitioner. However, settlement of a bill of costs between a solicitor and a client upon a special agreement precludes an order being made upon application for taxation. The agreement must first be set aside by action before the matter of taxation can be reopened: see *Re Whitcombe* (1844) 14 L.J CH.19. Of course there would be occasions where, although no real contract could be founded on by a legal practitioner, there might be quasi-contract or other circumstances giving rise to fees claimed on a quantum meruit basis.

k. **Duty not to Represent Himself in Court:**
Opene JCA, said:

It is pertinent to observe that there is nothing wrong for a legal practitioner to represent himself in a matter before the Court but common sense and experience dictate that it is better for him to engage the services of another lawyer. This is so because in many cases, the emotion and sentiments could becloud his reasoning and vision that he could not easily see things as any other lawyer could see them. This is exactly what has happened to the respondent in this case. He did not only display this in the way and manner that he argued his first brief but also in the oral argument before this Court. [100]

l. **Counsel of Law and not Counsel of Fact:**
Tobi JCA (as he then was) said:

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[96] Per Ademola, CJF in *Abuah v. Legal Practitioners Committee* (1962) 2 N.S.C.C 175 at 177.
[97] Per Edozie, J.C.A *in Oloko v. Ube* (2001) 15 WRN 116 at 129.
[98] Rule 50 (2) RPC, 2007
[99] (2000) 15 NWLR (pt. 690) 414 at 431 para C-E
[100] Per Opene, J.C.A in *Habib (Nig) Ltd v. Oyebanji* (1998) 13 N.W.L.R (pt. 580) 71 at 86.

But can he do that in law, in the absence of a counter affidavit? He cannot. Counsel is counsel of law and not counsel of facts in a case he appears as counsel *qua* advocate. The facts of the case are not his. The facts of the case belong exclusively to his client. The only function of counsel is to place his professional knowledge at the disposal of his client in the management of the witnesses in the evidential scene in the Court. Although there are instances when counsel may give evidence in a matter in which he is counsel *qua* advocate, the present case is not such an instance. Counsel here is not doing his own case but that of another person. Accordingly, I shall discountenance all the statements of the learned Senior Advocate made outside the legal position of the matter.[101]

I have said it a couple of times that counsel is basically counsel of law and not counsel of facts. The facts of the case are not his. They belong exclusively to his client. The client is the owner of the facts and he is the only person who can make use of them. He can call witnesses to assist him in giving the facts to the Court by way of evidence. As the owner of the facts, it is within his province so to do. But counsel cannot, on his own, relate facts, which have not earlier been given in evidence. Counsel can only relate evidence already given and vindicate such evidence by the application of the law. While he, counsel could be said, to 'own' the law the facts are not his but those of his client.[102]

m. **Legal Practitioner as a Litigant in Criminal Cases:**
Obaseki JSC said:

In the case of a barrister who is standing trial for an offence, he is a party in the comprehensive sense of the term and unless the Criminal Procedure Law Code or Act in Nigeria otherwise provides his proper place during trial is in the dock and he cannot stay at the bar fully robed to stand his trial and or address the Court whether he is conducting his case in person or is represented by Counsel. Similarly, a barrister who conducts criminal prosecution on his own behalf is entitled to no other privileges than as an ordinary person. This has been declared so since the case of *Queen v. Phillips* (1843 – 1846) 1 Cox Criminal Cases 17. [103]

n. **Where Legal Practitioner is a Retired Judicial Official he Cannot Appear or Sign Pleadings:**
The Rules provides that:

… a judicial officer ceasing to hold office who intends to exercise his Constitutional right of defending himself and prosecute his case whether in civil or criminal matter, is not a legal practitioner before that Court or Tribunal; he is a party *simpliciter*. He does not wear wig and robe, he does not sit in the well of the Court reserved for legal practitioner i.e the bar to all intent and purpose remains a litigant *simpliciter*. … any person who has held office as a judicial officer shall not on ceasing to be a judicial officer for any reason whatsoever thereafter appear or act as a legal practitioner before any court of law or tribunal in Nigeria.[104]

o. **Appearance by a body corporate to conduct its case in person:**
Belgore JSC on this said: "A body corporate may not be able to conduct its case in Court without being represented by counsel owing to its inability to appear in person.[105]

p. **Duty in Matters of Joint Plaintiff/Joint Action:**[106]
In joint actions the parties may employ one counsel.[107] Or where they have briefed several Counsels, they must act together. But *Fadayomi's case* does not

[101] Per Tobi, J.C.A *in Soy Agencies v. Metalum Ltd* (1991) 3 N.W.L.R (pt. 177) 35 at 43 paras B-C.
[102] Per Tobi, J.C.A in *Okoya v. Santilli* (1991) 7 N.W.L.R (pt. 206) 753 at 768 paras B-C.
[103] Per Obaseki, J.S.C in *Fawehinmi v. NBA (No.1)* (1989) 2 N.W.L.R (pt. 105) 494 at 533 paras B-C.
[104] Rule 6(3)&4) RPC; S. 292 (2) of the 1999 Constitution (as amended)
[105]Per Belgore, J.S.C in *Atake v. Afejuku* (1994) 9 N.W.L.R (Pt. 368) 379 at 416. See also *Frinton & Walton U.D.C v. Walton & District Sand & Mineral Co. Ltd & Or* [1938] 1 All E.R 640 and *Scriven v. Vescott (Leeds) Ltd* (1908) 53 Sol. JO. 101".
[106] Rule 28(1) RPC

[107] See *Williams v. Nwosu*(2001) 3 NWLR (Pt.700) 376 at 385 & 386, *Fadayomi v. Sodipe*(1986) 2 NWLR (Pt.25) 736

prohibit joint plaintiffs from having different counsel. It merely stresses that where the plaintiffs have different counsel, the counsel must act together. [108]

q. **Counsel Appearing Against Previous Clients:**
A Counsel should not accept a brief where it is clear that the services to be rendered flow out of or are closely connected with the previous services he had rendered to the opposing side.[109]

In Adesetan v. Thomas & Co,[110] the Court held that a legal practitioner who prepared a deed of mortgage for a former client, retains his power of attorney and confidence and so cannot appear against the client in litigation that arises from the previous transactions, such as one for the purpose of setting aside the deed of mortgage.

This rule may not apply to a general retainer.[111]

However, in *Onigbongbo Community v. Minister of Lagos Affairs & 31 Ors,*[112] the Supreme Court said that:

> … where a Counsel was employed as a senior to lead in an appeal, the subject matter of which was purely one of title to land, we see nothing wrong in appearing on the other side on another occasion on a matter which was manifestly a matter for the Court to determine which of the two sides is entitled to compensation in respect of the same land in an acquisition, or the extent of compensation payable to each side.

For example, in *Ikpasa v. Regd. Trustees of Presbyterian Church of Nigeria,*[113] *w*here the former legal adviser of the respondent appeared as counsel for the appellant against the respondent, his former employers, the court held that the legal practitioner was not barred. There was no conflict of interest in the case.

r. **Legal Practitioners should maintain Client's Account:**
(a) The lawyer should refrain from any action where for personal benefit or gain, he abuses or takes advantage of the confidences reposed in him by his client.
(b) money of the client or collected for the client or other trust property coming to the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstance be comingled with his own or be used by him.
Salami JCA on this said:

> If Mr. Ibegbu is not complying he is revelling in the commission of illegality …. It is unfortunate if Mr. Ibegbu does not have a client's account and indulges in spending clients' moneys as if it were his own personal money since all money that goes to him are presumably paid into his own personal account" [114]
> He probably had in mind the provisions of Section 20 of the Legal Practitioners Act CAP 207 of the Laws of the Federation of Nigeria, 1990. The Section which is on safeguard for clients deals with accounts and records for clients' moneys with legal practitioners".[115]

By the combined effect of Rule No. 23 of RPC and S.20 & 21 of the LPA, the legal practitioner is required to maintain client's account. The enormous benefit from this is that any money in their account is not subject to set off by the Bank for the legal practitioner's other liabilities due to the Bank.

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[108] Per Ogebe, J.C.A in *Re: Eke* (1993) 4 N.W.L.R (Pt. 286) 176 at 185 para G.
[109] *Onye v. Harri Clem (Nig.) Ltd* (1998) 7 NWLR (Pt.557) 64; *Anatogu v. Iweka II* (1995) 8 NWLR (Pt.415) 547.
[110] CCHCJ/3/72
[111] *Ayorinde v. Oki* CCHCJ/8/73/9
[112] (1971) 7 N.S.C.C 136
[113] (2006) 3 NWLR (pt.966) 106
[114] Per Salami, J.C.A in *Anatogu v. Anatogu* (1998) 6 N.W.L.R (pt. 552) 42 at 61-62 paras H-A.
[115] Per Salami, J.C.A in *Anatogu v. Anatogu* (1998) 6 N.W.L.R (pt. 552) 42 at 42 at 60 para E.

G. Giving Evidence by Counsel:[116]

Generally – Duty to Withdraw if he is Aware he is Likely to Testify as a Witness;

i. **Evidence of Counsel in a Case he is Appearing Professionally:**
Brett JSC, said:

> On behalf of Agbuku Angula, who was acquitted, defending counsel gave evidence in support of an *alibi*. He was a competent witness in law, but for the reasons which were stated in *Horn v. Rickard* [1963] N.R.N.L.R 67, and approved by this Court in *Obadara v. President Ibadan West District Grade B Customary Court* [1965] N.M.L.R 39, we think it highly undesirable that counsel should give evidence in a case in which he is appearing professionally. If his evidence is thought necessary he should decline to appear as counsel. Since counsel's evidence helped to secure the acquittal of his client, and did not affect any of the appellants, it cannot be said that any prejudice has resulted, but this is another example that should not be followed.[117]

ii. **Counsel's Duty to a Party where he is the Best Witness for all the Parties – he should Testify:**
Okezie JCA, on this stated:

> I will not conclude this judgment without commenting on the role played in this case by Mr. R. L. Yusuf the learned counsel who conducted the case for the defendant in the Court below. In paragraphs 4-6 of the statement of claim, his conduct in the entire transaction was mentioned. He is the Legal Adviser of the defendant and at one time acted as solicitor for both parties in the transaction. He should have been the best witness for the parties and in fact on 25/1/91 when hearing was to commence, Mr. Hamman learned counsel for the plaintiff told the Court that Mr. Yusuf was his first witness. He knew all the facts and he should have been of immense assistance to the Court but he failed to do so.[118]

iii. **Duty not to sign documents without reading:**
Coker JSC, said: "Thus, on the plaintiff's side there was a counsel who was so outrageously negligent as to sign a legal document without reading it."[119]

iv. **Duty to Personally Depose to a Counter-Affidavit when Allegations are made Against him in an Affidavit:**
Akpabio JCA, stated:

> I have carefully considered all the arguments canvassed above by learned counsel on both sides and must say first that learned counsel for the respondent (Obi Akpudo Esq) should have filed a proper counter-affidavit sworn to by himself, instead of delegating such an important task to a mere law clerk. The result is that throughout the entire 9 paragraph counter affidavit filed in the case, there was no averment that the land in dispute is not known as and called "Plot 95 Ashito Land, Enekwa Sumpu Obosi" as alleged by the appellant, but rather that it was called so and so. This Court therefore has no alternative than to hold that the averment in paragraph 2 of appellant's affidavit in support is admitted, and that the same piece of land was involved in both suits No. 0/291/93 the previous suit and 0/343/94 (the present suit).[120]

v. **Where a Legal Practitioner had Previously Adjudicated or Investigated a Matter.** A lawyer shall not accept employment as an advocate in any matter upon the merits of which he had previously acted in a judicial capacity.[121]

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[116] Rules 20(1) RPC
[117] Per Brett, J.S.C in *Gachi & Ors v. State* [1965] NMLR 333 at 336.
[118] Per Okezie, J.C.A in *Aunam (Nig.) Ltd v. U.T.C (Nig.) Ltd* (1995) 4 N.W.L.R (pt. 392) 753 at 765 paras G-H.
[119] Per Coker J.S.C in *Akinwumi & Ors v. Idewu & Ors* [1969] 6 N.S.C.C 299 at 300.
[120] –Per Akpabio, J.C.A in *Onyeke v. Harriclem (Nig.) Ltd* (1998) 7 N.W.L.R (pt.556) 64 at 71 paras D-F.
[121] Rule 6, Rules of Professional Conduct, 2007

In *Oyewole v. Asa & Ors,*[122] a former president of a customary court was barred from arguing a matter on appeal in which he had previously heard, though no judgment had been delivered while acting as president in the Customary Court.

This rule also applies to partners in the law firm of a former judicial officer.[123]

Rule 6(1) of RPC provides: "A lawyer shall not accept employment as an advocate in any matter upon the merits of which he had previously acted in a judicial capacity."

vi. **Ethical Conduct Expected from a Counsel in Blunder:**
Salami JCA (as he then was) stated the principle this way:

> In civil cases, I am quite aware that counsel has a right to choose what witnesses to call and in what order to call them: *Briscoe v. Briscoe* [1966] 2 WLR 204 and *M. Alao v. Bello Akanbi* (1989) 3 N.W.L.R (pt. 108) 118, 153. It is in pursuant to that right that he sought the writ and if he found he had blundered it is in the best interest of justice and of his client too to gracefully admit his error and make necessary amendment rather than seeking to bluff his way through.[124]

vii. **Duty on Communication with a Judge in a Matter Before the Court:**[125]
Lewis JSC, said:

> We must first, firmly and clearly, deprecate the practice of counsel addressing, during the course of a hearing, any private communication concerning the matter before the Court to the Judge hearing the action. The proper course would have been for him to act only with full notification to the counsel for the plaintiffs.[126]

5. Consequence for Breach of Duty of Care by a Legal Practitioner

Options Open to a Client for a Legal Practitioner's Improper/Unprofessional Discharge of Duty:

In England and in some other jurisdictions under the Commonwealth, courts have the power to enforce summarily undertakings given by legal Practitioners. It is part of the general jurisdiction of the courts to control legal practitioner's obligations, which is not confined to any fixed classification. The jurisdiction is not for the purpose of enforcing legal rights, but is to ensure honourable conduct on the part of the court's officers.

In Nigeria, while the courts have inherent powers to deal with the issue of contempt on the face of the court, the disciplinary jurisdiction for the legal practitioner is vested in the Body of Benchers established by Section 3 of the LPA 2004. By virtue of Sections 8 and 9(1) of Act No. 21 1994 which amended the principal Act – LPA 2004 [127] by inserting a new Section 10. The new Section 10(1) (b) provides:

> "That the exercise of disciplinary jurisdiction over members of the legal profession and over students seeking to become legal practitioners" vests on the Body of Benchers."

Act 21 of 1994 also establishes the Legal Practitioners' Disciplinary Committee (LPDC) in Section 9[128] by amending the principal Act, and inserting a new Section 11.

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[122] Suit No. HOS/2A/75 of 20/1976 High Court of Osogbo [1977] 2 OYSHC (Pt.1) 139
[123] – *Kehinde Adeniyi v. Balogun Adama*(1976) 4 ODHC 1 p.2.
[124] Per Salami, J.C.A in *Famakinwa v. Unibadan* (1992) 7 N.W.L.R (pt. 255) 608 at 623 paras B-C.
[125] Rule 35(5) RPC
[126] Per Lewis, J.S.C n *Evoyoma v. Aregba* [1968] 5 N.S.C.C 151 at 155-156.
[127] (or 1990 Act)
[128] [S.11(1) LPA 2004 as amended by Act 21]

Disciplinary Procedure for Erring Lawyers

Petitions against the Legal Practitioner to the NBA

The client may petition against an erring lawyer to the Nigerian Bar Association for professional misconduct. Rule 3 of the Legal Practitioners' Disciplinary Committee Rules 2006 Cap 207 stipulates that a petition against a legal practitioner can be made to the following categories of persons;

- (a) The Chief Justice of the Nigeria
- (b) The Attorney General of the Federation
- (c) The President of the Court of Appeal or a presiding Justice of the Court of Appeal
- (d) The Chief Judge of the High Court of a state, Federal High Court or High Court of the FCT
- (e) The Attorney General of a State
- (f) The Chairman of the Body of Benchers
- (g) The President of the NBA or the Chairman of a Branch of the NBA.
- It must be noted here that for the petition to be competent, it must relate to the conduct of the legal practitioner in a professional capacity.[129]

In re G. Idowu, the Supreme Court restated this principle

> In fact there was no evidence that Mr. Idowu would normally give legal advice; if anything, the evidence was to the contrary. From the evidence before the tribunal, we do not think he was acting in any professional capacity to secure the services of a surveyor. He might have misused his official position; and if it was alleged that he stole the money received in any way, the Tribunal, at this stage, would not be the proper forum to try his misconduct. We fail to see that any case has been proved against Mr. Idowu affecting his professional conduct in a professional capacity.[130]

Upon receipt of a petition by the NBA, either directly from the petitioner or if any petition is referred by any of the persons listed above to the NBA President/Secretary, the NBA will notify the affected legal practitioner; giving him twenty one (21) days to respond to the petition. If the response from the legal practitioner is satisfactory, the NBA will notify the petitioner and the legal practitioner of their satisfaction that there has not been any breach of professional duty.

Where however, the NBA is not satisfied with the response of the legal practitioner (or where the legal practitioner fails to respond), the NBA will refer the matter to one of its investigative committees to investigate while also notifying the legal practitioner of the reference. The investigative committee may request from the legal practitioner and the petitioner, to present further evidence in support/defence of the petition either by oral or written response to the allegations. Upon conclusion of their investigations, the investigative committee will turn in their report to the NBA.

If the report of the investigative committee indicts the legal practitioner, the NBA will send the report with all the supporting documents to the Secretary of the LPDC, with the letter conveying the report specifically indicating that the NBA has made out a prima facie case of professional misconduct against the legal practitioner. The NBA will also simultaneously inform the legal practitioner of the findings and decisions and also serve copies of the report and all letters relating to the matter.

The Legal Practitioners' Disciplinary Committee (LPDC) may proceed to hear and deliberate on the matter[131] in accordance with its rules (and in public),[132] which may be in the presence or

[129] *See Okike v. LPDC*. (2005) 15 NWLR (pt 949), 471, *NBA v. Kayode Alabi* (unreported) BB/LPDC/052 delivered 22/2/2011
[130] [1971] 1 NSCC 147
[131] Rules 3 and 4 Legal Practitioners' Disciplinary Committee Rules, 2006

absence of the legal practitioner, provided adequate notice had been given to the legal practitioner. The Directions of the LPDC are appealable to the Supreme Court.[133]
In *Okike v. LPDC*[134] Uwais C.J.N stated thus:

> In my opinion, the provisions of Section 233 subsection (1) of the 1999 Constitution have not in any way ousted the jurisdiction either expressly or impliedly of the Supreme Court to hear appeal from the Disciplinary Committee. Therefore in the absence of any express provision in the Constitution which outs the jurisdiction of the Court, we should be very reluctant to hold that the jurisdiction has been ousted. See *African Newspapers of Nigeria & Ors. v. The Federal Republic of Nigeria*[135]; *Anakwenze v. Aneke & Ors*[136] and *A-G. of Lagos State v. A-G of the Federation*[137]. This court does not readily oust its jurisdiction. In principle, it jealously protects the jurisdiction.

It must be noted here that: the Supreme Court has the power when deciding on Appeals from LPDC to confirm, increase or reduce the directions of the LPDC".[138]

Based on the above decision it would seem that all appeals from the decision of LPDC goes to the Supreme Court.

However, the Supreme Court in *Jide Aladejobi v. Nigeria Bar Association,*[139] (a five (5) man panel) held that the decision of the Court in *Okike v. LPDC*[140] was delivered *per incuriam*. In the *Aladejobi's* case the Supreme Court stated (mistakenly in my humble view) that the issue of competence of the Supreme Court was not a matter in issue and so was not considered in the *Okike's case*. Accordingly, it held that all appeals emanating from LPDC must go through Body of Benchers Appeal Committee first, before coming to the Supreme Court.

I humble submit with the greatest respect, that the *Aladejobi's* is unfortunate and it is the decision that is reached *per incuriam*, not the the *Okike's* case. The court cited the wrong *Okike's* case. There were two *Okike's* case, number 1 and 2. The actual *Okike's case* the Supreme Court ought to have considered was *Okike v. LPDC (No.1)* which is reported in 2005 2-3 SC 49, where a full panel of seven (7) justices of the Supreme Court, arrived at a unanimous verdict on the jurisdiction of the Supreme Court and accepted the amendment made by Act 21 1994 to the LPA, giving the appellate jurisdiction directly to the Supreme Court.

Thankfully, the Supreme Court has another opportunity to look into the matter in *Rotimi Akintokun v. LPDC* now pending before the Supreme Court. The judgment is being awaited to see what interpretation the Supreme Court may finally place on the above mistake in the 2004 LPA, brought about by the failure of the compilers of 2004 LPA to reflect the amendment by Act 21, 1994 in the revised 2004 LPA.

Section 14 of LPA 2004 provides that where the name of any person has been struck off the roll or a person has been or is deemed to have been suspended from practice, he may make an application for the restoration of his name to the roll or the cancellation of the suspension.[141]

Other Options Open to Clients Seeking Redress against Erring Legal Practitioners

(a) **Damages for Breach of Duty**:
A client who suffers loss as a result of the negligence of a legal practitioner may bring an action for damages against him.

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[132] Rule 13 of LPDC Rules provides that: the proceedings of the Disciplinary Committee including the announcement of the decisions of the Disciplinary Committee shall be held in public
[133] S. 12 of LPA 2004 (as amended) by Decree 21 of 1994)
[134] [2005] 3-4 SC 49 at 67
[135] (1985) 2 NWLR (pt. 6) 137
[136] [1988] 2 NSCC 798 at p.803
[137] [2004] 11-12 S.C 85 at page 112; (2004) 18 NWLR (pt.904) 1 at page 89H
[138] *Ndukwe v. LPDC* (2007) 5 NWLR pt.1026) 1 pg 43-44 paras G-A.
[139] (2013) 15 NWLR (pt. 1376).
[140] (2005) 15 NWLR (pt. 949) 471
[141] See *Re Abuah* (supra).

An action may be predicated on the retainer contract or in tort. If the client proceeds in tort, the heads of damages guiding such an action are likely to be any of the following circumstances:

(a) Loss of opportunity to acquire or renew an interest in land due to the lawyer's error.
(b) Diminution in value of property resulting from the lawyer's erroneous advice or investigation.
(c) Loss of opportunity to bring proceedings due to lawyer's fault if the client's claim is statute-barred, or dismissed for want of diligent prosecution. The same principles will apply in the cases of loss of opportunity to enforce judgment.
(d) Loss of opportunity to defend proceedings due to failure of the lawyer to take appropriate steps.
(e) Loss of some other financial advantage e.g. inability to recoup money loaned or loss in price or of earnings.
(f) The loss of putting right the lawyer's mistake where this is reasonably possible.
(g) Liability to third parties e.g. for additional rates or interest.
(h) Criminal liability e.g. where the crimes is one of strict liability.
(i) Wasted expenditure e.g. in lawyer's fees. Or in an abortive transaction, but the client cannot at the same time claim for anticipated gains.
(j) Incidental expenses
(k) Inconvenience and distress[142]

It should be noted that:

If a Counsel handles the case of his client carelessly or negligently and creates a situation that imposes an injury on his client such Counsel places himself at the risk of being sued for professional negligence by his clients. It seems that the approach hitherto followed by the Courts that the blunders or sins of counsel, should not be visited on litigants is unduly over-sheltering the indolence and negligence of our colleagues at the bar[143]

Exceptions to the Rule of Liability

Duty in Court- when acting as a barrister, section 9(3) LPA, 2004 spells out the exception. The duty was espoused in the case of *Rondel v. Worseley*[144] which I had previously cited in this paper.

Free Legal Service – Section 9(2) LPA 2004: a legal practitioner may not be liable in negligence for breach of duty of skill and care if he gives his services gratuitously; without consideration. However, having undertaken to give the service, the legal practitioner has a duty to the client independent of contract. This is dealt with in Section 9(2) LPA, 2004 where the legal practitioner may exclude or limit his liability in negligence when rendering gratuitous services.

b. **Likely Criminal Infraction for role Played in Client Matter**

(a) Criminal breach of trust.[145]
(b) The legal practitioner may be charged as an accomplice with his client if his work furthers the commission or leads to commission of any crime.

[142] See Jackson & Powell, *Professional Negligence*, (5th edn., Sweet & Maxwell, 2002) 665.
[143] Per Oguntade, J.C.A. in *Ayua v. Gbaka* (1997) 7 N.W.L.R. (pt. 514) 659 at 671 paras C-D, also see LPA S.9.

[144] [1967] 3 All E.R. 993

[145] *Re Abuah* (supra)

However, by Section 19(3) of the Banking and other Financial Institutions Act, 2004, it is provided that a nominee of a person to a bank may not be liable for the criminal conduct of the person. For instance, a legal practitioner as a nominee of a client in charge of a bank, may not be liable for the likely criminal conduct of his client.[146] That explains why the Supreme Court in *Kotoye's* case accepted the principle of constructive trust in shareholding, where the beneficiaries lack current capacity to hold the shares.

c. The client has the option to sue the legal practitioner for breach of contract.[147] The legal practitioner cannot by contract limit his liability for this breach of duty unless his services are offered gratuitously. Section 9 (1) & (2) of the Legal Practitioners' Act, 2004 and Rule 18(2) of the RPC are apt in this respect. For example, Rule 14(5) RPC provides that: "Negligence in handling of a client's affairs may be of such a nature as to amount to professional misconduct".

d. **Client's not Responsible for the Negligence of His Solicitor:**

> It occurs to us that the failure to comply with the conditions of appeal is entirely due in this case to the fault of the appellants' solicitors and to shut them out from the hearing of the appeal on the merits is to hold them personally responsible for the negligence of their solicitors. [148]

e. **Costs Incurred Unjustifiably by Client may be Paid by Counsel:**

> In assessing costs I have taken into account the fact that the appellant has only partially succeeded in the appeal and the matter mentioned earlier as to the exhibits copied in the record. On this latter point the Court may in future feel disposed to order that costs incurred unjustifiable in this manner be paid by counsel. [149]

f. **Action for Account - Client's Money paid out by a Solicitor without Authority is Recoverable in an Action for Account:**
On this Ademola CJN said:

> We cannot say that we share the views of the learned judge in this respect about the reason for payment of the amount, but in our view no solicitor should pay out any part of his client's money without authorization. In this case the family was unaware of his secret bargain and it was immaterial whether or not Chief Ashogbon on his own agreed that these men should be compensated for their trouble. It was plainly a matter for the family, and if it was felt that their work for the deserved to be compensated, there should be nothing secretive about it. We are unable to justify a solicitor paying out moneys from his client's funds without proper authorization. The defendant must refund the amount. [150]

6. Consequences of Breach of Duty by Client to the Legal Practitioner

Remedies open to the Legal Practitioner for client's breach of duty/contractual obligations:

Legal Practitioner's Right to recover his Professional Fees:

Section 16 of the LPA, 2004 and similarly worded sections under the previous Legal Practitioners Act, had been judicially considered in *Aburime v. NPA* [1978] 4 S.C. 111, 127-128 (S.C.) and *Oyo v. Mercantile Bank (Nig.) Ltd* (1989) 3 N.W.L.R (pt. 108) 213. The result of the authorities is that a legal practitioner is entitled to sue for his remuneration after one month of delivery to the client of his bill of charges.

Legal Practitioner's Right to Lien for the Recovery of Professional Fees:

(1) At common law a solicitor has two rights which are termed liens. Bairamian, JSC summarised them this way:

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[146] See *Kotoye v. Saraki*(1994) 7 NWLR (Pt.357) pg 414 at 444 paras C-D.
[147] See *Edozien v. Edozien*(1993) 1 NWLR (pt 272) 678 at 702 per Karibi Whyte JSC
[148] Per Coker, J.S.C in *Doherty & Anor v. Doherty* (1964) 3 N.S.C.C. 213 at 214.
[149] Per Taylor, F.J in *Adeleke v. Adewusi* (1961) 2 N.S.C.C 30 at 34.
[150] Per Ademola, CJN in *Odeku v. Dawodu* & Ors (1971) 7 N.S.C.C 140 at 143.

> (1) The first is a right to retain property already in his possession until he shall have been paid costs due to him in his professional capacity; and the second is right to ask the Court to direct that personal property recovered under a judgment obtained by his exertions stands as security for his costs of such recovery (2). In addition, a solicitor has by statute a right to apply to the Court for a charging order or property recovered or preserved through his instrumentality in respect of his taxed costs of the suit, matter, or proceeding prosecuted or defended by him. [151]

He said further:

> (2) "In passing, it is desirable to note that in the Court's view learned counsel for the appellant advanced a dangerous proposition that a solicitor may spend money to which he claims a lien, and if it turns out that the amount he thought he was entitled to was more than was justly due to him, he could refund the excess. His proper course is to have his remuneration settled whether by negotiation with his client or by appropriate proceedings in the first instance.[152]

Rule 17 (3)(a) of RPC 2007 provides that a legal practitioner may "acquire a lien granted by law to secure his fees and expenses". See for example, Rule 29(3)(b)(iii) which provides for right of debriefed lawyer to hold unto title documents until paid. The rule is however subject to court rules.

(2) The lawyer can sue the client in contract for payment of professional fees and expenses based on the contract of employment/retainer-

S.16 (1) of the LPA, 2004 gives the legal practitioner the right to approach a court to sue for his fees/expenses subject to his meeting the conditions stipulated in section 16(2) LPA, 2004.

When a Solicitor can Claim on *Quantum Meruit:*

Uwaifo, JCA (as he then was) on this stated:

> The appellant who has rendered services up to a point before he was debriefed can in my view, and on the principle stated in *Aburime's case* claim on a *quantum meruit*. The whole essence of such a claim is to submit to the discretion of the Court to award reasonable remuneration on a *quantum meruit*. [153]

Right of Counsel to Refuse to Act on Behalf of His Client:

Uwais, JSC, said on this:

> The plaintiff's counsel might have had a good reason for rejecting the service. His fees or instructions might not have been perfected, or no instructions were at all given to him by the plaintiff. In such a case counsel will be justified to refuse to do anything on behalf of a client that had failed to perform his (the client) obligations to the counsel.[154]

Limits to Confidentiality:

(i) If information is not confidential
(ii) If information given for the purpose of communication to third party
(iii) If information given where Legal Practitioner is acting for several persons, communication vis-à-vis parties\Dispute with client, lawyers can use fact to defend self e.g. disciplinary proceedings

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[151] Per Bairamian, J.S.C in *Sagoe v. Queen* (1963) 3 N.S.C.C 233 at 236.
[152] Per Bairamian, J.S.C in *Sagoe v. Queen* (1963) 3 N.S.C.C 233 at 237
[153] Per Uwaifo, J.C.A in *Oyo v. Mercantile Bank (Nig.) Ltd* (1989) 3 N.W.L.R (pt. 108) 213 at 230 paras B-C.

[154] *Odutola v. Kayode* (1994) 2 N.W.L.R (pt.324) 1 at 15 paras C-D

(iv) Information in furtherance of an illegal purpose or leading to commission of crime.[155]

7. **Conclusion:**

In line with global trends, the market is increasingly unlikely to tolerate expensive as well as slow and inefficient lawyers. For those lawyers who cannot identify or develop the distinctive capabilities to which I refer, I certainly do predict that their days are numbered. The legal world is over-resourced, and it will increasingly drive out inefficiencies and unnecessary friction and, in so doing, we will indeed witness the end of outdated legal practice and the end of outdated lawyers.

At this stage, I would want to sound one positive note. Lawyers compared with other professionals usually fare better in keeping clients' fidelity. Can any of us ever imagine leaving his money in private bank accounts in the custody of his banker(s) after death? Or deposit one's title documents with one's estate agent(s) in the hope that any or both of these professionals will exhibit necessary fidelity to one's beneficiaries? I am sure most will not take such (calculated) risks. Breach of confidence is plausible to imagine. But with the legal practitioner, it is a risk worth taking, even if it is possible to accuse him of likely over charging the deceased's estate. One thing is sure, the legal practitioner's first reaction is never to take all for himself or to deprive the beneficiaries. He is a man who normally sees to the keeping of fidelity as his primary duty. On this note, we need to begin to work on the public perception of lawyers.

[155] See Rule 15 RPC