

## RETHINKING PROFESSIONAL NEGLIGENCE BY LEGAL PRACTITIONERS IN NIGERIA<sup>1</sup>

### Abstract

*The legal profession is a noble one. It is treasured all over the world. Clients entrust their lives, wealth, property, rights and secrets on Legal Practitioners and in return expects diligence, dedication, confidentiality, honesty and professionalism. The relationship between a client and a Legal Practitioner is a fiduciary relationship which creates duties and obligations on both parties. The Legal Practitioners Act 1975 (LPA) and the Rules of Professional Conduct 2007 (RPC) are the major laws in Nigeria that create the duties of a Legal Practitioner to his clients and establish the basis for his liability where he fails to perform those duties within the standard required by the law. The Legal Practitioners Act specifically lays down the statutory framework and foundation for the liability of legal practitioners in Nigeria for professional negligence. The Rules of Professional Conduct further establishes the duties of legal practitioners to their clients and the general rules of professional conducts, which when adhered to will significantly reduce the occurrence of professional negligence in the Nigerian legal community. To this effect, professional negligence in the Nigerian legal profession is not a mere matter of common law, but a specie of the tort of negligence that has received statutory recognition. Thus, like the Medical Doctors and Accountants, Legal Practitioners are not immune from liability arising from professional negligence. Therefore, this paper examined the legal framework regulating professional negligence of Legal Practitioners in Nigeria. It adopted the Doctrinal Legal Research Methodology. The paper found that the statutory recognition of professional negligence of Lawyers in section 9 of the LPA is not adequate in addressing the issues surrounding such species of tort in Nigeria. It concluded that lack of up-to-date laws, poor enforcement of the RPC, judicial barriers and inadequate implementation of the law are the major factors that weaken the force of liability for professional negligence in the country. It recommended some amendments to the existing legal framework and other methods to ensure compliance.*

**Key words:** *Negligence, Ethics, Professional Responsibility, Legal Practice*

### 1.0 Introduction

All over the world, professionals in all areas of works including Medical Doctors, Accountants, Engineers, Architects and Legal Practitioners are expected to exercise a reasonable standard of care in their work.<sup>2</sup> Being a Professional means the possession of the requisite skills and expertise in the relevant field. Most of these professionals have rules of professional conducts and ethics regulating their affairs and the way they discharge their duties to their clients. Such duties are expected to be carried out with utmost care and diligence. Where a professional fails to exercise due care and diligence in his profession, he can be held liable for negligence.

In Nigeria today, the legal profession is gradually decaying with many legal practitioners touting for cases and engaging in a lot of shabby practices just to raise more income to live up to the financial expectations from the society. Some legal practitioners take more interest in obtaining new cases than in handling with competence and dedication the one they have already obtained and fully paid for by clients. In this part of the world, it is common for a legal practitioner to appropriate a client's money or engage in banter with a client over lack of dedication in exercising his duty. These practices not only breach

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<sup>2</sup> O Odeyinde, "The Legal Practitioners Professional Negligence in Nigeria: Evaluation of the General Liability and Immunity Afforded On Legal Practitioners in The Conduct Of Their Client's Case", [2021](1)(5) *Scholarly Journal of Advanced Legal Research*:27-40

lawyer-client relationship but also corrupts the legal profession which is noble and traditionally built on ethics, etiquette and decorum.<sup>3</sup>

Thus, section 9(1) of the Legal Practitioners Act establishes the statutory framework for professional negligence in the Nigerian legal profession. This provision makes a legal practitioner liable for the damages suffered as a result of his negligence in discharging his professional duties as a legal practitioner. The provision also makes void a clause in the retainership agreement or any such contract that operates to exclude him from liability or limit same. Furthermore, Rule 55(1) and (2) of the Rules of Professional Conduct for Legal Practitioners 2007 (RPC) provides stiff penalty for any Legal Practitioner that acts in breach or contravention of any of the rules in the RPC. However, in most cases, clients choose to seek redress in court against the legal practitioner by suing for professional negligence.<sup>4</sup> Thus, the court may accordingly hold the legal practitioner liable where the essential elements of professional negligence have been proved on a preponderance of evidence by the client plaintiff.

However, there are some problems facing the law recognizing professional negligence of legal practitioners in Nigeria. One major problem is the difficulty in proving professional negligence in the adversarial system. To succeed in an action for professional negligence, for example, the law requires a plaintiff to prove that the legal practitioner has fallen short of the standard which a reasonable legal practitioner would have adopted if placed in the same circumstance. This would require expert evidence from another legal practitioner, and in the legal profession, Lawyers are protective of their learned brothers and may not be willing to give evidence that will expose their colleagues to liability. There are also the problems of prolonged delay in justice delivery in Nigeria, the expenses and technicalities of the judicial process. Poor implementation, enforcement and regulation of the professional rules and ethics of the legal profession constitute another problem that constitute a serious setback in curtailing professional negligence in the Nigerian legal profession.

In the Nigerian legal system where a Legal Practitioner can practice both as a Barrister and Solicitor as opposed to the position in England, negligence is bound to occur. Also, in a legal system where a Legal Practitioner upon being call to the Nigerian bar can legally open a law office and start practicing on his own without undergoing a mandatory pupillage, negligence is also bound to occur. Also, in a legal system where Legal Practitioners are called to practice law generally without limitation as to the area of specialty as it is practised in the medical profession, negligence is also bound to occur, especially where the Legal Practitioner undertake a matter in the field in which he does not have legal knowledge, competence, and experience. In the face of all these problems, many clients have continued to grumble and die in silence over the injury they suffer as a result of the negligence of their lawyer. This problem is becoming prevalent in recent times where the cost of seeking redress is becoming more expensive. Because there is

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<sup>3</sup>*Yenkarti v. Abbah* (2017) LPELR-43032(CA)

<sup>4</sup> O C Oko, 'Lawyers' Professional Negligence in Nigeria' [1991](5) *Nigerian Juridical Review*

little or no deterrence, most legal practitioners have continued to neglect their rules of ethics and professional conduct in the pursuit of more income and relevance in the profession.

Based on the foregoing, the paper therefore seeks answers to following questions:

- i. What duties do the Legal Practitioners owe to their clients in the legal profession in Nigeria?
- ii. What is the standard of care expected of Legal Practitioners in discharging their professional obligations in Nigeria?
- iii. What are the legal and institutional frameworks regulating the conducts of the Legal Practitioner in the legal profession in Nigeria?
- iv. To what extent are Legal Practitioners liable in professional negligence to their clients?
- v. What are the problems facing the liability of legal practitioners for professional negligence in Nigeria?

In answering these questions, we have adopted the doctrinal legal research methodology for the purpose of analysing case laws, doctrines, and legal documents relating to the area of research.

## **2.0 Conceptual Clarifications**

This section of the paper clarifies some of the keywords and themes that are recurrent in discussing the subject.

### **2.1 Negligence**

The term ‘negligence’ comes from the root word ‘neglect’ which means the omission of proper attention to a person or thing, whether inadvertent, negligent or willful.<sup>5</sup> The Oxford Advanced Learners’ Dictionary defines the term negligence as ‘the failure to give somebody or something enough care or attention.’<sup>6</sup> For a legal definition, the Black’s Law Dictionary defines it as the ‘failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation or as any conduct that falls below the legal standard established to protect others against unreasonable risk of harm...’<sup>7</sup> Lord Atkin gives the *locus classicus* definition of negligence in the case of *Donoghue v Stevenson*<sup>8</sup> where he stated thus:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

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<sup>5</sup> B Garner, *Black’s Law Dictionary* (10<sup>th</sup>edn., Thomson Reuters 2014)1195

<sup>6</sup> A S Hornby, *Oxford Advanced Learner’s Dictionary* (10<sup>th</sup>edn., Oxford University Press 2020)1043.

<sup>7</sup> Garner (n 1)1196

<sup>8</sup> (1932)AC 562.

## 2.2 Professional Negligence

The term professional negligence is a species of the tort of negligence which arises where misconduct is committed in the course of practicing a profession.<sup>9</sup> Professional negligence has also been defined as ‘a lawyer’s failure to render professional services with the skill, prudence and diligence that an ordinary and reasonable lawyer would use under similar circumstance.’<sup>10</sup> In most cases, the term professional negligence has been used interchangeably with infamous conduct and the court has described it as a conduct which will be regarded as reasonably disgraceful and dishonourable by other members of the legal profession or which will bring the legal profession into disrepute.<sup>11</sup> Furthermore, in the case of *Okike v LPDC*,<sup>12</sup> the Supreme Court has held that a legal practitioner can only be held liable for infamous conduct where he was representing or acting for a client or himself in a professional capacity when the misconduct occurred. Thus, where the misconduct complained of took place in any other circumstance other than in the course of his professional employment, a charge of infamous conduct will fail.

## 2.3 Legal Practitioners

In Nigeria, the term ‘legal practitioner’ is used to refer to Barristers and Solicitors of the Supreme Court of Nigeria unlike what is obtainable in English where an individual can either practice as a Barrister or a Solicitor but cannot practice as both. Three categories of people could practice as Legal practitioners in Nigeria under the Legal Practitioners Act (LPA). Section 24 of the LPA defines a legal practitioner as a person entitled to practice as a barrister and solicitor either generally or for the purpose of any particular office or proceedings. The foregoing provision recognises three categories of persons that can qualify as legal practitioner in Nigeria and they are; those entitled to practice generally, those entitled to practice for the purpose of any particular office and those entitled to practice for the purpose of any particular proceedings.

A person shall be entitled to practice generally if, and only if, his name is on the Roll of Legal Practitioners kept by the Chief Registrar of the Supreme Court of Nigeria.<sup>13</sup> The LPA further provides that a person shall be entitled to have his name on the Roll if, and only if he has been called to the Bar by the Body of Benchers and he produces a certificate of call to the Bar to the Registrar of the Supreme Court.<sup>14</sup> A person shall be entitled to be called to the Bar if he produces a qualifying certificate from the Nigerian Law School to the Body Benchers and further satisfies the Body of Benchers that he is of good character, fit and proper to be called to the Nigerian Bar. Under this category, a person does not automatically become a legal practitioner upon being called to Bar by the Body of Benchers but becomes a Legal Practitioner upon enrolment at the Supreme Court after the Call. It is important to note further that The Council of Legal Education (CLE) can waive the requirement for the attendance of the course at the Law School before issuing

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<sup>9</sup> E. Malemi, *The Nigerian Legal Method*; Lagos, Princeton Publishing Co, 2012, 350.

<sup>10</sup> Garner (n 1)1103.

<sup>11</sup> *Ndukwe v. LPDC & Anor* (2007) LPELR-1978(SC)

<sup>12</sup> (2005) LPELR-2450(SC)

<sup>13</sup> Legal Practitioners Act 1974 Cap L11 LFN 2004, s2(1).

<sup>14</sup> *ibid.*, s7(1).

qualifying certificate.<sup>15</sup> However, the power to exempt is very exceptionally exercised under the Professional Bodies Special Provisions Act 1972 and the Professional Bodies (Legal Profession) Exemption Order 1973.

The second category of Legal Practitioners in Nigeria includes those entitled to practice by virtue of their office. By the provision of section 2(3) of the LPA, A person for the time being exercising the function of any of the following offices is entitled to practice as a Legal Practitioner in Nigeria:

- i. The office of the Attorney General, Solicitor-General or Director of Public Prosecution of the Federation or of a state;
- ii. Such office in the public service of the Federation, or of a state as the Attorney General of the Federation or of a State, as the case may be

The third category of legal practitioners in Nigeria includes those persons entitled to practice by the warrant of the Chief Justice of Nigeria (CJN) for a particular proceeding.<sup>16</sup> This category applies to foreigners, especially from common law jurisdictions. Section 2(2) of the LPA empowers the CJN to issue warrant to any applicant to practice as a Barrister and Solicitor in Nigeria after he is satisfied that the applicant's country has a legal system similar to that of Nigeria and has met other criteria to warrant such permit from the CJN.

## **2.4 Professional Ethics**

The term professional ethics or legal ethics has been defined as ‘the standard of professional conduct applicable to members of the legal profession within a given jurisdiction such as Nigeria.’<sup>17</sup> For the purpose of this long essay, professional ethics or legal ethics includes the set of rules, standards and guidelines recognized by the law, such as the Rules of Professional Conduct 2007, to regulate the conducts of lawyers in Nigeria the violation of which can expose the affected lawyer to appropriate disciplinary measures provided by the law.

## **3.0 Historical Evolution of the Legal Profession in Nigeria**

The discussion on the historical development of legal profession in Nigeria can be conveniently divided into three stages namely; the 1876 to 1914 stage, the 1914 to 1962 and the 1962 till date stage.

The first statute to regularize the whole machinery of administration of justice in parts of Nigeria was the Supreme Court Ordinance of 1876. It was the first ordinance that stated the qualifications of a legal practitioner in Nigeria and fused the legal profession in the colony by providing that every English-trained barrister or solicitor was upon enrolment in Nigeria, qualified to practice as a barrister and solicitor in Nigeria. Under this first stage, the categories of persons entitled to practice as Barrister and Solicitor in Nigeria are; professionally qualified lawyers who were called to the English Bar; article lawyers who

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<sup>15</sup> Legal Education (consolidation) Act 1976, s2(a) & 2(b).

<sup>16</sup> *Awolowo v. Usman Sarki, Minister of Internal Affairs and the Attorney-General of the Federation* (1962) LLR 177

<sup>17</sup> Garner (n 1) 1031.

were persons that have served for five years in the law office of a practicing legal practitioner in Nigeria or Gold Coast and passed the CJN examination;<sup>18</sup> and local attorneys which included persons licensed to practice as lawyers for a particular period of time usually six months subject to another renewable and local attorneys.<sup>19</sup>

However, the grant of license to local attorneys who lacked professional trainings in the practice of the law resulted in a protest organized by the professionally qualified lawyers and that stopped the issuance of license to the local attorneys. Furthermore, following the amalgamation that happened in 1914 and the subsequent repeal of the 1876 Supreme Court Ordinance by the Supreme Court Ordinance of 1943, new rules were established on the qualifications for legal practitioners in Nigeria. The new rule abolished the use of article lawyers and local attorneys and retained the professionally qualified lawyers with an additional admission into Nigeria by the CJN after fulfilling certain conditions.<sup>20</sup> However, one of the major problems with this stage of development is that the training of lawyers was done in England, whose legal system is different from that of Nigeria.<sup>21</sup>

In response to this challenge, an Unsworth Committee was set up in 1959 to make recommendations on how best to develop the legal profession in Nigeria.<sup>22</sup> The recommendations made this committee led to the promulgation of the Legal Education Act and the Legal Practitioners Act in 1962. Thus, the Nigerian Law School was established by the CLE in 1962. From this period, the individuals entitled to practice in Nigeria include those called to the Nigerian Bar after going through the vocational training at the NLS, those entitled to practice by CJN warrant and those entitled to practice by virtue of their position.

#### **4.0 Legal and Institutional Framework for Professional Negligence by Legal Practitioners In Nigeria**

The paper will now discuss the legal and institutional framework for professional negligence by legal practitioners in Nigeria. This refers to the laws and institutions that actually provide for the duties of legal practitioners and professional negligence thereof.

#### **4.1 Constitution of the Federal Republic of Nigeria 1999 (as amended) Cap C23 LFN 2004**

The Constitution of the Federal Republic of Nigeria 1999 (as amended)<sup>23</sup> is the fundamental law, made by the people.<sup>24</sup> Section 1(1) of the CFRN 1999 makes provision for the supremacy of the CFRN 1999 where it is expressly stated that this Constitution is supreme and its provisions shall be binding on all persons and authorities within the

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<sup>18</sup> Supreme Court Ordinance 1876, s73.

<sup>19</sup> *ibid.*, s74.

<sup>20</sup> Council of Legal Education, *Professional Ethics and Skills: Practice Handbook* (Yaliam Press Ltd 2019)82.

<sup>21</sup> *ibid*

<sup>22</sup> *ibid*, 84.

<sup>23</sup> Cap C23 LFN 2004 (as amended).

<sup>24</sup> *ibid.*, The Preamble.

territory of Nigeria. Section 4 of the CFRN 1999 empowers the National Assembly to make laws for the peace, order and good of Nigeria.

Also, item 49 of the Exclusive Legislative in Part I of the Second Schedule to the CFRN 1999 vests in the National Assembly the exclusive legislative power to make laws on matters relating to professional occupations. The listing of professional occupation in the Exclusive Legislative List implies that only the National Assembly can legislate on matters on professional matters to the exclusion of the State Houses of Assembly. However, this power may be delegated to legal institutions under the statute creating them and such law is known as subsidiary legislation or delegated legislation.<sup>25</sup> For instance, the National Assembly did not directly make the Rules of Professional Conduct 2007; but the Bar Council issued this subsidiary legislation by virtue of the power vested in it by the enabling statute from the National Assembly.

#### **4.2 Legal Practitioners' Act 1975 Cap L11 LFN 2004**

This is the primary legislation regulating legal practitioners in Nigeria. Section 9(1) of the LPA is the major provision of the LPA that has direct relevance and significance to this long essay. It provides that a legal practitioner shall not be immune from liability for damage attributable to his negligence while acting in his capacity as a legal practitioner. This is the statutory fulcrum around which professional negligence in the legal profession in Nigeria revolves. However, under section 9(2) of the LPA, a lawyer offering a *pro bono* service is excused from liability arising from professional negligence tied to that case.

#### **4.3 Rules of Professional Conduct 2007**

This is the Rules of Professional Conduct for Legal Practitioners in Nigeria. It is a subsidiary legislation made by the Bar Council pursuant to its statutory power of making and revising the rules of professional conduct of Lawyers in Nigeria. The RPC is not a mere code of ethics and moral principles, it is a Code of Conduct that has legal force and legally binding on all legal practitioners in Nigeria as was held in the case of *Nigerian Bar Association v Akintokun*.<sup>26</sup>

The first and paramount duty of legal practitioners in Nigeria is captured in Rule 1 of the Rules of Professional Conduct 2007 (RPC) which states that a legal practitioner shall uphold and observe the rule of law, promote and foster the course of justice, maintain a high standard of professional conduct. Rule 1 of the RPC also implores legal practitioners in Nigeria not to engage in any conduct which is unbecoming of a legal practitioner, such as engaging in any form of negligence mixing up client's money with personal money. Part B of the RPC particularly deals with the rules that regulate the relationship between a legal practitioner and his client and these will be explained in Chapter Four of this long essay.

#### **4.4 Constitution of the Nigerian Bar Association 2015 (as amended)**

The Constitution of the Nigerian Bar Association is not a statutory instrument. It is not a subsidiary legislation to the Legal Practitioners Act. It is a pure and simple private

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<sup>25</sup> E. Malemi, *The Nigerian Legal Method*; Lagos, Princeton Publishing Co, 2012, 227.

<sup>26</sup> (2006) 13 NWLR [pt. 996] 167

document which the members of the Nigerian Bar Association were entitled to draw up in exercise of their right to provide a constitution for the Association to regulate its affairs. It was accorded its due superior position by the Legal Practitioners Act, 1975 in the conduct of the affairs of the Nigerian Bar Association by the General Council of the Bar.<sup>27</sup> This legal instrument is relevant as it regulates the admission of the membership of legal practitioners into the Nigerian Bar Association (NBA). Article 3(6) of the NBA Constitution charges NBA to maintain the highest standard of professional conduct, etiquette and discipline of legal practitioners in Nigeria. Thus, the NBA Constitution vests the association with the power to receive complaints from clients against the professional misconduct of a legal practitioner with the aim of commencing the disciplinary measures against such legal practitioner.

#### **4.5 Legal Education (Consolidation) Act 1976**

The Legal Education (Consolidation) Act 1976 is the main legislation that regulates the education of Lawyers in Nigeria. It was first established in 1962 following the recommendations of the Unsworth Committee set up in 1959. Section 1 of the Legal Education (Consolidation) Act 1976 re-established the Council of Legal Education (CLE) as the proprietor of the Nigerian Law School, which is the only institution in Nigeria responsible for the vocational training of lawyers on professional ethics and skills and procedural law in Nigeria.

#### **4.6 International Code of Ethics 1956 (as revised)**

The International Code of Ethics (ICE) was adopted by the International Bar Association first in 1956 and subsequently revised in 1988. The ICE has a total of 21 Rules which regulate the conduct of legal practitioners at the international level. This ICE does not replace the Codes of Professional Conduct that apply at the domestic levels. Instead, they complement the domestic ones and further establish an international legal framework for the professional regulation of legal practitioners. For instance, Rule 1 of the ICE provides that “a lawyer who undertakes professional work in a jurisdiction where he is not a full member of the local profession shall adhere to the standards of professional ethics in the jurisdiction in which he has been admitted. He shall also observe all ethical standards which apply to lawyers of the country where he is working.”

#### **4.7 International Principles on Conduct for the Legal Profession 2011**

International Principles on Conduct for the Legal Profession 2011 is a framework under the auspices of IBA setting out a collection of principles for the purpose of providing a generally acceptable framework on the Code of Conduct for lawyers in any part of the world. The preamble of this International Principle on Conduct for the Legal Profession declares that lawyers throughout the world are specialised professionals who place the interests of their clients above their own, and strive to obtain respect for the Rule of Law. This is further reaffirmed in Rule 5 which provides that a lawyer shall treat client interests as paramount, subject always to there being no conflict with the lawyer’s duties to the court and the interests of justice, to observe the law, and to maintain ethical standards

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<sup>27</sup>*Fawehinmi v NBA & Ors* (1989) LPELR-1259(SC)

## **5.0 Institutional Framework for Professional Negligence By Legal Practitioners In Nigeria**

These legal frameworks discussed above, have created some institutional framework. These are hereby discussed:

### **5.1 The Judiciary**

Due to the roles judiciary plays in the society, it is often regarded as the last hope of the common man. The LPA vests jurisdiction in the State High Court in the judicial division where the legal practitioner in question usually carries on his practice or usually resides or in which the client in question usually resides or has his principal place of business or, in the Case of a Legal Practitioner authorized to practise by the warrant of the CJN, the High Court of the State in which the proceedings specified in the application for the warrant were begun.<sup>28</sup> Thus, an aggrieved client may approach this court to seek redress against a legal practitioner over professional negligence.

### **5.2 General Council of the Bar**

The General Council of the Bar or Bar Council is another regulatory body that plays essential role in maintaining the integrity and nobility of the legal professions. One of the core functions of the Bar Council is to ensure that the core values of the profession are observed. To uphold these core values, the Bar Council is thus empowered to enact rules of professional conduct and that resulted in the enactment of the Rules of Professional Conduct for Legal Practitioners in Nigeria 2007 which establishes *inter alia* the duties of the lawyer to the client, the breach of which may give rise to a suit for professional negligence.

### **5.3 Nigerian Bar Association**

The Nigerian Bar Association (NBA) is the association of all legal practitioners in Nigeria. Once a person has been called to bar, there is automatic membership for such person. The above is not incompatible with the right to freedom of association, because it is based on the prior agreement to become a legal practitioner. Thus, every legal practitioner is a member of the association. With respect to the misconduct of legal practitioners, the disciplinary action of NBA is merely investigative in nature – it can only investigate a complaint and write a report to that effect for necessary disciplinary action. NBA is responsible for the maintenance of the honour and independence of the Bar in its relation with the judiciary and the executive; maintenance of the highest standards of professional conduct, etiquette and discipline; promotion of good relations among members of the NBA; promotion of legal education and law reforms, etc.

### **5.4 Council of Legal Education**

The Council of Legal Education (CLE) is established by the Legal Education (Consolidation) Act pursuant to the Unsworth Committee Recommendation 1959. As stated earlier, the CLE is the proprietor of the Nigerian Law School with legal personality capable of suing or being sued in its corporate name.<sup>29</sup> The functions of the CLE include;

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<sup>28</sup> LPA, s.24.

<sup>29</sup>*Okonjo v Council of Legal Education* Unreported: Appeal No: FCA/L16/78

the formal education of aspirants to the bar, the continuing legal education of legal practitioners and such other powers as it may deem fit for carrying out the powers given to them. The CLE therefore plays essential role in training and continuous training of lawyers on both legal education and professional ethics which will promote efficient lawyer-client relationship and reduce significantly the occurrence of professional negligence in the legal profession.

### **5.5 Body of Benchers**

The Body of Benchers is established by section 3 of the LPA and it is a body corporate with common seal and perpetual succession.<sup>30</sup> It is the body of legal practitioners of the highest distinction in the legal profession in Nigeria. The following are the functions of the BOB:

- i. The Body of Benchers is responsible for the formal call to bar of persons seeking to become legal practitioners.
- ii. It exercises disciplinary jurisdiction over legal practitioner and aspirant to the bar.
- iii. It prescribes call fees to be paid by aspirants to the bar.
- iv. It issues certificate of call to bar to new wigs
- v. It prescribes the number of dining terms an aspirant to the bar shall keep before he is qualified for call to bar.
- vi. It ensures that an aspirant to the bar is of good character. In pursuance of this power, the Body has stipulated that every aspirant shall be sponsored by at least two members of the Body of Benchers.

### **5.6 Legal Practitioners Disciplinary Committee**

Just like the name implies, the Legal Practitioners Disciplinary Committee (LPDC) is a statutory body established by the LPA as a disciplinary measures for dishing out disciplinary measures against defaulting legal practitioners in Nigeria. Essentially, the LPDC's broad function is to consider and determine allegation of misconduct brought against legal practitioners and the CJN is empowered to make rules for the procedure of the committee. In pursuance of this power, the LPDC Rule 2006 has been established and provided the procedural rules in the discipline of legal practitioners in the country. It should be noted that the LPDC takes the status of the Court of Appeal and this implies that appeal against the decision and findings of the LPDC goes to the Supreme Court to the exclusion of all other courts in Nigeria or elsewhere.

### **6.0 Duties of Legal Practitioners To Their Clients**

Having looked at the legal and institutional framework, let us now take a closer look at the duties of legal practitioners to their clients.

#### **6.1 Duty of Honesty**

The duty of honesty is known as a fiduciary duty which implies that one party (the lawyer) is superior to the other (the client). In this case, the lawyer is presumed to be superior to

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<sup>30</sup> LPA, s.3(2).

his client, hence must be honest in dealing with the client. The duty of honesty includes the following:

- i. Duty not to act as a legal practitioner when he had previously acted as a judge over the matter<sup>31</sup>
- ii. Duty to represent the client within the bounds of law;<sup>32</sup>
- iii. Duty not to file frivolous and malicious suit;<sup>33</sup>
- iv. Duty not to breach agreement with client<sup>34</sup>
- v. Duty to disclose conflict of interest;<sup>35</sup>
- vi. Duty of dedication and devotion to the cause of his client. The lawyer's time must be dedicated towards the performance of the client's brief<sup>36</sup>
- vii. Duty not to act as an executor/administrator/trustee and a solicitor at the same time. When a legal practitioner is an executor of a property, the law states that he cannot act as solicitor in respect of the same property<sup>37</sup>
- viii. A legal practitioner who prepares a will is not expected to be beneficiary under such will. However if the benefit or gift coming to him is not much, then such gift can stand.<sup>38</sup>
- ix. A lawyer shall inform the client that his claim or defence is hopeless if he considers it to be so.<sup>39</sup> Where an action is statute-barred and counsel did not advise his client not to take the action, he could be indemnified in costs.<sup>40</sup>

The lawyer also has a duty not to act for two or more clients with opposing interest at the same time.<sup>41</sup> In *Onyeke v Harridem Nig Ltd*,<sup>42</sup> the Court of Appeal stated the following: "the court frowns upon the idea of a counsel appearing for one party, say the plaintiff, at the early stage of a transaction and then turning around at a later stage of the same transaction to appear for his opponent. but, where the transactions are different, the court will not restrain a counsel from changing sides."

The legal practitioner also owes his client the duty to account and report promptly when dealing with client's property.<sup>43</sup> The legal practitioner must duly account for money received on behalf of client. The legal practitioner must not mix such money or property with his. A legal practitioner in this regard is expected to open three separate accounts; personal account, trust account, and client's account. Money belonging to the client should be paid into client's account. A Lawyer has the duty to open a separate Bank account for the keeping of money received on behalf of a client and should make no withdrawal from

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<sup>31</sup> Rules of Professional Conduct 2007, rule 6(1); *NBA v Fawehinmi* (1986) 2 NWLR (Pt 21) 224

<sup>32</sup> RPC, rule 15

<sup>33</sup> *ibid*, rule15(3)(b) RPC

<sup>34</sup> *ibid*, rule 18(2) RPC

<sup>35</sup> *ibid*, rule 17

<sup>36</sup> RPC (n 6) rule 14

<sup>37</sup> *NBA v Koku* (2006) 11 NWLR (Pt 991) 431

<sup>38</sup> *Farely v Conigan* (1896) 7 QJ 105

<sup>39</sup> RPC (n 4) rule14(2)(e)

<sup>40</sup> *Bello Raji v X* (1946) 18 NLR 74

<sup>41</sup> RULE 17(1) & (4) RPC

<sup>42</sup> (1998) 7 NWLR (Pt. 556) 64

<sup>43</sup> RPC (n 1) rule 23(2) RPC, *NBA v Akintokun* (2006) 13 NWLR (Pt. 996) 165

it unless permitted by the Rules. A lawyer who breaches this provision could have his name struck off the roll even though there has been no criminal trial or conviction. A bank cannot have recourse to the Legal Practitioners client's account to recover any indebtedness of the legal practitioner to the bank unless the indebtedness arose in connection with the account.<sup>44</sup>

## **6.2 Duty of Care and Skill**

This duty includes the duty not to handle a matter he knows he is not competent to handle.<sup>45</sup> Although Lawyers are presumed to know the law, but the truth is that no Lawyer knows all the law in every field of human endeavour. Thus, a Lawyer should not handle a matter he is not skilled or competent in.

Furthermore, under rule 21(1) of the RPC, a Lawyer has a duty not to withdrawal from his professional employment except for a good cause. In addition to good cause exception, when the counsel has satisfied himself that he has no argument to offer in support of his own case, it is duty at once to say so, and to withdraw altogether. The counsel is the master of the argument and of the case in court and should at once retire if he finds it wholly unsustainable, unless indeed he has express instructions to the contrary.<sup>46</sup> Similarly, a lawyer has a duty to thoroughly investigate and marshal out facts stated by client including interview of potential witnesses for his client or for the opposing side.<sup>47</sup> It is not inadvisable that counsel should meet his client's witnesses for the first time in court.

In the absence of express limitation, an instruction to a lawyer confers upon him the power to do all such things as he considers necessary within the scope of his instructions to obtain the most favourable result for the client. Thus, he can compromise a suit or withdraw an appeal without further reference to his client. He can determine what accommodations to be granted to the opposing lawyer to the exclusion of his client, provided the merits of the case are unaffected and the client is not prejudiced. The basis of the Counsel's right (not duty) to control incidents of trial is the presumption of the client's confidence in the counsel.<sup>48</sup>

## **6.3 Duty of Professional Secrecy and Confidentiality**

Communications between lawyer and client in the normal cause of professional employment are privileged.<sup>49</sup> A legal practitioner is not to reveal secret or confidence of his client, use secret or confidence of his client to his client's disadvantage, use client's secret and confidence to his advantage or that of a third party, unless with client's consent after full disclosure. A lawyer will not be permitted to act against his former client when he has obtained confidential information while acting for him, which would be improper

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<sup>44</sup>*Re A Solicitor* (1952) VLR 385

<sup>45</sup> RPC (n 1), rule 16

<sup>46</sup>*Adewunmi v Plastex (Nig) Ltd* (1986) 3 NWLR (Pt. 32) 767

<sup>47</sup> RPC (n 1) rule 25

<sup>48</sup>*Edozien v Edozien* (1993) 1 NWLR (Pt. 272) 678

<sup>49</sup> Evidence Act 2011, s192(1), RPC, rule19(1) & (2)

and prejudicial to use against him in the service of an adversary. Otherwise, there is no rule that a lawyer cannot act against his former client.<sup>50</sup>

However, there are exceptional circumstances where the duty of secrecy and confidentiality will not apply. These exceptions include the following:

- i. Where the communication is made for the furtherance of an illegal purpose
- ii. Any fact observed by any legal practitioner in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, may be disclosed.<sup>51</sup>
- iii. Where it is permitted to be disclosed by rules of law
- iv. Where it is required by law or court order that the privileged information be disclosed
- v. Where the client consents to disclosure of the privileged information
- vi. Where disclosure is necessary for the prevention of client from committing a crime
- vii. Where it is necessary for the establishment or collection of his fee or to defend himself or his employees or associates against an accusation of wrongful conduct

## **7.0 Liability of Legal Practitioners for Professional Negligence**

In the case of *Ayua v Gbaka*<sup>52</sup> the Supreme Court has held 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 client.<sup>53</sup> However, the liability for the tort of negligence is not automatic, there are ingredients or elements that must be proved to the satisfaction of the court before a legal practitioner can be liable for this species of tort. This segment of this chapter explains these elements and the standard required by the Evidence Act 2011.

Generally, in order to prove the tort of negligence, a claimant must prove that the defendant owed him a duty of care, that the duty of care was breached by the defendant, and that the breach resulted in damage to the claimant.<sup>54</sup> Furthermore, in order to find a legal practitioner liable for professional negligence, it must be shown that what he did is what his professional colleagues would say is a mistake he ought not to have made. Put differently, the action of the legal practitioner must be such that falls short of the standard of a reasonably skillful legal practitioner placed in the same circumstance.

The foregoing elements of negligence must be proved conjunctively on a balance of probability or preponderance of evidence by virtue of the provision of section 134 of the Evidence Act 2011. This means that where the party or client gives evidence as to the claim before the court, judgment will be given to the party that the evidence tilts in favour of in the case.<sup>55</sup> In determining either balance of probability or preponderance of evidence,

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<sup>50</sup>*Onigbongbo Community v Minister of Lagos Affairs* (1971) JELR 44107

<sup>51</sup> Evidence Act 2011, s192(1)

<sup>52</sup> (1997) 7 NWLR (Pt. 514) 659

<sup>53</sup> *ibid*, 671, para D

<sup>54</sup>*Ighreriniove v SCC Nig. Ltd* (2013) 10 NWLR (Pt. 1361) 138; *Enyika v SPDC* (1997) 10 NWLR (Pt. 526) 638

<sup>55</sup>*Usman v KSHA* (2007) 11 NWLR (Pt. 1044) 148

the trial Judge is involved in some weighing by resorting to the imaginary scale of justice adumbrated.<sup>56</sup>

For example, in the case of *Lawson v Siffre*,<sup>57</sup> a solicitor advised his client to invest money on a certain mortgage. He however failed to investigate the mortgagor's title. As a result, the client lost his money to that investment. In a claim for professional negligence and damages by the client, the court held that the solicitor was liable in negligence. Similarly, in *Ross v Caunters*,<sup>58</sup> it was held that a solicitor in drawing up a will for a client owes a duty of care to a proposed beneficiary under the will and may be liable in damages for negligence.

### 7.1 Defences to Professional Negligence in the Legal Profession

When a legal practitioner breaches his duties, he shall be liable for negligence and this represents the general rule of law that excludes immunity of lawyers from professional negligence.<sup>59</sup> There are exceptions such as where the lawyer is engaged in *pro bono* services under section 9(2) and where the negligence arose in court litigation within the provision of section 9(3) of the LPA. These exceptions afford immunity to legal practitioners in Nigeria. There are three main reasons for the establishment of these exceptions. The first reason is the need for lawyers to be fearless and independent in conducting their clients' case in the court. The second reason is the need to forestall endless litigation, as every lawyer who losses a case, will invariably be sued by the client. The third reason is that legal practitioners are by the calling of their profession regarded as responsible men, on whom the vice of negligence or inadvertence is a rare attribute

According to the Black's Law Dictionary, a *pro bono* service is a service that is rendered for public good. It is a service that largely uncompensated especially regarding free legal services performed for the indigent or for a public cause. Section 9(2) of the LPA clearly provides that liability for professional negligence under section 9(1) of the LPA may be limited where the legal practitioner in question is not rewarded for his services either by way of professional fees, disbursement or otherwise. This clearly shows that the decision of the court in the English case of *Lawson v Siffre*<sup>60</sup> has been overtaken by section 9(2) LPA. In this case, the court held the legal practitioner liable in negligence, rejecting his defence that he did charge for his legal services. In other words, where a Lawyer renders *pro bono* service, he may limit or exclude his liability in negligence by an express contract. Thus, where he fails to limit or exclude his liability, he will be liable for negligence notwithstanding that the services were rendered gratuitously

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<sup>56</sup> *Mogaji v Odofin* (1978) 3-4 SC. 91.

<sup>57</sup> (1932) 11 NLR 113

<sup>58</sup> (1980) Ch 297

<sup>59</sup> O Odeyinde, 'The Legal Practitioners Professional Negligence in Nigeria: Evaluation of the General Liability and Immunity Afforded On Legal Practitioners in The Conduct Of Their Client's Case' [2021](1)(5) *Scholarly Journal of Advanced Legal Research*:27-40

<sup>60</sup> (1932) 11 NLR 113

Under section 9(3) of the LPA, a legal practitioner may not be liable for negligence for the conduct of proceedings in the face of the court. Thus, there is immunity from action in negligence on lawyers in respect of what is done or omitted to be done in the face of the court. Thus, in the light of the law, a legal practitioner is liable in negligence, unless he comes within the immunity accorded to barristers and advocates in court proceedings or in work closely connected with advocacy.<sup>61</sup>

## **8.0 Challenges Facing the Liability of Legal Practitioners for Professional Negligence In Nigeria**

The following are some of the challenges facing the liability of legal practitioners for professional negligence in Nigeria:

### **8.1 Lack of Specific Legislation on Professional Negligence in Nigeria**

Under Nigerian Laws, there are no specific statutory provisions yet, that apportion any type of damage for the breach of any of these duties by a lawyer.<sup>62</sup> This is an area of the Nigerian law that needs urgent reform. There is a general feeling among those that patronize legal services in Nigeria that lawyers cannot be made liable in negligence.

### **8.2 Retention of Barristers Immunity Clause**

In Nigeria, the rule of law exempting lawyers from negligence suits in the conduct of proceedings in court has been adopted in Section 9(3) of the LPA. The current law in Nigeria is that lawyers cannot be sued for professional negligence in the conduct of proceedings in a court, tribunal or other body. This rule was borrowed from England. However, today, England, America and Canada have abolished this immunity clause and Nigeria should follow.

### **8.3 Poor Implementation of the Laws and Rules Regulating the Conducts of Lawyers in Nigeria**

Without adequate implementation, laws are nothing but a dead wood and at best a toothless bulldog that barks when it is expected to bark. Most lawyers in Nigeria engaged in unethical and unprofessional practices in gross violation of the Code of Conduct because they know after all, nothing will be done as no one enforces the law. This problem also helps to encourage professional negligence in Nigeria.

### **8.4 Difficulty in Proving a Negligence of Legal Practitioner**

In proving that a defendant lawyer is negligent, the claimant is required to prove that other members of the legal profession of ordinary skill and competence and placed in the same circumstance would do something different and more to avert the injury that has occurred. This may require him to bring an expert witness preferably another legal practitioner, who are not easy to procure and easily convinced to give evidence against his professional colleague. This problem often prevents affected clients from pursuing a case of professional negligence in Nigeria.

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<sup>61</sup> E Malemi, *Law of Tort* (2<sup>nd</sup>edn., Ikeja: Princeton Publishing Co.2013) 355

<sup>62</sup> S M Safiyanu, 'Liability Of Legal Practitioners In Nigeria: The True Position Of The Law' [2020](4)(18) *International Journal of Social Sciences*:103-115

### **8.5 Judicial Barriers**

Although the court is the last of the common man, its efficacy is losing its confidence in the Nigeria of today. There are a lot of judicial barriers that prevent injured parties from seeking redress in court such as procedural delay, legalism, high cost of justice and legal representation, and judicial corruption.

### **9.0 Findings and Recommendations**

This paper found among other things that the relationship between a legal practitioner and a client is a fiduciary relationship that gives rise to duties and obligations, especially on the part of the legal practitioner who occupies the superior position in this relationship. Thus, the lawyer owes his client three classes of duties namely; duty of honesty, duty of care and skill, and duty of secrecy and confidentiality.

It further found that in exercising the foregoing duties, the law does not require a legal practitioner to be a super hero. The standard of care required of him is that of a reasonable prudent legal practitioner of ordinary skill and competence in that area of law.

It is important also to state that we found that basically, the Legal Practitioners Act 1975 and the Rules of Professional Conduct 2007 are the major laws that govern professional negligence of legal practitioners in Nigeria.

It is intrinsic to point out that the liability of a legal practitioner for professional negligence is neither automatic nor absolute. The claimant must prove that the Lawyer owed him a duty of care, that the Lawyer breached that duty of care and he (client) has suffered injury as a result of that breach. However, even after proving these on a preponderance of evidence, the Lawyer may be allowed to limit or escape liability in *pro bono* cases and in legal proceedings in the face of the court.

Importantly, we found that there are some problems facing the law on the liability of legal practitioners for professional negligence in Nigeria and these include poor implementation of the law, retention of the Barrister's immunity clause, judicial barriers, difficulty in proving professional negligence in Nigeria and the lack of specific legislation on professional negligence in Nigeria.

Based on the foregoing findings, the paper therefore, makes the following recommendations:

- i. That the National Assembly should enact or expand current legislation on professional negligence in Nigeria covering, especially the liability of legal practitioners in Nigeria.
- ii. That the National Assembly should amend the Legal Practitioners Act and delete section 9(3) as such immunity clause has become archaic.
- iii. That the General Council of the Bar should amend the Rules of Professional Conduct 2007 to reflect modern realities in the practice of the law, and provisions should be made for the adequate enforcement of the provisions of the RPC

- iv. A reduction in the difficulty of proving professional negligence in Nigeria would be helpful. As such, the courts should be more liberal and less legalistic.
- v. Finally, the court should be more proactive in determining cases involving professional negligence to avoid unnecessary delays.

## **10.0 CONCLUSION**

Section 9 of the LPA provides the statutory flavour for the liability of Lawyers for professional negligence in Nigeria and their specific exceptions. The RPC also provides the rules of professional conditions regulating the relationship between a lawyer and his client. However, there are some problems facing these provisions such as judicial barriers, obsolete provisions, poor implementation, inadequate laws and difficulty in proving professional negligence. The provisions of the RPC have also received a widespread criticism due to its weakness in regulating the conduct of legal practitioners in the country. It is hereby submitted that until the RPC and other regulatory laws are reviewed and adequately implemented, the problem of professional negligence will continue to rise in the Nigerian legal profession.