

A LAWYER'S DUTY TO THE COURT

BY ROBERT BELL AND CAROLINE ABELA

- A lawyer shall use tactics that are legal, honest and respectful of courts and tribunals
- A lawyer shall act with integrity and professionalism, maintaining his or her overarching responsibility to ensure civil conduct
- A lawyer shall educate clients about the court processes in the interest of promoting the public's confidence in the administration of justice

INTRODUCTION

A lawyer's duty to the court is a fundamental obligation that defines a lawyer's role within the adversarial system. However, a lawyer's duties are not carried out in a vacuum. While facing financial and competitive pressures, lawyers must fulfill and balance their duties to the client, opposing counsel, the administration of justice and society.¹

In order to facilitate discussion within the profession and, ultimately, provide some guidance to practitioners on the topic of a lawyer's duty to the court and potential conflicts a lawyer may perceive regarding this duty, this paper is divided into three main sections. The first section addresses the question of why a lawyer's duty to the court matters. The section discusses the many factors that relate to the duty to the court and strike at the heart of a lawyer's role vis-à-vis clients and the public interest. The second section of this paper sets out the three key duties to the court, which are:

- (1) to use tactics that are legal, honest and respectful to courts and tribunals;
- (2) to act with integrity and professionalism, while maintaining his or her overarching responsibility to ensure civil conduct; and,
- (3) to educate clients about the court processes in the interest of promoting the public's confidence in the administration of justice.

In order to illustrate these duties and the consequences of their infringement, a number of examples from case law and disciplinary panel decisions are discussed. The third section of this paper addresses whether a lawyer's duty to the court is paramount over his or her other duties. Finally, the paper also contains fact patterns for discussion on the conflict between different duties of a lawyer.

¹ See discussion in Furlong, Jordan "Professionalism Revived: Diagnosing the Failure of Professionalism among Lawyers and Finding a Cure" (Keynote Commentary to be delivered at the Chief Justice of Ontario's Tenth Colloquium on the Legal Profession March 28, 2008) online: <http://www.lsuc.on.ca/media/tenth_colloquium_furlong.pdf> at 2.

(1)

WHY A LAWYER'S DUTY TO THE COURT MATTERS

While it is not difficult to agree that lawyers owe a duty to the court, defining those duties in a comprehensive way is not a simple task. This difficulty relates, at least in part, to the number of concepts that inform or are informed by a lawyer's duty to the court. These concepts include: duties to the public interest, the profession's independence, the limits of zealous representation of a client and the consequences of failing to uphold a lawyer's duty to the court.

With these many related factors that strike at the heart of a lawyer's role, formulating a definition that satisfactorily balances and accounts for all of them is an important challenge. However, formulating a definition is not merely an academic task. It requires a better understanding of a lawyer's duty to the court and having this understanding is meant to serve very practical ends: to help identify and address the conflicts between different duties that may arise over the course of a career in law. Contrary to popular thought, it may not be sufficient to rely only on one's instinct and the notion that "I will know it when I see it".

A lawyer's duty to the court relates to his or her status as a professional who serves, not only clients, but also the public interest. Historically, a professional was distinguished from a tradesperson by a public declaration – demonstrated today by the oath taken at admission to the Bar – to serve others and devote their intellect and efforts to the public good.² This was captured by E.W. Roddenberry's 1953 article *Achieving Professionalism* in which he states:

It was probably inevitable that certain occupations requiring public avowals of faith or purpose should become known as professions. Originally, there were three: medicine, law, and theology. They were dignified by that title and set apart from other occupations because they were more than a livelihood: they represented a calling to some higher satisfaction than a commercial gain...Although rigorous asceticism was seldom required, doctors, lawyers and clergymen demonstrated enough selflessness down through the years to gain general respect.³

² *Ibid.*, at 2-3.

³ Roddenberry, E.W. "Achieving Professionalism" (1953) 44 *Journal of Criminal Law, Criminology, and Police Science* at 109 cited in Jordan Furlong, "Professionalism Revived: Diagnosing the Failure of Professional among Lawyers and Finding a Cure" (Keynote Commentary delivered at the Chief Justice of Ontario's Tenth Colloquium on the Legal Profession March 28, 2008) online: <http://www.lsuc.on.ca/media/tenth_colloquium_furlong.pdf> at 2.

As E.W. Roddenberry suggests, dedication to serving the public good is not a matter of blind altruism. Rather, it is a foundation upon which lawyers earn the confidence of the community and, as a result, are able to play their essential role in the administration of justice.

A lawyer's duty to the court also relates to the profession's independence, or what has been described as "the high degree of autonomy that lawyers experience from external controls other than those imposed by self-regulation."⁴ Self-regulation is a privilege that comes with substantial obligations that are intended to protect the rights of individuals. David W. Scott, Q.C. set this out as follows:

The Bar is independent of the State and all its influences. It is an institutional safeguard lying between the ordinary citizen and the power of the government. The right to counsel, which as mentioned, is inter-related with the law of privilege, depends for its efficacy on independence.

...

In order to fulfill the heavy responsibilities imposed on lawyers as officers of the court, a meaningful and practical environment of independence is essential. It is always within the framework of this relationship that the commercial interest of the client and the lawyer's interests must give way to the overriding duty to the court. This is not an obligation shared by other professionals...Our duties as officers of the court could not possibly be discharged other than in an environment of total independence.⁵

In other words, a lawyer may not be able to act in a way that serves the client's best interests if doing so would put the administration of justice and the community's confidence in the profession at risk.

⁴ Lesage, The Honourable Patrick J. Q.C., "Professionalism: The Tool-Kit (Session VI: How to Protect Your Professional Reputation)" (June 6, 2006) excerpt available online: <<http://rc.lsuc.on.ca/jsp/pageFromCLE/loadPageCleMonth.do?id=46>>.

⁵ Scott, David W. Q.C., *Law Society of Upper Canada Report to Convocation of the Futures Task Force Working Group on Multi-discipline Partnerships* (September, 1998) cited in Paul Perell, "Elements of Professionalism" (Chief Justice of Ontario Advisory Committee on Professionalism June 2002) online: <<http://www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf>> at 5.

A lawyer's duty to the court also helps define the limits of the zealous representation of a client. The need to create ethical boundaries within an adversarial system was addressed by Gavin MacKenzie in his article *The ethics of advocacy*.

*Adversarial tactics tend to escalate despite the best of intentions in a competitive system. Lawyers adopt adversarial tactics...because to refrain from doing so would put their clients at a competitive disadvantage relative to the clients of lawyers who show no such restraint...We should be sceptical of justifications of questionable conduct that appeal to the ethics of the adversary system.*⁶

On one hand, lawyers are asked to "raise fearlessly every issue, advance every argument and ask every questions, however, distasteful..."⁷ On the other hand, a lawyer's duty to the court may take priority over the interests of the client. Without such limits being adequately defined and respected, the profession risks an ethical race to the bottom.

The duty to the court is also important because there are consequences for lawyers who do not uphold it. This is demonstrated by the penalties attached to civil and criminal contempt.⁸ However, contempt does not necessarily apply to all actions that may erode, tarnish or delay the administration of justice. For instance, contempt of court has proven to be a tool of limited use in efforts to curb incivility in the litigation process.⁹ Certainly, less egregious acts may be addressed through cost awards or the Law Society's rules and disciplinary process. This raises an issue that is beyond the scope of this paper, but important nonetheless: whether there are adequate mechanisms for the enforcement of a lawyer's duty to the court. However, before that question can be considered, how we define a lawyer's duty to the court must be set out. The answer to that question is the purpose of this paper.

⁶ MacKenzie, Gavin "The ethics of advocacy", *The Advocates' Society Journal* (September, 2008) at 26-7.

⁷ Commentary to Rule 4.01(2) of the *Rules of Professional Conduct* (Law Society of Upper Canada).

⁸ *Poje v. Attorney General for British Columbia*, [1953] 1 S.C.R. 516 citing *Oswald's Contempt of Court*, 3rd ed., at 36. "...the distinction between contempts criminal and not criminal seems to be that contempts which tend to bring the administration of justice into scorn, or which tend to interfere with the due course of justice, are criminal in their nature; but that contempt in disregarding orders or judgments of a Civil Court or in not doing something ordered to be done in a cause, is not criminal in its nature. In other words, where contempt involved a public injury or offence, it is criminal in its nature, and the proper remedy is committal--but where the contempt involves a private injury only it is not criminal in its nature."

⁹ Perrell, Paul M. "The Civil Law of Civility" (delivered at the Chief Justice of Ontario's Tenth Colloquium on the Legal Profession March 28, 2008) online: <http://www.lsuc.on.ca/media/tenth_colloquium_perrell.pdf> at 12.

(2)

A LAWYER'S DUTY TO THE COURT

As set out above, we have distilled a lawyer's duty to the court to three key duties: (A) to use tactics that are legal, honest and respectful to courts and tribunals; (B) to act with integrity and professionalism while maintaining his or her overarching responsibility to ensure civil conduct; and (C) to educate clients about the court processes in the interest of promoting the public's confidence in the administration of justice. Below is a discussion of these three duties.

(A)

**A LAWYER'S DUTY TO USE TACTICS
THAT ARE LEGAL, HONEST AND RESPECTFUL**

A lawyer has a duty to use tactics that are legal, honest and respectful. This duty is often referred to as the duty of candour. Under this umbrella of a lawyer's duty to the court, lawyers are primarily responsible for ensuring that they do not employ strategies that will mislead the court; this includes misleading the court on evidentiary and legal points as well as making use of tactical strategies that are likely to affect a case.

Misleading on Evidentiary Issues. A lawyer cannot knowingly offer or rely on false evidence or misstate evidence.¹⁰ Misleading the court includes actions such as knowingly misrepresenting or misstating the facts in argument, inducing a witness to state misleading evidence and knowingly maintaining a false pretence.

There are several examples of a lawyer being sued¹¹ or reprimanded for misleading the court on evidentiary issues. In one case, a lawyer misled the Halton Region in terms of what an Order-in-Council said. The lawyer subsequently attempted to rely on what he said was a clerical error by an employee at Halton Region; however, the error was based on the lawyer's misrepresentation. This action, culminated with falsely swearing a *Land Transfer Tax Act* affidavit, and then misleading the court about the validity of such transaction, bought the lawyer disciplinary sanctions.¹² Other examples of misleading the court include: where a lawyer prepared and delivered a letter containing information he knew to be false and which he knew

¹⁰ Law Society of Upper Canada's *Rules of Professional Conduct*, (as of December 7, 2008), rule 4, on-line: <<http://www.lsuc.on.ca/regulation/a/profconduct/>>

¹¹ A client sued its counsel when, among other things, an Anton Piller Order was vacated because the order granting the Anton Piller Order "lacked candour". See *Law Times* (November 12, 2007), on-line: <www.lawtimesnews.com>

¹² *Law Society of Upper Canada v. Punnett* 1997 CanLII 824 (ON L.S.D.C.).

would likely be relied upon by others in civil proceedings, the Law Society imposed sanctions for such conduct.¹³ Similarly, where a lawyer attempted to induce a witness to sign a statement containing a different version of events related to the facts at issue rather than what actually transpired, the Law Society imposed sanctions for inducing this false evidence.¹⁴

An example of the court invoking or enforcing consequences for submitting false evidence includes *R. v. Wijesinha*. In that case, the Supreme Court of Canada upheld a criminal conviction for obstruction of justice after a lawyer had knowingly submitted false declarations to the Law Society.¹⁵ The lawyer was being investigated by the Law Society pursuant to allegations that he offered to pay a referral fee to a police officer each time a new client was retained following a failed breathalyzer test. The lawyer prepared declarations for the police officers and three clients, portions of which were false, and submitted them to the Law Society for its investigation.

Recently in the United States, the Chancery Court in Delaware dismissed a party's motion for reargument because a party misled the Court. The Court stated:

*In essence, the plaintiff sought to have a motion for reargument granted, but not by way of proper argument, but instead on the basis of a misleading recitation of the facts. In this opinion, I conclude that an order of dismissal is the only fitting remedy for this misconduct. When a party knowingly misleads a court of equity in order to secure an unfair tactical advantage, it should forfeit its right to equity's aid. Otherwise, sharp practice will be rewarded, and the tradition of civility and candor that has characterized litigation in this court will be threatened.*¹⁶

More and more, clients, as well as lawyers, are being sanctioned for lawyers' unseemly conduct.

Similar to blatantly offering false evidence, knowingly maintaining false pretences is another way a lawyer can mislead the court. Where counsel knows that the court is operating under a mistaken assumption and actively maintains the false pretence, the lawyer is guilty of misleading the court. An example of such unacceptable behaviour would be a circumstance in which a judge is referring to a witness by an improper title (i.e. referring to a

¹³ *Law Society of Upper Canada v. Hilburn* 1992 CanLII 379 (ON L.S.D.C.).

¹⁴ *Law Society of Upper Canada v. Hainsworth* 1995 CanLII 1768 (ON L.S.D.C.); see also *Law Society of Upper Canada v. Kamin* 1988 CanLII 17606 (ON L.S.D.C.).

¹⁵ *R. v. Wijesinha*, [1995] S.C.J. No. 49.

¹⁶ *Parfi Holding AB v. Mirror Image Internet, Inc.*, 2008 WL 4110698 (Del. Ch., Sept. 4, 2008), p. 915.

Certified General Accountant as a Chartered Accountant or referring to a defendant as a Chief Inspector when he had been demoted to the rank of station sergeant¹⁷) without being corrected. Failing to correct a false statement or pretence is a breach of a lawyer's duty of candour.

Misleading the Court on Legal Issues. Corresponding to our duty not to knowingly mislead the court on evidentiary issues, a lawyer cannot misstate the law. Lawyers are under a positive duty to make full disclosure of all the binding authorities relevant to a case. This means that all such authorities on point must be brought before the court, whether they support or undermine the position being argued by that party, even if opposing counsel has not cited such authority.¹⁸ This element of the duty includes drawing a judge's attention to any legal errors which have been made so that they can be corrected. This duty, however, should not be misconstrued as requiring the lawyer to present a disinterested account of the law. In fact, lawyers are obliged to distinguish those authorities which do not support their client's position. Thus, while a lawyer does not need to assist an adversary and is permitted to be silent on certain matters, they are not permitted to *actively* mislead the court. This obligation applies to contested and uncontested cases.

(B)

A LAWYER'S DUTY TO ACT WITH INTEGRITY AND PROFESSIONALISM WHILE MAINTAINING HIS OR HER OVERARCHING RESPONSIBILITY TO ENSURE CIVIL CONDUCT

Lawyers are officers of the court and as such, must act with integrity and professionalism while maintaining their overarching responsibility to ensure civil conduct. Under this second branch of a lawyer's duty to the court, a number of areas are covered; these areas include: (1) avoiding sharp practice; (2) having respect for the court; and (3) maintaining civility in dealing with others.

¹⁷ See *Meek v. Fleming*, [1961] 2 Q.B. 366.

¹⁸ This requires lawyers to be knowledgeable in the area of law which is at issue. If they do not possess sufficient knowledge of the law at issue, they must take steps to inform themselves.

(1) Avoiding Sharp Practice. Lawyers shall avoid sharp practice, which includes taking advantage or acting without fair warning upon slips, irregularities, or mistakes on the part of other lawyers.¹⁹ A most recent example of sharp practice was displayed in *Schreiber v. Mulroney*.²⁰ In that case, the lawyer for Mr. Schreiber had agreed not to obtain default judgment against Mr. Mulroney. Despite this agreement, Mr. Mulroney was noted in default. In setting aside the default judgment, Justice Newbould stated:

...

(5) [Mr. Schreiber's lawyer] *breached his agreement with [Mr. Mulroney's lawyer] when he sought default judgment. It was an egregious breach that [Mr. Schreiber's lawyer] had no right to commit and Mr. Schreiber had no right to instruct his solicitor to commit.*

(6) [Mr. Schreiber's lawyer] *did not give any advance notice to [Mr. Mulroney's lawyer] that he was going to note the defendant in default or take default judgment proceedings. In the circumstances of this case it is quite obvious that he should have done so. It constituted sharp practice that should not be condoned. While the "Principles of Civility for Advocates" published by the Advocates' Society are not the force of law, the lack of notice to [Mr. Mulroney's lawyer] breached those principles of civility. Incredibly, even after instructions had been given by [Mr. Schreiber's lawyer] to obtain a default judgment, he wrote on July 24, 2007 suggesting that there were still interlocutory matters to be dealt with without disclosing the default proceedings. [Mr. Schreiber's lawyer] conceded that his client had not told him not to provide advance or post notice to [Mr. Mulroney's lawyer], so this is something that [Mr. Schreiber's lawyer] took on his own behalf. This lack of frankness should not be condoned.*²¹

This act of incivility and breach of duty was later sanctioned through cost consequences against the client and his lawyer, personally.

In addition to not taking advantage of slip ups, this umbrella of a lawyer's duty to the court requires that lawyers refrain from influencing the decisions or actions of courts or tribunals by anything other than open persuasion. This rule applies both inside and outside the

¹⁹ Law Society of Upper Canada's *Rules of Professional Conduct*, (as of December 7, 2008), rule 6.03(3), on-line: <<http://www.lsuc.on.ca/regulation/a/profconduct/>>

²⁰ 2007 CanLii 34441 (ON S.C.).

²¹ *Schreiber v. Mulroney*, 2007 CanLii 31754 (ON S.C.) at para. 24.

courtroom. Lawyers may not make allegations of dishonesty unless they have evidence to support such allegations and shall not interfere with the administration of justice.

(2) Having Respect for the Court. Lawyers must respect the court. Respect comes in all forms – preparedness and timeliness are one aspect of consideration. Being familiar with the facts and law applicable to your case, and knowing your client's position is the most fundamental display of respect for the court process. This duty to the court is, in effect, an overlapping duty of competency we have to the client.

A lawyer should not abuse the court process. A lawyer should not unreasonably raise or defend an action for which there is no legal justification.²² In particular, when a lawyer knows there is no merit to the client's claim but pursues the claim for some other reason, this is an abuse of the court process. In the United Kingdom, for example, where there is wilful abuse of process by a lawyer who commences a claim without legal justification, the court awards sanctions against the lawyer. In one case, expenses were awarded against a solicitor who commenced an action which was "manifestly incompetent and irrelevant."²³ In another case, expenses were awarded where the lawyer ought to have known that the argument was insupportable.²⁴

Similarly, a lawyer should not waste time on irrelevancies, even if prompted to do so by the client and should not make frivolous and vexatious objections. In addition, requests for adjournments should not be taken lightly. Adjournments of cases can cause disruption to court sittings, inconvenience to jurors and witnesses and also as a result of the passage of time cause problems for a witness's memory. In essence, adjournments drain court resources.

Not appearing for court is a common failure of a lawyer's duty to the court. It is not an infrequent occurrence when a lawyer does not appear before the court because the client has so instructed the lawyer (either because the claim will not be disputed or the client does not want to spend further money for various reasons). However, despite a client's instructions, it is a lawyer's duty to appear before the court if he or she is counsel of record.²⁵

²² This is not to say that cases with little merit are an abuse of process.

²³ *Manson v. Chief Constable of Strathclyde* as cited in Paterson, Alan and Bruce Ritchie, *Law, Practice and Conduct for Solicitors* (W. Green: Edinburgh, 2006), p.8.

²⁴ *Blyth v. Watson* 1987 S.L.T. 616.

²⁵ *Duca Community Credit Union Ltd. v. Tay*, [1995] O.J. No. 3282 (Gen. Div.).

Being late for court, although highly irritating and a waste of time, is generally not conduct that is considered egregious and neglectful of a lawyer's obligation. However, in our view, tardiness is a breach of a lawyer's duty to the courts because it, among other things, causes delay and disruption to the court process. Tardiness effects the administration of justice. For example, in *LSUC v. Ducas*, the Law Society hearing panel found, *inter alia*, that the lawyer had breached his duty to the court by appearing 25 minutes late for his own motion by which time the motion had been dismissed.²⁶ In a separate incident, the same lawyer called the plaintiff's counsel on the day scheduled for trial to inform him that he could not attend because he had another, previously scheduled hearing. The judge refused an adjournment and granted a judgment against the lawyer's client.

(3) Maintaining Civility in Dealing with Others. When dealing with others, a lawyer shall be courteous, civil and act in good faith with all persons with whom he or she deals with during the course of practice.²⁷ This civil conduct extends to those in the legal profession and to those individuals who are integral to our legal process.

A lawyer's duty to be civil to opposing counsel, includes the following conduct:

- the duty not to engage in acrimonious exchanges with opposing counsel or otherwise engage in undignified or discourteous conduct;
- the duty to be honest and truthful with opposing counsel; and
- to be accommodating and flexible regarding scheduling and routine matters.

Acrimonious exchanges with opposing counsel come in all forms – sarcasm, intimidation, rudeness and unfounded personal attacks. One fitting example of a personal attack is again set out in the *Schreiber v. Mulroney* case described above. Mr. Schreiber's lawyer wrote to Mr. Mulroney's lawyer. His letter stated:

Your letter is not deserving of a response. Your conduct of last week was inappropriate and unethical and worthy of Law Society sanction. Your letter is nothing more than a weak and pathetic effort to cover up your disgraceful conduct – or as is said in the vernacular – it is nothing more than a CYA effort.

²⁶ *LSUC v. Ducas*, [1996] L.S.D.D. No. 203.

²⁷ Law Society of Upper Canada's *Rules of Professional Conduct*, (as of December 7, 2008), rule 6.03(1), on-line: <<http://www.lsuc.on.ca/regulation/a/profconduct/>>.

*I have taken the liberty to copy the managing partner of your firm with this letter because I am sure that you have kept the events of last week and our recent exchange of correspondence under the radar within your firm.*²⁸

Michael Code has highlighted four distinct ways in which civility effects our legal system: (a) when incivility takes the form of personal attacks on counsel's competency and integrity, the lawyer is distracted from his or her work of planning and preparing the evidence for trial; (b) personal acrimony between counsel does not allow the trier of fact to focus on the real issues; (c) personal acrimony between counsel unnecessarily lengthens court proceedings; (d) the legitimacy of our legal system is lost if counsel were able to display incivility in open court.²⁹ Expanding on the last point, open court provides the public with access to the judicial system allowing them to opine and criticize lawyers and judges. Such behaviour undermines the general respect of all citizens for law and the judicial process, which is essential to the continued functioning of a democratic society.

A lawyer also has a duty to maintain an honest relationship with opposing counsel. The failure to fulfill this obligation is demonstrated in *LSBC v. Jeffery*. In that case, during the course of the litigation, a court official instructed a lawyer that the trial, which was scheduled to begin in three days, had been taken off the trial list.³⁰ The lawyer undertook to inform opposing counsel. However, in the hopes of reaching a settlement with the defendant, the lawyer did not tell opposing counsel immediately but instead sent a revised offer to settle. Opposing counsel subsequently discovered from a different source that the trial had been adjourned. The discipline panel held that the lawyer was under an obligation to the court to promptly pass on the information. It rejected the argument that this was "a situation analogous to that of a lawyer possessed of information developed during the adversarial process for the use of his client."³¹

A lawyer's duty of civility extends to those individuals who are integral to our legal process – such as witnesses. Like our duty to opposing counsel, lawyers have a duty to

²⁸ *Schreiber v. Mulroney*, 2007 CanLii 34441 (ON S.C.) at para. 38.

²⁹ Code, Michael "Counsel's Duty of Civility: An Essential Component of Fair Trials and Effective Justice System" *Canadian Criminal Law Review* (February 2007), p. 6.

³⁰ *Law Society of British Columbia v. Jeffery*, [1996] L.S.D.D. No. 250.

³¹ *Ibid.*

treat witnesses in a civil and courteous manner. They must not harass, demean or actively intimidate a witness. The failure to abide by this duty was vividly demonstrated by the case of *LSBC v. Ewachniuk*. In that case, a lawyer in a civil dispute intimidated two witnesses and also requested that Crown Counsel lay charges against the witnesses to prevent them from traveling to Canada to give testimony prejudicial to his clients. On judicial review of the disciplinary panel's decision, the British Columbia Court of Appeal noted that "acting to suppress evidence constitutes a 'serious interference in the administration of justice' and is wrongful conduct that strikes at the heart of the barrister's duty to the court..."³²

For our own witnesses, lawyers should advise witnesses how to address the court and educate them about the procedures that will be followed in eliciting their evidence. Further, we may draw their attention to relevant issues, assist in refreshing their memories by referring to known facts or other evidence and prepare them to stand up to a hostile cross-examination. We may not, however, suborn perjury, persuade witnesses to avoid summonses or obstruct access to witnesses by other parties. Although we must prepare witnesses, we must take care not to put words into the mouths of witnesses or advise them to manipulate or withhold evidence. In general, as set out in part 2A to this discussion paper, we must not permit witnesses to be presented in a misleading way.

(C)

A LAWYER'S DUTY TO EDUCATE CLIENTS ABOUT THE COURT PROCESSES IN THE INTEREST OF PROMOTING THE PUBLIC'S CONFIDENCE IN THE ADMINISTRATION OF JUSTICE

This third branch of a lawyer's duty to the court requires that a lawyer educate clients about the court processes in the interests of promoting the public's confidence in the administration of justice. This requires us to educate clients about the limits of the law, as well as about our professional obligations. We share responsibility for ensuring that broader society has a knowledge and understanding of the law and an appreciation of the values advanced by the rule of law. Every lawyer must make an effort to educate the public about our judicial system and the value of lawyers, judges, juries, and the many other participants in the system.

³² *Law Society of British Columbia v. Ewachniuk*, [2003] B.C.J. No. 823 at para. 19 (B.C.C.A.).

(3)

IS A LAWYER'S DUTY TO THE COURT PARAMOUNT TO ALL OTHER DUTIES?

There is a perception that a lawyer's duty to the court may conflict with a lawyer's other duties, such as the duties a lawyer owes to his or her client. While academic analysis on the point is important, in practical terms the respective duties set the boundaries of the adversarial process. In our view, in the long run, violating the duty to the court in fact harms a client's interests. Rationalizing behaviour which is inconsistent or which undermines the duty to the court under the guise of having a duty to the client is quite simply, offside.

Canada. Gavin MacKenzie, in his recent article on *The ethics of advocacy*, states that a lawyer's duty to the client and duty to the court are given equal prominence. He writes:

In the United States the duty to the client is generally seen as the lawyer's primary duty, while in Britain the duty to the court is pre-eminent. In our rules, the two duties are given equal prominence – which may make ethical choices in advocacy more difficult in our jurisdiction.³³

In our view, a lawyer must do what he or she can to first assess whether there are competing duties and in effect, attempt to ensure the duty to the court is respected as the pre-eminent duty. The case of *Schreiber v. Mulroney* is a good example of this analysis. Again the facts are that the lawyer for Mr. Schreiber had agreed not to obtain default judgment against Mr. Mulroney but did so in any event. As a result, counsel for Mr. Mulroney moved to set aside the default judgment. In the course of the proceeding, Mr. Schreiber's lawyer wrote scandalous correspondence to Mr. Mulroney's lawyer, accusing him of unethical conduct and copying the letter to members of the legal profession, as well as the managing partner of the lawyer's law firm. In granting costs against Mr. Schreiber and his counsel, personally, for such egregious conduct, Justice Newbould commented on the competing duties of a lawyer:

[29] The conduct of [Mr. Schreiber's lawyer] that I described in my reasons of August 3, 2007 as being egregious and wrong constitutes conduct sufficient to warrant an order that costs to be paid personally by him. During argument on costs, [Mr. Schreiber's lawyer] said that while he believed that he had acted properly, if he was guilty of anything, he was guilty of an error of judgment in not telling [Mr. Mulroney's lawyer] of his instructions to note Mr. Mulroney in default and proceeding to a default

³³ MacKenzie, Gavin "The ethics of advocacy", *The Advocates' Society Journal* (September, 2008), p. 26.

judgment. He said that it has never been clear to him which duty takes precedence when a solicitor's duty to his client conflicts with a duty owed to other counsel and to the court.

[30] In my view, in the circumstances of this case, there should have been no conflict between those duties. [Mr. Schreiber's lawyer's] duty to his client was to fully inform him of the agreement not to note Mr. Mulroney in default and to advise him that he could not take that step. The failure to do so has resulted in wasted steps being taken that have been set aside at the expense of Mr. Schreiber. In this case Mr. Schreiber wanted to take the default proceedings, but that is no answer. A lawyer cannot rely on a client's instructions as a defence if the lawyer has acted in a manner inconsistent with the goals of the judicial system, but must decline to follow instructions that would constitute misconduct. See Orkin, *The law of Costs*, 2nd Edition at para. 220.2.

Put another way, a lawyer must not compromise his or her professional standards in order to please the client. As is seen in the *Schreiber* case, the path does not end up assisting the client's cause at all. In this sense, is there any reason to actually consider which duty is paramount?³⁴

Let us consider the experience in other jurisdictions.

Britain. In contrast to the United States where the duty to the court is subservient to the duty to the client, in Britain, the duty to the court is the dominant duty. One of the most often cited quotes with respect to this issue comes from Lord Denning in the case of *Rondel v. Worsley*, in which he states:

[The advocate] has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously mis-state [sic] the facts. He must not knowingly conceal the truth...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 of 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 of the profession and is subject to its discipline.³⁵

³⁴ With some exceptions that have been recognized in law, such as that of solicitor-client privilege.

³⁵ [1966] 3 W.L.R. 950 (Eng. C.A.) at 962-63.

This reasoning makes sense. It may be argued that an important component of our system of justice is the adversarial approach to issues, which assists the trier of fact in arriving at a just and sensible decision. If there was a brutish and purely partisan approach, the truth would almost certainly be obscured. In this event, decisions on disputes would not, in our view, be accepted as fair or just and the public would quickly lose confidence in the administration of justice.

While the bar must be fearless in advancing a client's cause, there are almost certainly boundaries, be it through Rules of Civil Procedure, the Code of Professional Conduct or normative limits which inform counsel and their role in our system of justice. As such, if "a tie goes to the runner" the runner would be the lawyer's duty to the court and this should take priority over a lawyer's duty to the client in considering examples that are close to the line.

Australia and New Zealand. Australia and New Zealand follow in the footsteps of Britain. While both a duty to the court and a duty to the client are recognized, the literature is clear that conflict is resolved in favour of the court:

The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case. ... It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow.³⁶

³⁶ Pagone, G.T. *The Advocate's Duty to the Court in Adversarial Proceedings* (Melbourne: Supreme Court of Victoria, 23 July 2008), citing *Giamarelli v. Wraith*, (1988) 165 CLR 543, 556-7.

(4)
SCENARIOS FOR DISCUSSION

The following two fact scenarios for discussion are taken or adopted from the American College of Trial Lawyers, *Trial Ethics Teaching Programme – Canadian Manual*.³⁷

1. A significant client of the law firm of which you are senior partner, who is also a friend, is served with a claim in which the plaintiff seeks money owed and interim relief, including a writ of attachment on some of the client's assets. The client tells you he owes the money and has no defence to the action but needs to delay for as long as possible because an immediate judgment would cause personal and financial ruin and extreme embarrassment. He expresses hope that other pending business deals will enable him to pay his creditors in due course, and he asks you to do everything you can to stall, to defeat the claim for interim relief, and to delay judgment until he can get his affairs in order.

Assume the same facts, except that you are a fifth year associate in the firm and will be reviewed for partnership in six months. A partner who is on the firm's Management Committee relates the client's problems and instructs you to handle the matter.

In each case, what do you do?

2. You are consulted by two middle-aged brothers, who look very much alike. They were at a club recently and were repeatedly harassed by a drunken stranger. John is a successful investment banker. As a result of his success, he owns several unencumbered properties in the downtown core. John, on the evening in question, threw an empty beer bottle at a man just before closing. It struck him on the temple and caused him to fall against a chair. He died from his injuries five days later and the family has brought a civil suit against John. The bar was dimly lit and identification of the person who threw the beer bottle will be an issue. John's brother Jim, who has bounced around from job to job, is currently unemployed. He does not have any assets or income and wants to take responsibility for throwing the beer bottle so that his brother will not be held liable and lose all of his assets.

How do you advise the brothers? Can you represent either?

³⁷ *Trial Ethics Teaching Programme – Canadian Manual* (American College of Trial Lawyers, 2005), online: American College of Trial Lawyers, <<http://www.actl.com/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=2441>>.

CONCLUSION

A lawyer's duty to the court touches upon nearly every aspect of his or her practice. Yet, beyond the most obvious cases, determining when duties to the client are secondary to those owed to the court may not always be crystal clear. The goal of this paper was not only to demonstrate the difficulties that may face lawyers when duties conflict but also to provide guidance to practitioners when similar situations arise. And, given the varied circumstances and pressures by the profession today, there is little doubt that new and challenging problems will come about. The hope is that lawyers will be better prepared to address them equipped with a fuller understanding of their duty to the court.

In sharing examples of lawyers who have not respected the duty to the court, we risk reinforcing negative stereotypes or simply adding to the list of commentators disappointed at a lack of civility and professionalism. However, the duties discussed are, in our respectful view, fundamental to the privilege of continuing as an independent and self-regulated profession. Finally, while there are those who may disagree with the approach to the duty to the court, the interplay of duties and professionalism arguably define the lawyer's role in the administration of justice and in serving the public interest.

APPENDIX A
THE LAW SOCIETY OF UPPER CANADA'S RULES OF PROFESSIONAL CONDUCT
EXCERPTS OF RULE 4 – RELATIONSHIP TO THE ADMINISTRATION OF JUSTICE

Advocacy

4.01 (2) When acting as an advocate, a lawyer shall not

- (a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party,
- (b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable,
- (c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence, or inducement affecting the impartiality of the officer,
- (d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate,
- (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct,
- (f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or like authority,
- (g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal,
- (h) deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent,
- (i) dissuade a witness from giving evidence or advise a witness to be absent,
- (j) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another,
- (k) needlessly abuse, hector, or harass a witness,
- (l) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge, and

(m) needlessly inconvenience a witness

Courtesy

4.01 (6) A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings in the course of litigation.

Encouraging Respect for the Administration of Justice

4.06(1) A lawyer shall encourage public respect for and try to improve the administration of justice.

APPENDIX B
THE LAW SOCIETY OF UPPER CANADA'S RULES OF PROFESSIONAL CONDUCT
EXCEPTS OF RULE 6 - RELATIONSHIP TO THE SOCIETY AND OTHER LAWYERS

INTEGRITY

6.01 (1) A lawyer shall conduct himself or herself in such a way as to maintain the integrity of the profession.

Courtesy and Good Faith

6.03 (1) A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

6.03 (2) A lawyer shall agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities, and similar matters that do not prejudice the rights of the client.

6.03 (3) A lawyer shall avoid sharp practice and shall not take advantage of or act without fair warning upon slips, irregularities, or mistakes on the part of other licensees not going to the merits or involving the sacrifice of a client's rights.

Communications

6.03 (5) A lawyer shall not in the course of a professional practice send correspondence or otherwise communicate to a client, another licensee, or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

APPENDIX C
EXCERPTS FROM THE ADVOCATES' SOCIETY'S PRINCIPLES OF CIVILITY

PART I - RELATIONS WITH OPPOSING COUNSEL

General Guidelines for Relations with Opposing Counsel

1. Counsel should always be courteous and civil to counsel engaged on the other side of the lawsuit or dispute. It is the responsibility of counsel to require those under their supervision to conduct themselves with courtesy and civility as well.

...

3. Counsel should always be honest and truthful with opposing counsel.

...

Cooperating with Opposing Counsel

5. Counsel should avoid unnecessary motion practice or other judicial intervention by negotiating and agreeing with opposing counsel whenever practicable.

...

Conduct Which Undermines Cooperation Among Counsel

17. Counsel should avoid sharp practice. Counsel should not take advantage of, or act without fair warning to opposing counsel, upon slips, irregularities, mistakes or inadvertence.

18. Counsel should not falsely hold out the possibility of settlement as a means of adjourning a discovery or delaying a trial.

19. Subject to the Rules of Practice, counsel should not cause any default or dismissal to be entered without first notifying opposing counsel, assuming the identity of opposing counsel is known.

...

Conduct at Examinations for Discovery

21. Counsel, during examination for discovery, should at all times conduct themselves as if a judge were present. This includes avoiding inappropriate objections to questions, discourteous exchanges among counsel and excessive interruptions to the examination process.

...

25. Counsel should not engage in examinations for discovery that are not necessary to elicit facts or preserve testimony but rather have as their purpose the imposition of a financial burden on the

opposite party.

...

Accommodating Requests from Opposing Counsel

30. Counsel, and not the client, has the sole discretion to determine the accommodations to be granted to opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights. This includes, but is not limited to, reasonable requests for extensions of time, adjournments, and admissions of facts. Counsel should not accede to the client's demands that he or she act in a discourteous or uncooperative manner toward opposing counsel.

31. Counsel should abstain from obstructing any examination or court process.

32. Subject to applicable practice rules, counsel should give opposing counsel, on reasonable request, an opportunity in advance to inspect all evidence or all non-impeaching evidence.

PART II - COMMUNICATIONS WITH OTHERS

...

Communications with the Judiciary Outside of Court

35. As a general principle, unless specifically provided in the Rules of Practice, a practice direction or a notice to the profession, counsel should not communicate directly with a judge out of court about a pending case, unless invited or instructed to do so by the court.

...

PART III - TRIAL CONDUCT

...

45. Counsel should avoid hostile and intemperate communication among counsel at all times, particularly close to trial when stress levels are high. Such communication will only deteriorate further during the trial and adversely affect the administration of justice in the case.

During Trial

...

52. When the court has made a ruling on a matter, counsel should in no way attempt to re-argue the point or attempt to circumvent the effect of the ruling by other means.

...

54. Counsel should never attempt to get before the court evidence that is improper. If counsel

intends to lead evidence about which there may be some question of admissibility, then counsel should alert opposing counsel and the court of that intention.

...

56. Counsel cannot condone the use of perjured evidence and, if counsel becomes aware of perjury at any time, they must immediately seek the client's consent to bring it to the attention of the court. Failing that, the counsel must withdraw. Nothing is more antithetical to the role of counsel than to advance the client's case before the court, directly or indirectly, on the basis of perjured evidence.

57. Counsel, or any member of their firm, should not give evidence relating to any contentious issue in a trial.

...

59. Counsel should be considerate of time constraints which they have agreed to or which have been imposed by the court.

...

PART IV - COUNSEL'S RELATIONS WITH THE JUDICIARY

What Judges Can Expect from Counsel

62. Judges are entitled to expect that counsel will treat the court with candour, fairness and courtesy.

63. Judges are entitled to expect that counsel are by training and experience competent to handle the matter before the court.

64. Notwithstanding that the parties are engaged in an adversarial process, judges are entitled to expect that counsel will assist the court in doing justice to the case.

65. Judges are entitled to expect counsel to assist in maintaining the dignity and decorum of the courtroom and their profession and avoid disorder and disruption.

66. Judges are entitled to expect counsel to be punctual, appropriately attired and adequately prepared in all matters before the courts.

67. Judges may expect counsel to properly instruct their clients as to behaviour in the courtroom, and any court-related proceedings. Counsel are expected to take what steps are necessary to dissuade clients and witnesses from causing disorder or disruption in the courtroom.

68. Judges are entitled to expect that counsel, in their public statements, will not engage in personal attacks on the judiciary or unfairly criticize judicial decisions.

APPENDIX D

EXCERPTS FROM THE CANADIAN BAR ASSOCIATION'S CODE OF PROFESSIONAL CONDUCT

RULE

When acting as an advocate, the lawyer must treat the court or tribunal with courtesy and respect and must represent the client resolutely, honourably and within the limits of the law.

Commentary

Guiding Principles

1. The advocate's duty to the client "fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case" and to endeavour "to obtain for his client the benefit of any and every remedy and defence which is authorized by law" must always be discharged by fair and honourable means, without illegality and in a manner consistent with the lawyer's duty to treat the court with candour, fairness, courtesy and respect.

Prohibited Conduct

2. The lawyer must not, for example:

- (a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring another party;
- (b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable;
- (c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with such officer that give rise to real or apparent pressure, influence or inducement affecting the impartiality of such officer;
- (d) attempt or allow anyone else to attempt, directly or indirectly, to influence the decision or actions of a tribunal or any of its officials by any means except open persuasion as an advocate;
- (e) knowingly attempt to deceive or participate in the deception of a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;
- (f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;
- (g) make suggestions to a witness recklessly or that he or she knows to be false. The cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition;

- (h) deliberately refrain from informing the tribunal of any pertinent adverse authority that the lawyer considers to be directly in point and that has not been mentioned by an opponent;
- (i) dissuade a material witness from giving evidence, or advise such a witness to be absent
- (j) knowingly permit a witness to be presented in a false or misleading way or to impersonate another;
- (k) needlessly abuse, hector or harass a witness;
- (l) needlessly inconvenience a witness.

Errors and Omissions

- The lawyer who has unknowingly done or failed to do something that, if done or omitted knowingly, would have been in breach of this Rule and discovers it, has a duty to the court, subject to the Rule relating to confidential information, to disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.

Duty to Withdraw

- If the client wishes to adopt a course that would involve a breach of this Rule, the lawyer must refuse and do everything reasonably possible to prevent it. If the client persists in such a course the lawyer should, subject to the Rule relating to withdrawal, withdraw or seek leave of the court to do so.

The Lawyer as Witness

- The lawyer who appears as an advocate should not submit the lawyer's own affidavit to or testify before a tribunal save as permitted by local rule or practice, or as to purely formal or uncontroverted matters. This also applies to the lawyer's partners and associates; generally speaking, they should not testify in such proceedings except as to merely formal matters. The lawyer should not express personal opinions or beliefs, or assert as fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer must not in effect become an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to someone else. Similarly, the lawyer who was a witness in the proceedings should not appear as advocate in any appeal from the decision in those proceedings. There are no restrictions upon the advocate's right to cross-examine another lawyer, and the lawyer who does appear as a witness should not expect to receive special treatment by reason of professional status.

Interviewing Witnesses

6. The lawyer may properly seek information from any potential witness (whether under subpoena or not) but should disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way. The lawyer shall not approach or deal with an opposite party who is professionally represented save through or with the consent of that party's lawyer.

A lawyer retained to act on a matter involving a corporation or organization that is represented by another lawyer should not approach

- (a) a director, officer, or person likely involved in the decision-making process for the corporation or organization, or
- (b) an employee or agent of the corporation or organization whose acts or omissions in connection with the matter may have exposed it to civil or criminal liability, concerning that matter,

except to the extent that the lawyer representing the corporation or organization consents or as otherwise authorized or required by law.

Unmeritorious Proceedings

7. The lawyer should never waive or abandon the client's legal rights (for example, an available defence under a statute of limitations) without the client's informed consent. In civil matters it is desirable that the lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections or attempts to gain advantage from slips or oversights not going to the real merits, or tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.

Undertakings

14. An undertaking given by the lawyer to the court or to another lawyer in the course of litigation or other adversary proceedings must be strictly and scrupulously carried out. Unless clearly qualified in writing, the lawyer's undertaking is a personal promise and responsibility.

Discovery Obligations

15. Where the rules of a court or tribunal require the parties to produce documents or attend on examinations for discovery, a lawyer, when acting as an advocate, shall explain to the client the necessity of making full disclosure of all documents relating to any matter in issue, and the duty to answer to the best of the client's knowledge, information, and belief, any proper question relating to any issue in the action or made discoverable by the rules of court or the rules of the tribunal; shall assist the client in fulfilling the obligation to make full disclosure, and shall not make frivolous requests for the production of documents or make frivolous demands for information at the examination for discovery.

Courtesy

16. The lawyer should at all times be courteous, civil, and act in good faith to the court or tribunal and to all persons with whom the lawyer has dealings in the course of an action or proceeding. Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative or disruptive conduct by the lawyer, even though not punished as contempt, might well merit disciplinary action.

Role in Adversary Proceedings

17. In adversary proceedings, the lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (save as required by law or under paragraphs 2(h) or 7 above) to assist an adversary or advance matters derogatory to the client's case. When opposing interests are not represented, for example, in ex parte or uncontested matters, or in other situations where the full proof and argument inherent in the adversary system cannot be obtained, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the court is not misled.

Communicating with Witnesses

18. When in court the lawyer should observe local rules and practices concerning communication with a witness about the witness's evidence or any issue in the proceeding. Generally, it is considered improper for counsel who called a witness to communicate with that witness without leave of the court while such witness is under cross-examination

Agreements Guaranteeing Recovery

19. In civil proceedings the lawyer has a duty not to mislead the court about the position of the client in the adversary process. Thus, where a lawyer representing a client in litigation has made or is party to an agreement made before or during the trial whereby a plaintiff is guaranteed recovery by one or more parties notwithstanding the judgment of the court, the lawyer shall disclose full particulars of the agreement to the court and all other parties.

Scope of the Rule

20. The principles of this Rule apply generally to the lawyer as advocate and therefore extend not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals and other bodies, regardless of their function or the informality of their procedures.

Making lawyers moral? Ethical codes and moral character

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This article argues that professional codes of conduct cannot perform the important task of ensuring that lawyers uphold high ethical standards. Instead, moral behaviour by lawyers requires the development of fixed behavioural attributes relevant to legal practice – what may be called a lawyer's professional moral character. At the same time, however, along with other factors, professional codes are important in that they can either contribute to or detract from the successful development of professional moral character. If so, it is argued that in order to have the best chance of assisting the character development of lawyers, codes should neither take the form of highly detailed or extremely vague, aspirational norms, but should instead guide ethical decision-making by requiring them to consider a wide range of contextual factors when resolving ethical dilemmas.

1. INTRODUCTION

To a large extent, access to justice, and the quality of law and the legal process is in the hands of legal practitioners who can (and frequently do) cause much harm in their professional activities.¹ For example, treating law purely as a business can lead to citizens going unrepresented or being poorly represented. Conversely, overzealous representation and loyalty to clients may harm opponents, affected third parties, the administration of justice, and the general public interest. Accordingly, at least since the realisation that most Watergate miscreants were trained lawyers, professional legal ethics has been taught and academically debated in the United States. A similar willingness to take ethics seriously has spread more recently to Canada, Australia and New Zealand.

* Earlier versions of this article were presented at the 2000 SPTL conference at the University of London and at staff seminars at the Universities of Edinburgh and Glasgow. I would like to thank Susan Robb and Christine Rae for their research help, and Aileen McHarg for her patience and perceptive assistance in discussing and commenting on various drafts.

1. See eg D L Rhode 'Institutionalising Ethics' (1994) Case W Res LR 665; D Nicolson and J Webb *Professional Legal Ethics: Critical Interrogations* (Oxford: Oxford University Press, 1999), esp ch 6.

In the United Kingdom, the general public has long been sceptical about the integrity of lawyers,² while consumer and government concerns about their morality, access to justice, and the quality of legal services have led to increased regulation³ and calls for ethics to become central to legal education.⁴ However, influenced by legal formalism's banishment of all questions of morality and justice from the study and teaching of law, as well as by the traditional distinction between 'academic' and 'vocational' issues in legal education, academics have until very recently almost⁵ totally ignored lawyers' ethics. Admittedly, there has a relatively long-standing interest in related 'macro' ethical issues, such as access to justice, the meaning of professionalism, and the existence and justifiability of restrictive practices.⁶ But, by contrast, discussion of the ethical dilemmas raised by legal practice, such as whether lawyers should act for any client irrespective of moral considerations, how far they should go in pursuing client interests, whether there should be limits to client confidentiality and how to reconcile conflicts of interest, has been largely confined to descriptive accounts written by and for practitioners.⁷

2. See eg Shakespeare's Dick the Butcher in *Henry VI, Part II*, Act 4, Scene II: 'The first thing we do, let's kill all the lawyers'; Jonathan Swift's description of lawyers as a 'society of men ... bred up from youth in the art of proving by words multiplied for the purpose, that white is black and black is white, according as they are paid'; *Gulliver's Travels* ch 5; John Stuart Mill's complaint that '[the lawyer] hires himself out to do injustice or frustrate justice with his tongue' in J Bowring (ed) *The Works of Jeremy Bentham* (Edinburgh: William Tait, 1843) vol 7, p 479; the scorn heaped on lawyers by Dickens (*Bleak House*, *Great Expectations*) and Trollope (*The Three Clerks*, *Phineas Redux*).

3. Nicolson and Webb, above n 1, ch 4; text accompanying nn 28–33; and for more recent developments, see K Economides and J Webb 'Editorial' (2003) 6 *Legal Ethics* 127 at 129.

4. The Lord Chancellor's Advisory Committee on Legal Education and Conduct *First Report on Legal Education and Training* (London: ACLEC, 1996) paras 1.19–1.20; The Law Society of England and Wales *Second Consultation on a New Training Framework Review for Solicitors* (London: The Law Society, 2003) pp 21–22.

5. But cf R Tur 'Profession in Crisis?' *Scots Law Times*, 18 August 1989, p 297, 'An Introduction to Lawyers' Ethics' (1992) 10 *Journal of Professional Legal Education* 217, 'Confidentiality and Accountability' (1992) 1 *Griffith LR* 73 and 'Accountability and Lawyers' in R Chadwick (ed) *Ethics and the Professions* (Aldershot: Avebury, 1994).

6. See eg M Zander *Lawyers and the Public Interest* (London: Weidenfeld and Nicolson, 1968) and *A Matter of Justice: The Legal System in Ferment* (London: Tauris Publishing, 1988); R Abel *The Legal Profession in England & Wales* (London: Basil Blackwell, 1988) and *English Lawyers Between Market and State: The Politics Of Professionalism* (Oxford: Oxford University Press, 2003); M Burrage 'From a Gentlemen's to a Public Profession: Status and Politics in the History of English Solicitors' (1996) 3 *International Journal of the Legal Profession* 45; A Paterson 'Professionalism and the legal services market' (1996) 3 *International Journal of the Legal Profession* 137.

7. Eg W Boulton *Conduct and Etiquette at the Bar* (London: Butterworths, 6th edn, 1975); T Lund *A Guide to the Professional Conduct and Etiquette of Solicitors* (London: The Law Society, 1960); P M K Bird and J B Weir *The Law, Practice and Conduct of Solicitors* (London: Waterlow Publishers, 1989); D Napley *The Technique of Persuasion* (London: Sweet & Maxwell, 4th edn, 1991) ch II, though see the more critical contributions of D Pannick *Advocates* (Oxford: Oxford University Press, 1992); and A Phillips *Professional Ethics for Scottish Solicitors* (Edinburgh: Butterworths, 1990).

In the last ten years, however, academic interest in 'micro' ethics has mushroomed. Edited collections,⁸ full-length books,⁹ a special edition of the *International Journal of the Legal Profession*,¹⁰ and articles in assorted journals¹¹ have all appeared, along with the 1998 launch of *Legal Ethics*,¹² the establishment of the SPTL (now SLS) Practice, Profession and Ethics subsection, and most recently Exeter University's hosting of the First International Conference on Legal Ethics.¹³ In broad terms,¹⁴ this burgeoning debate over micro ethics has addressed one or other of two concerns: the 'what' and the 'how' of lawyers' ethics. The former is concerned with the content of lawyers' ethics, looking at how lawyers resolve, but more frequently at how they ought to resolve, the ethical issues they face in practice. The latter addresses the equally important question of how to ensure that lawyers actually uphold whatever substantive ethical norms are regarded as appropriate. Indeed, for those, like myself, who doubt whether there are ever any categorically correct answers to difficult ethical problems, the slightly different question of how to ensure that lawyers at least care about and are committed to acting morally seems more critical than attempting to define ethical behaviour. Consequently, it is this issue which is the focus of this article.

Historically, while Parliament and the courts have occasionally, and on an ad hoc basis, laid down legal rules governing the behaviour of lawyers, particularly solicitors, within the profession itself the centuries-old patrician, *noblesse oblige*¹⁵ or gentleman's tradition¹⁶ regarded ethical standards as guaranteed by

8. R Cranston (ed) *Legal Ethics and Professional Responsibility* (Oxford: Clarendon Press, 1995); S Parker and C Sampford (eds) *Legal Ethics and Legal Practice* (Oxford: Clarendon Press, 1995); K Economides (ed) *Ethical Challenges to Legal Education and Conduct* (Oxford: Hart Publishing, 1998).

9. Nicolson and Webb, above n 1; A Boon and J Levin *The Ethics and Conduct of Lawyers in England and Wales* (Oxford: Hart Publishing, 1999); R O'Dair *Legal Ethics: Text and Materials* (London: Butterworths, 2001); J Griffiths-Baker *Serving Two Masters: Conflicts of Interest in the Modern Law Firm* (Oxford: Hart Publishing, 2002). See also the empirical studies of lawyer behaviour cited below n 73, which touch on ethical issues.

10. Vol 4 (1997).

11. In addition, to those in *Legal Ethics*, see D R F O'Dair 'Ethics by the Pervasive Method – The Case of Contract' (1997) 17 LS 305; L Sheinman 'Looking for Legal Ethics' (1997) 4 International Journal of the Legal Profession 139; M Blake and A Ashworth 'Some Ethical Issues in Prosecuting and Defending Criminal Cases' [1998] Crim LR 16; D A Ipp 'Lawyers' Duties to the Court' (1998) 114 LQR 63; D Nicolson and J Webb 'Taking Lawyers' Ethics Seriously' (1999) 6 International Journal of the Legal Profession 109.

12. Hart Publishing.

13. See S Nelson 'Reflections from the International Conference on Legal Ethics from Exeter' (2004) 7 Legal Ethics 17.

14. Cutting across them and informing both are discussions of ethical theory: see eg J Webb 'Being a Lawyer/Being a Human Being' (2002) 5 Legal Ethics 130; D Nicolson 'The Theoretical Turn in Professional Legal Ethics' (2004) 7 Legal Ethics 17.

15. D Luban 'The *Noblesse Oblige* Tradition in the Practice of Law' (1988) 41 Vand LR 717.

16. Cf Burrage, above n 6; A Thornton 'The Professional Responsibility and Ethics of the English Bar' in Cranston, above n 8, pp 56–57. For residual echoes of this tradition, see eg Lund, above n 7, p 54; *Queen v O'Connell* (1844) 7 Ir LR 261 at 312; *Smith v Smith* (1882) 7 PD 84 at 89; *Rondel v Worsley* [1969] 1 AC 191, 227; below n 69 and accompanying text.

the existence of universal, a priori principles, which were correctly understood and applied because of lawyers' common social background, informal peer pressures, judicial oversight and unwritten systems of etiquette. Formal controls were regarded as otiose given that, as gentlemen and therefore men of honour, lawyers instinctively knew how to behave. At most what was needed was to control entry into the profession so that only those made of the 'right stuff' gained the privilege of practising. Most professions, however, promulgate written rules governing their members' behaviour, usually systematised in a single 'code of conduct' and (at least theoretically) backed up by sanctions. Although semi-official texts on ethics and etiquette were already in existence,¹⁷ from 1974 the British legal profession began to follow suit and now all four branches have a code or something similar.¹⁸

No doubt, this code-making activity¹⁹ can be viewed cynically as an attempt to portray lawyers as honourable, reliable and ethical, and hence worthy of the respect and high financial rewards which accompany professional status, and/or as a desperate attempt to ward off state intervention in a climate of state and public hostility. However, less cynically, social contractarians regard codes as the written manifestation of the bargain between profession and society, under which the former agrees to ensure certain ethical standards in return for the advantages of professional status.²⁰ Although, it might be true that codes (and their enforcement)²¹ tend to prioritise the interests of professional elites,²² they

17. Lund, above n 7; Boulton, above n 7.

18. See below text above nn 28–31.

19. On the function of codes, see eg D L Rhode 'Why the ABA Bothers: A Functional Perspective on Professional Codes' (1980–81) 59 Texas LR 689; L H Newton 'Lawgiving for Professional Life: Reflections on the Place of the Professional Code' in A Flores (ed) *Professional Ideals* (Belmont, CA: Wadsworth Publishers, 1988); M S Frankel 'Professional Codes: Why, How and with What Impact' (1989) 8 Journal of Business Ethics 109; N Moore 'The Usefulness of Ethical Codes' (1989) Annual Survey of American Law 7; F C Zacharias 'Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics' (1993) 69 Notre Dame LR 225; M Coady and C Bloch (eds) *Codes of Ethics and the Professions* (Carlton South: Melbourne University Press, 1996); L E de Groot-van Leeuwen and W T de Groot 'Studying Codes of Conduct: A Descriptive Framework for Comparative Research' (1998) 1 Legal Ethics 155.

20. See eg D Rueschemeyer 'Professional Autonomy and the Control of Expertise' in R Dingwall and P Lewis (eds) *The Sociology of the Professions: Lawyers, Doctors and Others* (London: MacMillan, 1983) p 41; C Menkel-Meadow 'Portia Redux: Another Look at Gender, Feminism and Legal Ethics' in Parker and Sampford (eds), above n 8, pp 39–40; A A Paterson 'Professionalism and the Legal Services Market' (1996) 3 International Journal of the Legal Profession 137.

21. See H W Arthurs 'Climbing Kilimanjaro: Ethics for Postmodern Professionals' (1993) 6 Westminster Affairs 3 and 'The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?' (1995) 33 Alberta LR 800; B L Arnold and J Hagen 'Careers of Misconduct: The Structure of Professional Deviance among Lawyers' (1992) 57 American Sociological Review 771.

22. See eg P Shuchman 'Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code' (1968) 37 Geo Wash LR 244; T Schneyer 'Professionalism as Politics: The Making of a Modern Legal Ethics Code' in R Nelson, D Trubek and R Solomon (eds) *Lawyers' Ideals/Lawyers' Practice* (Ithaca: Cornell University Press, 1992); D Sugarman 'Bourgeois Collectivism, Professional Power and the Boundaries of the State: The Private and Public Life of the Law Society, 1825–1914' (1996) 3 International Journal of the Legal Profession 81.

are the closest one comes to a collective statement of the ideals, values and behavioural standards to which professions are committed.²³ As such, codes inform the public of what they can expect from professions, whilst also allowing professionals to resist client demands for unethical action. From an internal perspective, codes may provide a focus for stimulating intra-professional debate over ethical issues. They may also resolve 'co-ordination problems'²⁴ by spreading the sacrifice of self-interest involved in upholding ethical standards between all professional members or, less commendably, be used to promote the interests of some professionals over others or protect the profession from external competition.

However, perhaps the most important code function, and the one which underpins many others, is to ensure ethical behaviour. This function can be achieved directly, depending on the particular regulatory strategy adopted, either by deterring behaviour deemed unethical or otherwise unprofessional, or more positively by encouraging ethical behaviour. Indirectly, codes may perform an educative function by inculcating ethical norms both at the start of and throughout a professional's career.

This function is, of course, not unique to professional codes. Lawyers are still subject to external legal controls, all intending practitioners must take professional responsibility courses, and informal socialisation within the profession will always occur. Nevertheless, the codes can now be seen as the central means of inculcating and enforcing ethical behaviour. Given that they are partly based on relevant statutory and common law norms, the codes constitute separate, enforceable sets of rules and principles²⁵ and act as a readily accessible guide to professional behaviour norms. Consequently, they tend to constitute the (in many cases, exclusive) focus of the brief ethical instruction in the professional stage of legal education which represents most students only exposure to legal ethics. Moreover, the fact that breaches of the codes can lead to disciplinary action means that lawyers may ignore them at their peril.

These reasons suggest that the codes have considerable potential to influence lawyer behaviour and therefore deserve a central place in discussions of professional legal ethics. However, I shall argue that their impact is likely to be limited if individual lawyers are not committed to acting ethically. This requires possession of the sort of character which regards doing the right moral thing (whatever that might involve) as important and worthy of pursuit notwithstanding the many disincentives and counter-pressures thrown up in contemporary legal practice. If developed, such moral character represents the most effective and potentially long-term means of improving lawyer morality. Nevertheless, while there are undoubtedly myriad factors affecting lawyers' character development, I will seek to show that, depending on their form, codes have a role to play in helping to develop and sustain moral character.

23. A Woolley 'Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer' (1996) 1 *Canadian Journal of Law and Jurisprudence* 61 at 71.

24. J Lichtenberg 'What are Codes of Ethics?' in Coady and Bloch (eds), above n 19, p 21ff.

25. *Kenyon-Brown v Desmond Banks and Co* (unreported, 1998), Lawtel transcript no C8600213.

Here one can distinguish between two ideal-types of codes.²⁶ At one extreme, 'aspirational codes' eschew detailed ethical guidance for statements of broad principles couched in the language of moral suasion. If intended for anything more than window dressing, such codes at best guide rather than direct moral behaviour. Moreover, aspirational codes set high standards, but do not reinforce these with disciplinary sanctions. At the other extreme are lengthy codes specifying professional duties which attempt to deal with all potential ethical and conduct issues in a detailed fashion. Although specific rules are occasionally justified on consequential grounds,²⁷ they usually follow a deontological, and hence legalistic, ethical model in laying down rules which apply in an all-or-nothing, categorical manner without reference to the particular context or consequences of the prohibited or required behaviour. Moreover, the rules tend to lay down minimalist behaviour standards, and to focus on prohibition rather than positive duties. Since rule breaches are punished by sanctions, such codes are usually called 'disciplinary codes'.

Given that all British codes are reinforced by disciplinary sanctions, none fits the pure aspirational model. However, the Faculty of Advocates' *Guide to the Professional Conduct of Advocates*²⁸ is drafted in largely aspirational language and runs to a mere 33 pages. Even shorter is the *Code of Conduct for Scottish Solicitors*,²⁹ which simply reproduces the aspirational code drafted by the *Comité Consultatif des Barreaux Européens* (though the *Solicitors Professional Handbook*³⁰ collects, but does not systematise, more detailed norms contained in codes for criminal work and solicitor-advocates and in the various practice rules, regulations and guidelines promulgated as secondary legislation). The *Code of Conduct of the Bar of England and Wales*³¹ does contain detailed rules, but these generally concern issues such as the system of pupillage, the running of chambers, and work in law centres, rather than ethically contentious issues which tend to be governed by general, and sometimes rather vague, principles.

By contrast, notwithstanding numerous vague principles and even references to virtues like independence and integrity, the English and Welsh Law Society's *Guide to the Professional Conduct of Solicitors*,³² reflects a noticeable preference for detailed norms. Consequently, its systematised collection of various practice rules, regulations and guidelines, relevant legislation and codes for specific practice areas exceed 750 densely packed pages. Interestingly, the *Guide*'s status as a disciplinary code is currently threatened by proposals to 'simplify the rules and make them less burdensome for the benefit of clients and practitioners', and to organise them into a hierarchy of core duties, detailed rules and non-mandatory guidance.³³

26. See eg C Sampford with C Parker 'Legal Regulation, Ethical Standard-Setting, and Institutional Design' in Parker and Sampford (eds), above n 8, p 14ff; Nicolson and Webb, above n 1, p 97ff.

27. As in the case of confidentiality: see eg Nicolson and Webb, above n 1, pp 258–259.

28. Edinburgh: Faculty of Advocates, 1988.

29. See *Solicitors Professional Handbook 2004* (Edinburgh: W Green/Sweet & Maxwell, 2004).

30. *Solicitors Professional Handbook 2004*, above n 29.

31. London: General Council of the Bar, 2000, as amended.

32. London: The Law Society, 8th edn, 1999.

33. 'Rules for the Twenty-First Century: Final Consultation on a New Set of Professional Conduct Rules' (London: The Law Society, 2004).

If, as I claim, a code should be designed with the promotion of moral character in mind, then these proposals represent a step in the right direction. However, in order best to support character development, I will argue that they need to go further and require lawyers to resolve ethical dilemmas in the light of relevant contextual factors. To some extent, this argument echoes that of others, most recently Hutchinson.³⁴ However, he sees such judgment as operating outside the codes rather being incorporated into its design. Conversely, such incorporation has been championed by Simon,³⁵ and by Webb and myself,³⁶ but without being linked specifically to the need to foster and sustain moral character. This article seeks to bring together the arguments for character and contextuality, whilst also sketching the contours of a contextual code in more detail than Simon.

It should be noted, however, that I am not arguing that a contextual code provides the only or even the best method of inculcating ethical awareness and commitment amongst lawyers through character development. It is possible that reforms relating to legal education, professional role morality, the adversarial system and various other aspects of legal practice, such as its increasing commercialisation, bureaucratisation and specialisation, might have an even greater impact on attempts to foster and sustain lawyers' moral character.³⁷ However, since the professional codes appear to be here to stay, their limitations and optimum form for promoting moral behaviour also require serious consideration.

2. WHAT IS WRONG WITH CODES?

My starting point for such consideration is the various philosophical and psychological problems with seeing morality in terms of obedience to rules. This approach flows from a philosophical tradition that has dominated ethics since the Enlightenment. It is often called the deontic tradition because it sees morality in terms of duties.³⁸ Deontic ethics is most obviously associated with deontologists like Kant and his successors (Rawls, Gewirth etc), but it is also found in many religions, as exemplified by the Bible's ten commandments, and even in utilitarianism. What they share is an emphasis on universally applicable principles or rules imposing behavioural duties. These duties may be specific and categorical (do not lie) or they may be much more general

34. A C Hutchinson *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law, 1999) (extracted in 'Legal Ethics for a Fragmented Society: Between Professional and Personal' (1998) 5 *International Journal of the Legal Profession* 176 and 'Taking it Personally: Legal Ethics and Client Selection' (1998) 1 *Legal Ethics* 168). See also eg Webb, above n 14; D Luban 'Epistemology and Moral Education' (1983) 33 *JLE* 636; H L Feldman 'Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?' (1996) 69 *Southern Calif LR* 835; S G Kupfer 'Authentic Legal Practices' (1996) 10 *Georgetown Journal of Legal Ethics* 33.

35. W H Simon *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge, Mass: Harvard University Press, 1998) pp 9-11, 69-74, chs 6-7.

36. Above n 1, pp 115-116, 242-247, 263-275, 280-286.

37. As regards these factors, see below nn 76, 79-80, 90-91, 128-132 and associated text.

38. *Deon* being the ancient Greek for duty.

(always do whatever maximises utility in any given situation). For some, intellectual reason, human intuition or natural sympathy were thought to enable one to know what one's duties required, and that this would somehow motivate moral behaviour, but more commonly it was thought that moral duties needed to be identified by the 'experts' (philosophers, politicians, religious leaders), laid down in ethical, legal and religious codes, and reinforced by threats of punishment.³⁹

Reducing ethics to obeying externally set duties and codes is, however, increasingly seen as an inferior form of morality. Thus, for example, following a pure form of Kantianism,⁴⁰ the psychologist Kohlberg regards the highest stage of moral development as involving individuals formulating their own moral principles (though he nevertheless believes that these apply universally).⁴¹ More radically, postmodernists like Bauman argue that codes are the antithesis of morality and that morality ends where ethical codes begin.⁴² Morality involves recognising the Other's unspoken and unconditional demand, which, because it is unlimited in scope and ambiguous as to content, cannot be reduced to formulae and rules. Indeed, Bauman argues that the 'greater the moral responsibility, the dimmer is the hope of its normative regulation'.⁴³ Morality is thus marked by personal choice and anxiety, both of which are extinguished by codes.

While there is much that is inspirational in these accounts of ethics, one need not go this far to realise that relying solely on codes and duties to ensure lawyer ethics is inadequate. Instead, one can begin with the psychology of moral behaviour. Following Rest, it is now accepted that moral behaviour (whatever its content) involves four⁴⁴ components: sensitivity, judgment,

39. See Z Bauman *Postmodern Ethics* (Oxford: Blackwell, 1993), esp Introduction and chs 1 and 3; A J Dawson 'Professional Codes of Practice and Ethical Conduct' (1994) 11 *Journal of Applied Philosophy* 146.

40. Known as act-deontology: see eg W K Frankena *Ethics* (Englewood, Cliffs, NJ: Prentice-Hall, 1963) pp 21-23; T L Beauchamp *Philosophical Ethics: An Introduction to Moral Philosophy* (New York: McGraw-Hill, 1982) pp 115-116.

41. See eg L Kohlberg 'Moral Stages and Moralization: The Cognitive-Developmental Approach' in T Lickona (ed) *Moral Development and Behaviour* (New York: Holt, Rinehart and Winston, 1976), *Essays on Moral Development, Vol 1: The Philosophy of Moral Development* (New York: Harper and Row, 1981) and *Essays on Moral Development, Vol 2: The Psychology of Moral Development* (New York: Harper and Row, 1984); L Kohlberg, C Levine and A Hewer *Moral Stages: A Current Formulation and a Response to Critics* (London: Karger, 1983).

42. See Bauman, above n 39, *Life in Fragments: Essays in Postmodern Morality* (Oxford: Blackwell, 1995), esp ch 1 and 'What Prospects of Morality in Times of Uncertainty?' (1998) 15 *Theory Culture and Society* 11. See also Dawson, above n 39, at 153; S Salbu 'Law and Conformity, Ethics and Conflict: The Trouble with Law-Based Conceptions of Ethics' (1992) 68 *Ind LJ* 101.

43. 'What Prospects of Morality', above n 39, p 20 (emphasis removed).

44. But see L J Duckett and M B Ryden 'Education for Ethical Nursing Practice' in J Rest and D Narvaez (eds) *Moral Development in the Professions: Psychology and Applied Ethics* (Hillsdale, NJ: Lawrence Erlbaum Associates, 1994) p 61, who argue that 'implementation' involves a fifth, albeit interpersonal rather than purely psychological, component.

motivation and courage.⁴⁵ First, moral sensitivity enables individuals to recognise moral problems when they arise. This requires both cognitive and affective psychological capacities, since awareness of a moral problem may stem from empathy or guilt rather than intellectual categorisation. Secondly, moral judgment enables individuals to identify the salient features of issues, and to select and justify appropriate responses. Here the intellectual capacities of knowledge and reasoning *may* dominate, as when individuals first evaluate and select from competing ethical theories or duties and then decide what behaviour they require. But again, as feminists, postmodernists and a host of earlier ethicists argue, the response to moral issues might equally be an emotional one.⁴⁶

These two components, however, only take us so far towards moral behaviour. Empirical research repeatedly confirms that *knowing* what is morally right is only weakly linked to doing what is right.⁴⁷ Acting morally requires two additional components. Moral motivation ensures that individuals want to put into effect the moral solution selected and elevate it over competing considerations like self-interest or institutional values. Without this component, individuals might *know* what morality requires but not in fact *care*. Here it is moral feelings and character dispositions which are important rather than cognition. But even if they care, individuals require the moral courage to be able to convert ethical thought and concern into ethical action by resisting temptations to compromise moral standards. Crucial here are the personal virtues of moral fibre, steadfastness, perseverance and backbone, or what psychologists call ego-strength.

This psychological model of moral behaviour reveals a number of problems with deontic ethics in general and the reliance on ethical codes in particular. One is that the common emphasis in deontic ethics on rationality, and the intellectual understanding of duties and their application to fact situations, leaves little space for the sort of affective psychological capacities that sensitise people to moral situations, help them choose appropriate behaviour and motivate moral behaviour.⁴⁸ Emotional faculties also influence whether moral decisions are implemented in a 'rational, but cool, distant or autocratic manner

45. The chapters in Rest and Narvaez (eds), above n 44, esp ch 1; J Rest 'The Major Components of Morality' in W Kurtines and J Gewirtz (eds) *Morality, Moral Behaviour and Moral Development* (New York: Wiley, 1984); D Narvaez and J Rest 'The Four Components of Acting Morally' in W M Kurtines and J L Gewirtz (eds) *Moral Development: An Introduction* (Boston: Allyn and Bacon, 1995). NB: whereas the above refer to 'moral character' as the fourth component, I use the term 'moral courage', because of my argument that developed moral character involves all four components.

46. See eg Nicolson and Webb, above n 1, pp 34-38, and 46-49 regarding feminism and postmodernism; and J C Tronto *Moral Boundaries: A Political Argument for an Ethic of Care* (London: Routledge, 1993) regarding Scottish Enlightenment philosophers. See also S G Clarke and E Simpson 'Introduction: The Primacy of Moral Practice' in S G Clarke and E Simpson (eds) *Anti-Theory in Ethics and Moral Conservatism* (New York: State University of New York, 1989).

47. See J Rest 'Background: Theory And Research' in Rest and Narvaez (eds), above n 44, pp 21-22, and 'Can Ethics be Taught in Professional Schools? The Psychological Research' (1988) 1 *Ethics Easier Said Than Done* 22.

48. Feldman, above n 34, esp at 904-908.

... [or] ... in a manner that illustrates interpersonal warmth, empathy, compassion, and connectedness'.⁴⁹

A second and more serious problem is that codes and duties are highly unlikely on their own to equip lawyers to identify and resolve all potential ethical problems arising in legal practice.⁵⁰ Attempts by disciplinary codes to deal conclusively with all possible moral problems are likely to be frustrated by limited foresight, and the rapidly changing nature of legal practice and its social context. Moreover, as the legal profession's current rules exemplify,⁵¹ codes often contain conflicting duties but no means to resolve such conflicts. One solution might be to provide overriding general principles,⁵² but this raises the problem that afflicts aspirational codes, namely that general principles are usually too vague to determine their application to concrete dilemmas. In fact, given the inherent ambiguity and vagueness of language, even specific rules are open to varying interpretations. This suggests that codes always require those they govern to exercise judgment, albeit to differing degrees depending on whether they are disciplinary or aspirational.⁵³ Yet, as we shall see, codes alone are not sufficient to inculcate effective ethical judgment in lawyers.

The final and most important drawback to codified, duty-based ethics is that even if lawyers can identify and resolve moral problems, they still need to care about acting morally and to have the courage to do so when faced with competing pressures and temptations. Professional legal ethics discourse has little to say about moral motivation and courage. Instead, either these are just assumed to exist or it is hoped that the threat of sanctions will ensure that codes are obeyed. The effectiveness of this threat is, however, crucially dependent on the profession's ability to detect wrongdoing, often in situations where lawyer behaviour is hidden from view,⁵⁴ and in a milieu where lawyers are unlikely to be willing to risk ostracism by reporting their colleagues.⁵⁵ It is also dependent on the profession possessing the resources and will to pursue and punish wrongdoers, yet the record to date⁵⁶ indicates that neither commodity is in great supply. Moreover, empirical research suggests that professionals who pay attention to ethical rules solely because of threatened punishment have a weakened commitment to the mandated behaviour.⁵⁷ This

49. Duckett and Ryden, above n 44, p 61.

50. See eg Dawson, above n 39; Feldman, above n 34, at 932ff.

51. See Nicolson and Webb, above n 1, ch 8.

52. Another might be to utilise the codes' 'spirit' (F Silverman *Handbook of Professional Conduct for Solicitors* (London: Butterworths, 1989) p 69; Inns of Court School of Law *Professional Conduct* (London: Blackstone, 2nd edn, 1997) p 2), but whether a spirit exists and is identifiable by individual practitioners is highly dubious: Sheinman, above n 11, at 143.

53. No doubt, lawyers could (and in fact do) seek authoritative interpretations from their professional bodies. However, lawyers might not care sufficiently about acting morally to consult them, some moral issues might require immediate resolution, whereas the approach of always seeking advice in cases of ambiguous aspirational norms would be impractical.

54. O'Dair, above n 9, p 5.

55. Rhode, above n 19, at 709.

56. Abel, above n 6, pp 134–135 and 252–253; M Zander 'Only the talk is tough' *Gazette* 95, 2 December 1998, p 46; *The Times*, 22 May 1998, p 9.

57. M M Coady 'The Moral Domain of Professionals' in Coady and Bloch (eds), above n 19, p 49.

is particularly problematic in the case of lawyers given that their skills in finding ways around inconvenient rules meant that they might not regard code rules as greatly limiting their freedom to act unethically.

Duty-based codes of ethics thus fail to address much of what is psychologically required for moral behaviour. The increasingly common response is a call for a return to virtue or aretaic⁵⁸ ethics, which can be traced back to the Greeks, particularly Aristotle. Gradually overtaken by the duty-based Judaeo-Christian approach to morality, virtue ethics was eclipsed by deontic ethics following the Enlightenment,⁵⁹ only to be revived recently in response to the perceived failures of deontic ethics.⁶⁰

By contrast to deontic ethics, virtue ethics emphasises 'being' rather than 'doing'; character rather than action.⁶¹ Given that we generally judge character from someone's behaviour,⁶² action is not ignored altogether. Nevertheless, morality is seen largely as a question of a person's overall moral worth and in particular their possession of moral virtues, namely fixed character traits, dispositions or habits of belief, perception, feeling and behaviour which are regarded as morally right or commendable. Virtue ethics focuses on what counts as moral goodness and the virtuous life, and how people can make themselves morally better through developing moral virtues. It recognises that individuals are not born with developed virtues, nor with the 'practical wisdom' which enables them to see how to act in practical situations and allows their natural propensity to act morally to flower into virtue. Instead, virtue and practical wisdom are gradually developed through actual engagement with moral issues. By emulating others, by trial and error, by instruction from authoritative others, and by experiencing the appropriate satisfaction or regret at the outcome of one's actions, moral dispositions gradually develop to the point that appropriate moral behaviour, beliefs and feelings become part of the individual's essential character.⁶³ As McDowell puts it: '[o]ccasion by

58. From the Greek 'arete' meaning excellence, referring here to excellences of moral character (ie virtues).

59. But see J Haldane 'Medieval and Renaissance Ethics' in P Singer (ed) *A Companion to Ethics* (London: Blackwell, 1991) pp 143–144 regarding the continuing legacy of Aristotle and Aquinas' merger of his ideas with Catholic doctrine.

60. See eg G E M Anscombe 'Modern Moral Philosophy' (1958) 33 *Philosophy* 1; A MacIntyre *After Virtue: A Study in Moral Theory* (London: Duckworth, 2nd edn, 1985); B Williams *Ethics and the Limits of Philosophy* (London: Fontana Press, 1985).

61. The following account draws on Beauchamp, above n 40, ch 5; Dawson, above n 39; Feldman, above n 34; Frankena, above n 40, ch 4; A Flores 'Introduction: What Kind of Person Should a Professional Be' in Flores, above n 19; G Pence 'Recent Work on Virtues' (1984) 21 *American Philosophical Quarterly* 281 and 'Virtue theory' in Singer, above n 59; R Hursthouse *On Virtue Ethics* (Oxford: Oxford University Press, 1999). See also J J Kupperman *Character* (New York: Oxford University Press, 1991) and 'Character and Ethical Theory' (1988) 13 *Midwest Studies in Philosophy* 115, regarding what he describes as character, rather than virtue, ethics.

62. Cf O O'Neill *Toward Justice and Virtue: A Constructive Account of Practical Reasoning* (Oxford: Blackwell, 1998) p 72.

63. See Aristotle *The Nicomachean Ethics* (Amherst, NY: Prometheus Books, 1987) esp Bk II, ch I and Bk VI, ch XIII; and see further Luban, above n 34; D Carr *Educating the Virtues: An Essay on the Philosophical Psychology of Moral Development and Education* (London: Routledge, 1991).

occasion, one knows what to do, if one does, not by applying universal principles but by being a certain kind of person: one who sees situations in a certain distinctive way.⁶⁴

If properly developed, and not simply constituted by unthinking habits, prejudices or other harmful beliefs, moral character can be said to equip individuals with all four psychological components of morality. Unlike traditional deontic ethics,⁶⁵ virtue ethics concentrates on ensuring, not just the ability to recognise moral problems and to choose the right response, but crucially also the motivation and courage to carry through this choice. Moreover, where virtue is developed as a way of life, moral behaviour is far more likely than if individuals have to rely on any existing moral duties to persuade them to take morality seriously. For example, those whom we regard as moral 'saints' – Gandhi, Mother Teresa, Oskar Schindler, for example – were motivated by deep-seated and spontaneous feelings of compassion, and empathy – by 'habits of the heart' – rather than pious adherence to duty.

However, in addition to refreshing those components of moral behaviour that deontic ethics cannot reach, virtue ethics is said to have other advantages. One is that there are many aspects of good character, such as displaying personal integrity, the appropriate emotional response to others, or commitment to persons, groups or political causes, which are relevant to morality, but which traditionally have been omitted from deontic ethics and even now cannot be easily squeezed into ethical codes and moral duties. Similarly, virtue ethics stress that, even when particular conduct is considered appropriate, one may – and in many cases should – feel remorse at having to override competing moral considerations. This in turn may motivate a more sensitive and caring implementation of the ethical decision.

Another advantage of going beyond deontic ethics is that the mere fact that people obey moral obligations tells us little about their morality. They might, for instance, obey out of self-interest. Virtue ethicists argue against Kant that even obedience motivated by a sense of duty is less morally praiseworthy than virtuous behaviour stemming from dispositions, traits and sentiments which lie at a deep level of psychological motivation,⁶⁶ and which lead to immoral conduct being dismissed out of hand or not even entering the mind.

Finally, it is arguable that virtue ethics deals even better with the two components of moral behaviour that deontic ethics does cover. This is because virtuous dispositions involve ways of feeling as well as thinking and, according to moral psychologists, emotions are as – if not more – important to morality than the intellect. Unlike rational thought, sentiments like affection and empathy play a role in all four components of moral behaviour; even moral judgment, its most rational component. Judgment, it is argued, does not only involve rationally working out which duty best fits a moral dilemma and how

64. J McDowell 'Virtue and Reason' (1979) 62 *The Monist* 331 at 347.

65. Contemporary deontologists and consequentialists are beginning to address many of the central aretaic concerns (McDowell, above n 64, esp at 3–4, 54), but it remains to be seen whether they can coherently incorporate them and give them the attention they deserve.

66. See eg Hursthouse, above n 61, ch 4; P Foot *Virtues and Vices* (Oxford: Basil Blackwell, 1978) pp 13–14.

it should be applied. It also involves a 'perceptual capacity'⁶⁷ which enables individuals to respond to the requirements of each unique situation by drawing upon empathy, compassion and imagination, as well as their past experiences and entire world-view.⁶⁸ This is essential because, even if moral codes do regulate all moral issues, they can never be sufficiently flexible or sensitive to cope with the specific nuances, particularities, and emotional aspects of each unique moral situation. Furthermore, as we have seen, codes are unlikely to regulate all relevant issues and, here, moral character acts to fill the gap.

3. WHAT IS RIGHT WITH CODES?

Ethical codes thus appear only partly to address the requirements for moral behaviour. This might suggest that the energy expended in drafting and enforcing code provisions would be better directed at supporting the moral character that lawyers bring with them to the job. Thus the Faculty of Advocates claims – remarkably, in its code's preface⁶⁹ – that throughout the last 450 years:

'... it has never been felt necessary to produce a code of written rules with which an advocate is expected to comply. Nor has such a code become necessary now. The work of an advocate is essentially the work of an individual practitioner whose conscience, guided by the advice of his seniors, is more likely to tell him how to behave than any book of rules.'

In referring to a lawyer's 'conscience, guided by the advice of his seniors', the Faculty seems to echo the aretaic approach to ethics. However, no attempt is made to explain how lawyers come to possess the character attributes justifying this trust. The traditional suggestion was that the 'gentleman lawyer's' social background ensured that he was of the 'right stuff'.⁷⁰ But even if one accepts that a white, upper middle-class upbringing generated the right moral character, the current diversity of lawyers' backgrounds⁷¹ makes this argument outdated. Moreover, if character alone guaranteed ethical standards, one might expect rigorous checks on professional entrants and unethical lawyer behaviour to be confined to a few bad apples who elude this form of quality control. Yet checks on professional entrants' moral fitness to practise are perfunctory,⁷² whereas

67. McDowell, above n 64, at 333.

68. See D Luban and M Millemann 'Good Judgment: Teaching Ethics in Dark Times' (1995) 9 *Georgetown Journal of Legal Ethics* 31.

69. Above n 28.

70. See above n 16.

71. See D Nicolson 'Demography, Discrimination And Diversity: Legal Ethics And Social Background' (2005) 12 *International Journal of the Legal Profession* (forthcoming).

72. D Rhode 'Moral Character as Professional Credential' (1985) 94 *Yale LJ* 411; Hutchinson, above n 34, p 62, who also notes that character assessment comes too early, in that professional entrants have not yet tested their character through actual ethical dilemmas in practice.

studies of lawyer activity⁷³ and disciplinary proceedings⁷⁴ reveal that unethical behaviour – or at least breaches of professional norms – is far from rare.

In the past, eschewing moral codes could possibly have been justified on the grounds that the collegiality of a small close-knit legal profession and the typicality of long apprenticeships ensured informal socialisation into accepted ethical norms.⁷⁵ While this argument might still apply to the Faculty of Advocates, whose membership is small and centrally located, it is no longer plausible even at the English and Welsh bar, which is now relatively large, demographically diverse and geographically widely distributed – factors of course which apply even more to solicitors. In addition, the profession's increased fragmentation along economic and specialist lines means that professional socialisation will vary from one practice milieu to another and will be located in individual chambers and firms, if not smaller units within firms.⁷⁶

In a slightly different vein, Philips, argues that ethical codes lower rather than raise ethical standards and are unnecessary as most moral problems can be resolved using 'first principles'.⁷⁷ However, the existence of universally and objectively valid moral principles is now widely questioned, and not only by postmodernists.⁷⁸ And, even if such first principles do exist, Philips himself admits that they cannot indisputably solve all problems and then unwittingly confirms this by identifying the lawyer's duty to pursue client interests as the foundational principle of lawyers' ethics. Admittedly this duty, and more fundamentally the role morality of neutral partisanship, which requires lawyers to act zealously for clients irrespective of moral considerations, does have a prominent role in the codes.⁷⁹ However, it is not officially accepted as the central principle of ethical practice and, if it were to be, this would be highly contentious⁸⁰ and hence unable to justify the eradication of written rules.

73. J Baldwin and M McConville *Negotiated Justice: Pressures to Plead Guilty* (London: Martin Robertson, 1977); G Davis *Partisans and Mediators* (Oxford: Clarendon Press, 1994); M McConville, J Hodgson, L Bridges and A Pavlovic *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Oxford: Clarendon Press, 1994); A Boon 'Ethics and Strategy in Personal Injury Litigation' (1995) 22 JLS 353; H Genn *Hard Bargaining* (Oxford: Clarendon Press, 1997); B Neale and C Smart "'Good" and "Bad" Lawyers? Struggling in the Shadow of the New Law' (1997) 19 Journal of Social Welfare & Family Law 377; M McConville 'Plea Bargaining: Ethics and Politics' (1998) 25 JLS 562; J Griffiths-Baker *Serving Two Masters* (Oxford: Hart Publishing, 2002).

74. See the studies cited in above n 56; and A Sherr and L Webley 'Legal Ethics in England and Wales' (1997) 4 International Journal of the Legal Profession 109 at 121.

75. Cf Burrage, above n 6, at 54; Thornton, above n 16, pp 56–57.

76. See eg Burrage, above n 6, at 54; Nicolson and Webb, above n 1, ch 3, esp pp 60–61; Boon and Levin, above n 9, ch 3, esp pp 89–94; A Francis 'The Business Context: Legal Ethics, the Marketplace and the Fragmentation of Legal Professionalism' (2005) 12 International Journal of the Legal Profession (forthcoming).

77. Phillips, above n 7, esp preface and ch 1. See also the introduction to the *Code of Conduct for Scottish Solicitors*, above n 29.

78. See Nicolson and Webb, above n 1, pp 39–46.

79. Nicolson and Webb, above n 1, chs 6 and 8.

80. See eg Nicolson and Webb, above n 1, chs 6–9; Boon and Levin, above n 9, esp pp 26–36; O'Dair, above n 9, esp ch 5; R Cranston 'Legal Ethics and Professional Responsibility' in Cranston, above n 8; Special Issue 'Lawyers' Duties, Adversarialism and Partisanship in UK Legal Ethics' (2004) 7 Legal Ethics 167.

Moreover, as Paterson argues, under the intuitive, first-principle approach lawyers might become heavily embroiled in problems like conflict of interest without even realising it.⁸¹ A similar point undermines the Faculty of Advocates' faith in the ability of experienced lawyers to guide young professionals down the right moral track. Without introduction to the myriad ethical problems raised by legal practice, many legal neophytes may not get as far as seeking guidance and, even if they do, their 'seniors' might not themselves have experienced or even considered the problem raised.

In addition to these problems with abandoning ethical codes, there are three other major considerations. The first is that, whatever might be best from a theoretical perspective, ethical deregulation is a non-starter politically since the consumer and state demands for greater professional accountability and transparency which helped precipitate codification show no signs of dissipating.⁸²

Secondly, critics of virtue ethics argue that relying on character alone to ensure moral behaviour is risky.⁸³ This is because focusing on the totality of an individual's character may leave single acts of immorality unchallenged; because the virtues are too vague and controversial to adequately guide moral behaviour; and because virtue ethics is inherently conservative in seeing character development as tied to practices within particular communities, thus potentially leading to unthinking vicious rather than virtuous habits and dispositions. Whilst somewhat exaggerated,⁸⁴ these dangers suggest that, just as duty-based ethics cannot get off the ground without moral character, so is it preferable⁸⁵ for virtue ethics to be supplemented by moral principles which enable evaluation of the actions of even virtuous individuals.⁸⁶

The final consideration which cautions against total ethical deregulation takes us to the heart of my argument about the interrelationship between ethical codes and moral character. Thus far I have argued that codes will underdetermine ethical behaviour unless lawyers care about and are committed to acting ethically. I will now seek to show that codes can play an important role in the development and maintenance of the moral character which ensures

81. A Paterson 'Legal Ethics: Its Nature and Place in the Curriculum' in Cranston, above n 8, p 177.

82. Cf A Crawley and C Bramall 'Professional Rules, Codes and Principles Affecting Solicitors (or What Has Professional Regulation to do with Ethics?)' in Cranston, above n 8, p 105.

83. See eg O'Neill, above n 62; T L Beauchamp and J F Childress 'Virtues and Conscientious Actions' in Flores, above n 19.

84. Eg Hursthouse, above n 61, ch 1, argues that virtues are no less vague in guiding behaviour than the principle of utility or the idea of applying correct moral rules, whereas her discussion of the role of reason in virtuous action (pp 124-125) counters the idea that moral character may include unthinking prejudices.

85. But not essential: H I Dreyfus and S E Dreyfus 'What is Morality? A Phenomenological Account of the Development of Ethical Expertise' in D Rasmussen (ed) *Universalism and Communitarianism* (Cambridge, Mass: MIT Press, 1990) p 258.

86. See Frankena, above n 40; Beauchamp and Childress, above n 83; and O'Neill, above n 62, who have sought to integrate the deontic and aretaic traditions. In the context of professional ethics generally and lawyers' ethics see, respectively, B Jennings 'The Regulation of Virtue: Cross-Currents in Professional Ethics' (1991) 10 *Journal of Business Ethics* 561; Nicolson, above n 14.

not only these two components of moral psychology but also enhanced moral sensitivity and judgment.

As we have seen, virtue ethics holds, and psychological research confirms,⁸⁷ that we are not born with fully formed moral characters. Instead, morality develops over time and, although it may slow and stagnate, moral development may also continue throughout adulthood, especially for those who enter tertiary education, and who take ethics courses.⁸⁸ Yet, whatever professional entrants' existing state of moral development, they will not have been exposed to the type of ethical issues raised by legal practice and the moral considerations relevant to their resolution. Accordingly, they will have not begun to develop the intuitive and spontaneous responses to professional moral problems, the nuanced moral judgment, and the motivational and behavioural dispositions needed in legal practice. In other words, while legal neophytes may possess a *personal* moral character they have yet to develop a *professional* moral character.

It is in helping to develop and sustain such 'professional moral character' that codes can play an important role. Aristotle⁸⁹ himself acknowledged that the development of moral character starts with the application of rules before reaching the point where stable motivational and behavioural dispositions are in place. Through exposure to the codes, students can learn what issues previous generations have identified as relevant to legal practice and what solutions they regard as justified. This experience needs to extend beyond knowing the rules to evaluating their appropriateness and underlying justifications. And, if morality is going to become integral to a lawyer's professional character, law students and the newly qualified need to practise applying the rules in role-playing⁹⁰ and preferably also clinical work.⁹¹ The rules can also provide the

87. See Kupperman (1991), above n 61, ch 3.

88. See eg Kohlberg, above n 41; the essays in Rest and Narvaez (eds), above n 44; Rest, above n 45; J Rest and D Narvaez 'The College Experience and Moral Development' in W M Kurtines and J L Gewirtz *Handbook of Moral Behaviour and Development* (Hillsdale, NJ: L Erlbaum, 1991).

89. Above n 63, esp Bk X, ch 10. See also Dreyfus and Dreyfus, above n 85; R S Peters 'Moral Development and Moral Learning' (1974) 58 *The Monist* 541.

90. See generally the essays in Rest and Narvaez (eds), above n 44, esp that by Sprinthall; D A J Richards 'Moral Theory, the Developmental Psychology of Ethical Autonomy and Professionalism' (1981) 31 *JLE* 359; and in relation to legal ethics education, Paterson, above n 81.

91. See generally N Redlich 'The Moral Value of Clinical Legal Education: A Reply' (1983) 33 *JLE* 613; M Jewell 'Teaching Law Ethically: Is It Possible?' (1984) 8 *Dal LJ* 474; S Hartwell 'Moral Development, Ethical Conduct and Clinical Education' (1990) 35 *New York Law School Law Review* 131; J Johnstone and M P Treuthart 'Doing the Right Thing: An Overview of Teaching Professional Responsibility' (1991) 41 *JLE* 75; J Webb 'Conduct, Ethics and Experience in Vocational Legal Education: Opportunities Missed' in Economides (ed), above n 8; A Evans 'The Values Priority in Quality Legal Education: Developing a Values/Skills Link through Clinical Experience' (1998) 32 *Law Teacher* 274; and more specifically in relation to character formation, Luban, above n 34; Luban and Millemann, above n 68; R Conklin 'The Moral Failure of Clinical Legal Education' in D Luban (ed) *The Good Lawyer: Lawyer's Roles and Lawyer's Ethics* (Totowa, NJ: Rowman and Allanheld, 1983); D Nicolson 'Making Lawyers Moral? Moral Character and Ethical Education', paper presented to the First International Legal Ethics Conference, University of Exeter, July 2004.

focus for a lawyer's day-to-day engagement with ethical issues and profession-wide ethical debates conducted by professional bodies and perhaps also in 'ethical circles'⁹² established to keep moral issues at the forefront of lawyers' minds, thereby contributing to continuing character development.⁹³

4. WHAT IS THE RIGHT TYPE OF CODE?

This programme for character development is obviously highly dependent on legal ethics teaching becoming far more sophisticated and prominent in legal education than at present. However, it is also dependent on the design of the professional codes. Depending on their form, codes can either help inculcate and sustain such character development, or they can undermine it. The important question is which, if either, ideal-type is best suited to this task.

The clear trend, both generally⁹⁴ and in the British legal profession has been towards disciplinary codes. Their supporters⁹⁵ can point to the fact that, compared to aspirational codes, detailed and highly specific duties, which apply in an absolute and non-contextual fashion, define more clearly the terms of the alleged social contract between profession and community and enable closer regulatory control, thus avoiding the problems of a deregulated legal profession raised above.

Of course, as we have seen, no code will be totally clear in its requirements. However, disciplinary codes have various unique drawbacks.⁹⁶ Thus the attempt to regulate all aspects of particular issues with specific rules might well lead to individual professionals and disciplinary bodies regarding issues inadvertently overlooked as not subject to ethical considerations. Disciplinary codes also suffer from being less knowable by their subjects. One reason is that detailed regulation of all contemplated ethical issues is likely to lead to dense documents, especially if the codes tailor regulation to the different environments of an increasingly specialised and fragmented profession. Another reason is that highly specific solutions to problems may quickly become outdated in a rapidly changing world, thus requiring constant revision, but if this occurs, lawyers will find it difficult to keep abreast with constant changes. Indeed, they may even become disillusioned with their professional bodies' ability authoritatively to resolve ethical problems and give up on the rules altogether.

Another set of disadvantages flows from the way in which disciplinary codes resolve moral issues. Categorical rules prevent sufficient attention being given to the context of moral dilemmas, the specific needs of those involved, and the consequences of particular solutions. Furthermore, the tendency of disciplinary

92. See Sampford and Parker, above n 8, p 17.

93. Hutchinson, above n 34, esp p 15; Kupfer, above n 34.

94. See Moore, above n 19, at 15; Zacharias, above n 19, at 223.

95. See eg Lichtenberg, above n 24; Cranston, above n 8, pp 5-6; Paterson, above n 81, pp 176-177 and 'Legal Ethics in Scotland' (1997) 4 International Journal of the Legal Profession 25 at 37; D Webb 'Book Review' (2000) 3 Legal Ethics 90 at 91.

96. See eg Feldman, above n 34; Hutchinson, above n 34; Zacharias, above n 19; Salbu, above n 42; R E Loder 'Tighter Rules of Professional Conduct: Saltwater for Thirst?' (1987) 1 Georgetown Journal of Legal Ethics 311.

codes to set lowest common denominator standards is unlikely to assuage public demands for an ethical profession. Without more aspirational ideals, ethical behaviour is likely to sink to the bare minimum required, especially if lawyers think that supererogation will place them at a competitive disadvantage.⁹⁷ Given that minimalist duties are easily satisfied without much self-sacrifice, they undermine suggestions that ethical behaviour is central to professional status. And where sacrifice is expected, it will not necessarily be evenly spread throughout the profession. The more detailed a code, the less likely are its rules to reflect a consensus⁹⁸ and hence the greater the scope for professional elites to draft rules reflecting their own interests.⁹⁹ This in itself may make highly detailed codes unethical.

But even where professional rule-makers strive for neutrality, providing categorical answers to specific ethical dilemmas increases the chances of such answers being categorically 'wrong'. And where such 'wrong' solutions are reinforced by sanctions, lawyers are faced with either feeling guilty about their behaviour or switching off moral conscience in favour of unthinking rule adherence. As many have argued in relation to the lawyer's role morality of neutral partisanship,¹⁰⁰ neither response to conflicts between professional and personal morality is calculated to promote an individual lawyer's psychological health or a well-adjusted profession.

However, given that it makes life more comfortable, lawyers are more likely to opt for shutting down their moral faculties.¹⁰¹ For those who see moral character as the best route to ethical behaviour, it is this response which represents disciplinary codes' most serious defect. Reducing ethics to adherence to detailed rules is likely to replace individual ethical decision-making with 'mindless conformity to the rules',¹⁰² especially as such rules suggest that all possible ethical dilemmas have been considered by the experts. This in turn is likely to encourage technocratic and legalistic modes of ethical reasoning, and to discourage lawyers from constantly looking to their own consciences and moral insights, and from questioning the law's justice and morality. Faced with a thicket of detailed rules, lawyers may fail to see 'the ethical forest for the law-like trees'. As Hutchinson goes on to argue, 'weighed down with discrete and detailed directives on this or that matter, there is little to counsel the floundering

97. D Luban 'Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics' (1981) 40 MdLR 451 at 460-461.

98. Though, paradoxically, the greater such a consensus, the less the rules are needed.

99. See above n 22.

100. G J Postema 'Moral Responsibility in Professional Ethics' (1980) 55 NYULR 63 and 'Self-Image, Integrity and Professional Responsibility' in Luban (ed) (1983), above n 91; A Eshete 'Does a Lawyer's Character Matter?' in Luban (ed) (1983), above n 91; B Williams 'Professional Morality and its Dispositions' in Luban (ed) (1983), above n 91; J J Flynn 'Professional Ethics and the Lawyer's Duty to Self' (1976) 3 Washington University Law Quarterly 429; D S Kleinberger 'Wanted: An Ethos of Personal Responsibility - Why Codes of Ethics and Schools of Law Don't Make for Ethical Lawyers' (1989) 21 Connecticut LR 365.

101. Cf R Wasserstrom 'Lawyers as Professionals: Some Moral Issues' (1975) 5 Human Rights 1 at 9 and 'Roles and Morality' in Luban (ed) (1983), above n 91, pp 29-30; W H Simon 'The Ideology of Advocacy: Procedural Justice and Professional Ethics' (1978) 29 Wis LR 103.

102. Salbu, above n 42, at 166.

or jaded lawyer in establishing an overall and professional *modus vivendi*'.¹⁰³ In other words, even if lawyers do possess a developed personal moral character, disciplinary codes hamper the development of professional moral character.

In fact, however, such codes may actually undermine lawyers' already existing moral character. This is because they may encourage them to reduce ethics to a matter of risk analysis and risk management, in which they make 'good guesses as to the level of malpractice at which they should operate in any given situation'¹⁰⁴ and use their legal skills to avoid disciplinary sanctions when they miscalculate. This strategy of 'creative compliance',¹⁰⁵ especially when combined with adherence to the role morality of neutral partisanship, may lead to cynicism and indifference to ethical considerations, which in turn may inhibit the development of professional moral character or even alter an underlying personal moral character. In this way, detailed codes may weaken those components of moral psychology that the limitations of all ethical codes make so important to ensuring moral behaviour.

Accordingly, if it is accepted that moral character is essential to ethical behaviour and that codes can help develop and sustain character, aspirational codes appear to be better suited to this task. The fact that they leave discretion to individual professionals has several advantages in relation to character development. By encouraging law students to explore alternative solutions to moral problems and their justifications, and by requiring practising lawyers (and law clinic students) to exercise judgment in real-life dilemmas, aspirational codes require regular exercise of the individual's 'moral muscles'. This should act to sustain personal, and foster professional, moral character, particularly if supported by 'moral mentors' in law schools, law clinics, and practice settings. Moreover, the lack of categorical answers allows prospective and practising lawyers to learn through trial and error, and particularly from feeling regret or remorse when chosen solutions to ethical issues turn out to be inappropriate. This is arguably one of the surest ways for developing fixed dispositions towards virtue.

An aspirational code's inclusion of professional ideals (such as upholding justice and giving legal voice to the weak, unpopular etc) and virtues (like trustworthiness, integrity, and moral courage) could also have a positive effect on moral character. Instead of requiring minimal behavioural standards, aspirational norms may inspire lawyers to strive to be as moral as they can be and, since 'it is one property of an aspiration that we properly feel ashamed of ourselves for not living up to it',¹⁰⁶ keep alive a lawyer's moral conscience.

More generally, an aspirational code's lack of categorical solutions to specific issues is more likely than one with fixed solutions to foster ongoing profession-wide debates about the appropriate use of a lawyer's ethical discretion. Such debates could play an important role in the 'constructed community of professional norms'¹⁰⁷ and in fostering a shared sense of legal

103. Above n 34, p 182.

104. Practitioner quoted in Hazard, *Ethics in the Practice of Law* (New Haven: Yale University Press, 1978) p 153. See also Phillips, above n 7, pp 12 and 129.

105. See D McBarnet and C Whelan 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control' (1991) 54 MLR 848.

106. Luban and Millemann, above n 68, at 50.

107. Kupfer, above n 34, at 63.

professionalism, understood as 'an idealised way of *being*' that includes commitment 'to using professional skills and knowledge, in morally acceptable ways, for the benefit of society'.¹⁰⁸ According to Flores, 'reference to virtues such as honesty and integrity, and ideals such as truth and justice, deepens in significant ways our understanding of what it means to be a professional, and ... how professionalism must imply something more than rule-governed behaviour'.¹⁰⁹

Aspirational codes therefore have distinct advantages over disciplinary codes. Yet we have also seen that their lack of clear direction means that professional regulators cannot argue that lawyers will act in particular ways and hence persuade the public that their interests are being protected. This is particularly so because the need for fair warning through clear norms counsels against aspirational codes being reinforced by disciplinary sanctions. Where lawyers do not already have the moral character necessary to ensure moral behaviour, the lack of sanctions may result in the codes being ignored. Moreover, while aspirational codes allow space for moral character to develop through the exercise of judgment and the exploration of ethical considerations, their lack of specificity means that they do little themselves to instigate and guide the process of character development, which is instead dependent on educators and experienced practitioners being willing and able to play this role.

In other words, whereas an aspirational code does not anaesthetise moral conscience and undermine moral character, it offers insufficient regulation and guidance, yet its alter ego overemphasises strict regulation to the detriment of professional moral character development and may even undermine established personal moral character. How is one to square the circle and synthesize an aspirational code's reliance on character with a disciplinary code's focus on regulation?

5. A CONTEXTUAL CODE

One approach would be to attempt to find an optimum point between over-specificity and over-vagueness that neither precludes disciplinary sanctions nor turns codes into legalistic documents. However, achieving the right balance between 'unenforceability and insubstantiality'¹¹⁰ is extremely difficult, not least because – as Zacharias argues¹¹¹ – this will depend on which of a code's possible functions¹¹² is seen as most important. Greater specificity is required, for instance, if codes concentrate on directing lawyer behaviour, resolving 'co-ordination problems' or providing a 'defensive ethics' against demanding clients. On the other hand, highly detailed codes tend to undermine the aim of encouraging lawyers to engage in moral introspection or upholding their image as trustworthy professionals. Of course, different parts may fulfil different

108. Flores, above n 61, p 2.

109. Flores, above n 61, p 3.

110. Luban, above n 97, at 461.

111. Above n 19. See more generally J J White 'Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation' (1980) American Bar Foundation Research Journal 926 at 935.

112. See above nn 19–23 and associated text.

functions and hence may justify different solutions to the specificity/generality question.

Here a useful distinction can be drawn between *ethical* norms, which involve questions of what is morally 'right' or 'good', and *conduct* norms, which relate to matters of etiquette or 'mere regulation', with the latter resembling traffic or VAT regulations in requiring 'knowledge and implementation', but no 'thought and understanding'.¹¹³ From the perspective of character development, there is little objection to detailed regulation of issues like advertising, insurance requirements, and training contracts. Not raising ethical dilemmas, their resolution is unlikely to impact on character development. By contrast, where ethical dilemmas are raised, such as whether lawyers can refuse representation, how much control to exercise over clients, or when confidentiality can be breached, overly specific rules raise the problems associated with disciplinary codes. Nevertheless, the answer does not simply lie in making these ethical norms less specific. Instead, codes could be divided into two sections or even two separate codes, with the conduct norms taking a disciplinary form and the ethical norms a contextual form.

Not unlike the current codes, the 'contextual' code favoured by Webb and myself¹¹⁴ would commence with broad aspirational principles, professional ideals and virtues, requiring lawyers, for instance, to act with integrity, honesty and candour, and to practise in ways which promote the public good. At a second level, it would outline more specific principles and duties, such as respecting client confidences, ensuring equal access to the law, upholding client autonomy etc. Then at a third level it would combine these ideals, virtues, principles and duties with more specific guidance on how they affect the resolution of particular dilemmas. It is here that a contextual code will differ most from the current codes. Instead of either simply stating some general principle or duty or providing categorical answers to highly specific questions a contextual code would set out contextual factors which affect how one might apply the various virtues, ideals, principles relevant to particular ethical issues. As in administrative law, such factors would have to be considered and weighed against each other in reaching a resolution, but they would not by themselves determine the decision.¹¹⁵

In addition, the codes could also include commentaries explaining the relevance of the particular virtues, ideals, principles, duties and contextual factors in question, as well as the rulings of professional bodies dealing with requests for guidance on particular ethical dilemmas and disciplinary matters. In this last regard, it is important that contextual codes retain a disciplinary function in order to be taken seriously. Admittedly, some loss of certainty will accompany the move away from detailed norms.¹¹⁶ Although the professional bodies do not seem overly concerned about imposing penalties on their

113. Crawley and Bramall, above n 82, p 105.

114. See above n 36. See also Simon, above n 35.

115. Although occasional categorical rules for important ethical obligations would not seriously undermine the advantages of contextualism, it is difficult to think of any which are not also obvious legal obligations (eg the rule against stealing from clients). Even the duty to represent criminal defendants despite moral qualms, I will argue, should be merely a strong presumption rather than a categorical rule.

116. But not as great as might be expected: see Simon, above n 35, pp 70–71.

members under open-ended norms, in order to avoid any unfairness under a contextual code, punishment can be limited to situations where lawyers ignore relevant contextual factors, take into account irrelevant considerations or otherwise act in ways in which no reasonable lawyer would act. Where this is not clearly the case, disciplinary bodies can make declarations for the future, contributing to a rich seam of precedents and a common understanding of how relevant contextual factors should play out, as well as sparking useful debates in the legal community at large. Undoubtedly, this will mean some loss in deterrence. However, this drawback can be offset by developing a more sophisticated and effective regulatory strategy than the half-hearted 'command and control' approach currently adopted.¹¹⁷

A clearer idea of a contextual code can be conveyed by showing how it might deal with the controversial issue of whether lawyers should be able to refuse client representation on moral grounds.¹¹⁸ In the case of advocates and barristers, the so-called cab-rank rule totally prohibits such refusals, whereas solicitors have absolute discretion to refuse and, apart from the prohibition of racial, sexual and other forms of discrimination, are given no guidance as to how to exercise this discretion (though the role morality of neutral partnership strongly encourages them to represent irrespective of moral considerations). By contrast, a contextual code could first specify the virtues, ideals and principles relevant to the issue of client selection. These would include the traditional justifications for lawyers providing representation notwithstanding moral misgivings: the procedural system's dependence on two zealous adversaries; the fact that representation may be necessary to enhance individual dignity and autonomy; the idea of equal access to law; and the need to protect the vulnerable, the unpopular and the powerless. However, also included could be a principle of moral integrity which stresses that lawyers are implicated in, and hence morally responsible for, all harmful actions taken on behalf of clients; that they cannot pass on moral responsibility either to clients, whom they have freely chosen to represent, or to the profession, which they have voluntarily entered.

Then in guiding lawyers to decide how these principles should play out in particular cases, the code's third level could require consideration of the following contextual factors:¹¹⁹

- the relevant material, emotional and psychological interests, desires and needs of those involved in and affected by legal representation;
- the respective harms likely to ensue to prospective clients, those associated with them, third parties, the legal system, the general public, the environment, the individual lawyer and the legal profession depending on whether representation is or is not provided;
- the balance of power between lawyer and prospective client, and between the latter and any opponent and affected others;

117. See Nicolson and Webb, above n 1, ch 4; J Webb and D Nicolson 'Institutionalising Trust: Ethics and Responsive Regulation of the Legal Profession' (1999) 2 *Legal Ethics* 148.

118. The following is based on Nicolson and Webb, above n 1, chs 6–8 *passim*.

119. Cf Simon, above n 35, who limits his relevant factors to those which promote (*legal* as opposed to *substantive*) justice, by enabling lawyer to vindicate a case's 'legal merits'. Space constraints preclude a full criticism of this narrow view of justice, but see Nicolson and Webb, above n 1, p 220.

- whether the lawyer's moral objection is to the client's objectives, the tactics which might be used to achieve these, or merely to the client him or herself because of his or her beliefs and past actions; and
- how certain the lawyer is about the client's moral beliefs and the facts relevant to the above factors.

However, a contextual code need not stop there. Guidance could also be given on how these contextual factors might play out in particular areas of practice. Thus, at one extreme, the code might stress that a combination of power imbalances between accused and the state, the potentially disastrous consequences of criminal convictions and the danger posed to civil liberties generally if defendants' rights are ignored and the innocent are convicted generate a very strong presumption in favour of acting for criminal accused. At the other extreme, there are no particular reasons why lawyers should have to swallow their ethical objections when companies seek representation in activities like lobbying where lawyers are not particularly required. Where, however, civil litigation is involved and particularly where it has reached court, citizens' need for lawyers to help them assert their rights and possibly also autonomy and dignity, and lawyers' monopoly of advocacy rights swing the balance more towards providing representation despite moral objections, especially where power imbalances between the prospective client and opponent resemble criminal cases.

When compared with the current codes, the contextual approach has advantages in relation to both the issue of client representation and the more general aim of fostering a more ethical profession through character development. As regards the former, an approach which requires lawyers to think through the reasons for and against representation is likely to ensure stronger commitment to client interests than one where lawyers provide representation solely because of threatened sanctions or the promise of financial rewards. An interesting paradox in the current position is that while the cab-rank rule and neutral partisanship more generally are justified as ensuring protection to the weak, the unpopular and the impoverished,¹²⁰ these are precisely the people that many lawyers try to avoid representing¹²¹ and who, when represented, frequently receive lack-lustre assistance.¹²² Rather than force unwanted clients on unwilling lawyers, it ought to be recognised that the obligation to provide representation for those in need falls on the profession as a whole, which should collectively ensure that it is fulfilled.¹²³

More generally, by exposing law students to the various dilemmas and moral considerations that arise in different practice arenas, contextual codes can help them make ethically informed choices about what area of law to practise. This is probably their most significant ethical decision, determining both the type of moral dilemmas they are likely to face and the likely constraints on their

120. See the references in Nicolson and Webb, above n 1, p 193 nn 84–86.

121. Nicolson and Webb, above n 1, p 204 n 180.

122. See Baldwin and McConville, McConville, Davis, all above n 73.

123. Hutchinson, above n 34, ch 5; D Nicolson 'Afterword: In Defence of Contextually Sensitive Moral Activism' (2004) 7 Legal Ethics 269 at 270–272, responding to A Boon 'Cause Lawyers and the Alternative Ethical Paradigm: Ideology and Transgression' (2004) 7 Legal Ethics 231 at 250–268.

ability to display moral integrity.¹²⁴ It is therefore essential that aspiring lawyers consider these dilemmas and constraints before they make career choices and before financial rewards, career prospects and job satisfaction overwhelm their moral consciences. Moreover, actual application of a contextual code in role-playing or law clinics will hopefully also start the development of professional moral character. Such character would continue to strengthen as lawyers repeatedly consider the code's wide range of relevant considerations in resolving dilemmas throughout their careers and are periodically exposed to novel contextual factors which have to be compared with more familiar factors in resolving moral dilemmas.

6. CONCLUSION

Although I have argued that development of professional moral character and its support by a contextual code provides the most profitable route to an ethical legal profession, I am under no illusion that the task is an easy one. Its difficulty flows from the fragility of moral character in general and the difficulties of remaining virtuous in legal practice.

As regards the former, some philosophers have argued that social psychology experiments in which subjects were surprisingly susceptible to situational factors encouraging harmful or discouraging helpful behaviour show that character dispositions do not exist¹²⁵ or that at best there are only 'local traits' which provide reliable behavioural dispositions for highly specific situations.¹²⁶ Although these arguments have been vehemently contested as misinterpreting both the experiments and the concept of character,¹²⁷ virtue ethicists have acknowledged that the fully virtuous moral agent predictably acting morally in the face of contrary situational pressures and temptations is far from the norm. Instead, full virtue is an ideal to be strived for and achieved, if at all by, over time and by degrees. Indeed, some now agree that considerable attention needs to be paid to exploring how moral agents might best be able to resist situational pressures and temptations to act immorally.

124. Hutchinson, above n 34, p 73.

125. G Harman 'Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error' (1999) 99 Proceedings of the Aristotelian Society 315, 'The Nonexistence of Character Traits' (2000) 100 Proceedings of the Aristotelian Society 223 and 'No Character or Personality' (2003) 13 Business Ethics Quarterly 87.

126. J M Doris 'Persons, Situations, and Virtue Ethics' (1998) 32 Noûs 504 and *Lack of Character: Personality and Moral Behaviour* (Cambridge: Cambridge University Press, 2002); P Vranas 'The Indeterminacy Paradox: Character Evaluations and Human Psychology' (2005) 39 Noûs 1.

127. N Athanassoulis 'A Response to Harman: Virtue Ethics and Character Traits.' (2000) 100 Proceedings of the Aristotelian Society 215; M Merritt 'Virtue Ethics and Situationist Personality Psychology' (2000) 3 Ethical Theory and Moral Practice 365; J J Kupperman 'The Indispensability of Character' (2001) 76 Philosophy 239; G Sreenivasan 'Errors about Errors: Virtue Theory and Trait Attribution' (2002) 111 Mind 47; C Millier 'Social Psychology and Virtue Ethics' (2003) 7 The Journal of Ethics 365; R C Solomon 'Victims of Circumstances? A Defense of Virtue Ethics in Business' (2003) 13 Business Ethics Quarterly 43; R Kamtekar 'Situationism and Virtue Ethics on the Content of Our Character' (2004) 114 Ethics 458; L Besser-Jones 'Social Psychology, Moral Character, and Moral Fallibility' (unpublished manuscript).

This is particularly apposite in the case of lawyers. Of the various situational pressures they face, while the ideology of neutral partisanship has remained largely unchanged and there has even been some weakening of the adversariality of legal proceedings,¹²⁸ the commercialisation, specialisation and bureaucratisation of legal practice has grown apace.¹²⁹ Accordingly, legal practice has come to prioritise the financial bottom line and the exercise of technical skills over ethics more than ever before. Moreover, in large practice settings, moral responsibility may now 'float'¹³⁰ throughout the organisation or 'fall between the players'.¹³¹ In this light, it is hardly surprising that practising lawyers apparently exhibit a lower stage of moral development than law graduates.¹³²

This suggests that current approaches to ethical codes are not working. But it might also be taken to suggest that the current climate of legal practice, along with the general fragility of moral character, its alleged fragmentation into local traits, and the apparent rarity of fully virtuous moral agents preclude placing any faith in contextual codes and the development of moral character. For two reasons, I think that such a response is misplaced.

One is that legal practice in fact requires stable local, rather than global, moral traits. Particularly due to increasing specialisation, lawyers are not required to act virtuously across a wide range of situations, but only in relatively few routine situations. A contextual code will inform legal neophytes of the ethical considerations relevant to various practice areas, thus guiding and adding an ethical dimension to their choice of practice area, and then make routine the application of various contextual considerations to specific moral dilemmas as they arise. In this way, it is possible that fixed behavioural dispositions of a moral nature may relatively soon emerge.

Secondly, the potential fragility of lawyers' moral character and its susceptibility to the situational pressures and temptations of legal practice are not problems which are exclusive to a character-based approach to the 'how' of legal ethics. Any alternative to a contextual code and a focus on character development needs to ensure that lawyers not only perceive moral problems when they arise and know how to resolve them, but also care about acting morally and do so despite situational obstacles.

The most plausible option is the intensification of a command and control strategy. This requires, on the one hand, subjecting the increasingly complex problems of an increasing diversified legal profession to ever more detailed rules, and constantly revising them as conditions and ethical priorities change, and, on the other hand, a much greater commitment to the detection and prosecution of disciplinary offences. Whether the professional bodies have the inclination to devote the necessary resources to such increased rule-making and enforcement is a moot point, though the English and Welsh Law Society's

128. See eg D Webb 'Civil Advocacy and the Dogma of Adversarialism' (2004) 7 Legal Ethics 210; L Webley 'Divorce Solicitors and Ethical Approaches – The Best Interests of the Client and/or the Best Interests of the Family?' (2004) 7 Legal Ethics 231.

129. See the works cited in above n 76.

130. Bauman, above n 39, pp 19–20.

131. D Luban *Lawyers and Justice: An Ethical Study* (Princeton, NJ: Princeton University Press, 1988) pp 123–125.

132. Webb, above n 78, p 271.

recent proposals and the other professional bodies initial reluctance to promulgate rules do not bode well. But even if the commitment existed, we have seen that it is unlikely that even detailed rules can cover all situations or the professional bodies can detect and successfully prosecute all breaches. Yet where the rules run out or sanctions appear ineffective, I have argued that the reliance on detailed rules and the threat of sanctions will leave lawyers with inferior judgment capacities, a narrower range of moral sensibilities and a reduced personal commitment to moral behaviour.

Arguably, if professional moral character had as long to develop as personal moral character and was supported by as many powerful institutions, then a combination of detailed rules and disciplinary sanctions might just be a plausible means to making lawyers moral. However, professional moral character must develop over a much shorter period with far weaker socialisation institutions, and possibly even greater countervailing pressures and temptations than those that challenge personal moral dispositions. Consequently, an approach to ethics which directly engages with character development seems far better suited to ensuring moral behaviour by lawyers and it in this process that a contextual approach to code design can play an important role.

**BODY OF SENIOR ADVOCATES OF NIGERIA
(BOSAN)**

**TOPIC:
LEGAL ETHICS AND PROFESSIONALISM IN THE
PRACTICE OF LAW**

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13TH SEPTEMBER, 2018

LEGAL ETHICS AND PROFESSIONALISM IN THE PRACTICE OF LAW

PROTOCOL

INTRODUCTION

I wish to place on record my indebtedness to the organizers of this event for extending to me an invitation to serve as a facilitator for the maiden 'pre-swearing in' induction programme for the soon-to-be Senior Advocates of Nigeria. I was very far away from this country when the invitation reached me by Whatsapp message. My first reaction was to inhale and to contemplate whether I would be in a position to prepare a paper soon after undergoing what was a rigorous medical evaluation including a long flight home and I did not see any way out. My conclusion was that, I am obliged to participate and my advice to you today is that, whenever this body (BOSAN) calls on you, do your best to render whatever service is required notwithstanding the inconvenience. As you will soon discover, *unto whom much is given much is expected* and so this profession recognizes 'a pay back time.' Once I came to that conclusion, I also had to come to terms with the nature of the assignment and, on proper reflection, I thought it would serve as a background to acquaint you with, why in my view, I have been invited to this event.

In that connection, a week before I travelled, my set, that is, the Nigerian Law School Class of 1978, celebrated the 40th Anniversary of our Call to the Nigerian Bar. What this means within the confines of our discussion today, is that I have had the fortune of navigating the Rules of Professional Conduct for the period of

40 years and the presumption must be that I should know a thing or two about the circumference of what is expected of a lawyer in practice. Besides, I was elevated to the Inner Bar in the year 2000 and so, in the past 18 years or thereabout, I have also had the privilege of practicing our coveted profession as a Senior Advocate of Nigeria, and the other inevitable presumption is that I also ought to know the inevitability of a person of that rank demonstrating his/her understanding of legal ethics and professionalism both in theory and in practice. Many occasions will arise when you will instantly need to assert your appreciation of the demands of being a seasoned and ethical professional. It is probably for these reasons that the organizers have asked me to dilate on and to lead the discussion on the topic: **"Excellence and Professionalism in the Practice of Law."**

Quite graciously, the organizers of this event helped me to breakdown this topic into four (4) subtopics namely:

- I. 'The Senior Advocate of Nigeria: A Rebuttable Presumption of Excellence?'
- II. 'Understanding the Culture and Demands of Continuous Excellence.'
- III. 'Scholarship in Legal Practice.'
- IV. 'The Legal Services Revolution.'

Before I dilate on my main topic for today, I need to underpin the fact that this is a one day event and I am one of several speakers, which means that I am not at liberty to roam far and wide but will advisedly keep my speech very short, bearing two specific things in mind. The first is that, none of you is less than 10 years at the

Bar, which is a prerequisite for being admitted to the inner Bar. An inevitable corollary to that fact is that, you have been stewed in not just the dimensions of professional ethics and professionalism but on the imperatives of keeping your practice within bounds. Some of you in fact have spent thirty (30) years and above at the Bar in active practice and our professional demands are very well ingrained in your bones. Accordingly, you have less or little more to learn. In addition, the second point is that, as a member of the Legal Practitioners Privileges Committee (the body saddled with the onerous task of vetting all applicants), one is entitled to the inevitable conclusion that, any person found worthy of donning the silk gown must have demonstrated some modicum of excellence within the profession both in learning and character and both of these ingredients have a bearing on ethics and professionalism. I was involved in that vetting process and I can confirm, that anybody who jumps all the obstacles and becomes eligible to be conferred with the rank of Senior Advocate of Nigeria can beat his or her chest exuberantly. Again, I have known some of you over many years and have come to see the sun in your eyes and I am personally convinced that your light will so shine on our profession so as to leave no one in doubt (including innocent bystanders) that your silk gown will sit on you very prettily.

IS THERE A DIFFERENCE BETWEEN ETHICS AND PROFESSIONALISM?

Very often, a lot of persons within and without different professional organizations consider ethics to mean the same thing as being demonstrably a seasoned professional. My feeble

research has led me to the conclusion that both do not mean exactly the same thing and whenever I am in doubt or unsure of any legal position, I visit the Black's Law Dictionary. The Tenth Edition of that dictionary refers to the word '*ethics*' as "a system of moral tenets or principles; the collective doctrines relating to the ideals of human conduct and character." The Dictionary emphasizes that:

*"...Ethics refers to imperatives regarding the welfare of others that are recognized as binding upon a persons conduct in some more immediate and binding sense than law and in some more general and impersonal sense than morals. This definition is narrower than those of the Philosophers..."*¹

On the other hand, the same dictionary refers to '*professionalism*' as:

*"The characteristics, ideas, and ideals of those who belong to a professional calling; specifically, the practice of a learned art in characteristically, methodical, courteous and ethical manner..."*²

The Authors of the dictionary have taken extraordinary steps to give an inkling of the need to define professionalism. My humbly held view is that, things concerning morality dwell more in the realm of natural law while professionalism arises more or less from the stipulations in the professional code of a given profession. You may therefore wish to refer to our very well known Rules of Professional Conduct for your continuing guidance.

¹ The Black's Law Dictionary, Bryan A. Garner, 10th Edition,

² Supra note 1

Thus, 'Legal Ethics' is a term used to describe a code of conduct governing proper professional behavior as arising from moral tenets and principles, which establishes the nature of obligations owed by lawyers and the legal profession to individuals and to society.

Several common law jurisdictions, including Nigeria's, discern some distinction between the two topics. A former Chief Justice of the State of Georgia in the United States, Harold Clarke, described the distinction between ethics and professionalism as:

"... the idea that ethics is a minimum standard which is required of all lawyers while professionalism is a higher standard expected of all lawyers."

The Georgia Chief Justice's Commission on Professionalism states that, ***"the term ethics, commonly is understood in the CLE context to mean 'the law of lawyering' and the rules by which lawyers must abide in order to remain in good standing before the bar."***³

Further, A. McArthur Irvin, an American practitioner, in referring to the distinction, is quoted as saying that:

Professionalism, on the other hand, appears to harken back to the traditional meaning of ethics, i.e., one who would rise above the minimal standard would be described as ethical. But the

³ Georgia State Professionalism CLE Guidelines

*passage of precise rules setting out a minimal threshold of legally permissible conduct in specific situations may have altered our understanding of professionalism. Most lawyers would not describe mere adherence to such rules of minimal behavior as professional conduct. It would seem clear that professionalism must rise to a higher level than the mere minimum standard for preserving the right to practice law.*¹⁴

Both ethics and professional discussions tend to focus on misconduct -- the undesirable elements of lawyering. An instance of an unacceptable conduct of a legal practitioner can be seen in the recent case of *N.B.A v. Ofomata* (2017) where it was directed that, the issuance of a dud cheque will amount to an infamous conduct thus, no legal practitioner should engage in such behavior.⁵ An infamous conduct was elucidated in *Umazi Ndukwe v. The Legal Practitioners Disciplinary Committee* (2007), which stated that:

"It is an infamous conduct in a professional respect for a legal practitioner to hold on to a client's money without justification after a demand for the money by the client. All right-thinking members of the Legal Profession must view such a misconduct with great concern not only for the protection of

⁴ "Ethics and Professionalism: A Distinction with a Difference?" Paper delivered by A. McArthur Irvin to the American Bar Association Section on Employment Law Midwinter meeting 2012

⁵ *N.B.A v. Afam Ofomata* (2017) 5 NWLR (Pt. 1557) 144

the public but also for the protection and preservation of the legal profession."⁶

Moving beyond mere adherence to minimum expected conduct, the Georgia Commission declared that "professionalism is meant to address the aspirations of the profession and how we as lawyers should behave."

According to the Commission: "Professionalism is a wide umbrella of values encompassing competence, civility, legal ethics, integrity, commitment to the rule of law, to justice and to the public good. Professionalism calls us to be mindful of the lawyer's roles as officer of the court, advocate, counselor, negotiator, and problem solver." Professionalism asks us to commit to improvement of the law, the legal system, and access to that system. These are the values that make us a profession enlisted in the service not only of the client but of the public good as well. While none of us achieves perfection in serving these values, it is the consistent aspiration toward them that defines a professional. The Commission encourages thought not only about the lawyer-client relationship central to the practice of law but also about how the legal profession can shape us as a people and a society.

At this juncture, let me draw your attention to a challenge (which I believe is at the epicenter of our discussion today) thrown to the Nigerian lawyer by the Late Dr. Olawale Elias (former Dean of Law of the Faculty of Law, University of Lagos, later Attorney General of the Federation and Minister of Justice, and thereafter Chief

⁶ Umazi Ndukwe v. The Legal Practitioners Disciplinary Committee (2007) 5 NWLR (Pt. 1026)

Justice of Nigeria) who threw his very heavy intellectual weight on illuminating even obscure areas of Nigerian law. He said:

*"Never before in the long history of human thought has law had to face a more challenging situation than that in contemporary Nigeria. The prevailing social and economic forces call for a type of lawyer who is at once a social engineer and an analyst, a pericles and a plumber, capable of appreciating the values of existing institutions and mores and yet ever ready to make a dynamic contribution to maintenance of a proper balance between the claims of the state and those of the individual. Law and society should engage in a continuous dialogue both as to the choice of means, and as to the end in view. If Nigerian Law can fulfill the role of stimulating economic growth and social well being, elevate the moral tone of the community, foster a spirit of unity among the diverse ethnic groups and become a common law for the country under which no man is oppressed, it will have made an important contribution in the world of ideas for the cause of human betterment."*⁷

I have brought up this challenge at this point particularly because at this stage of our national life, the vagaries of our economy, the uncertainty in our politics and the noticeable insecurity in our daily existence and our general well-being as Nigerians, the Nigerian lawyer and particularly, the Body of Senior Advocates (BOSAN)

⁷ 'Law in a Developing Society', T. O. Elias at p. 140 to 141

must determine the boundaries of our legal ethics and the confines of professionalism. This is because we have outsiders snooping for the fees that lawyers are paid without a corresponding examination of the quantum of work that may or may not have been done (as well as increasing risks in executing our instructions or briefs); we have anxiety in some quarters because we have been told that the Rule of Law will be subordinated to the inscrutable dimensions of national security; lawyers have been denounced for allegedly defending persons suspected or charged with corruption in different Courts; some have become afraid of speaking out lest they be hounded as enemies of persons in authority at different strata. Would a lawyer be professional when he runs away preemptively before examining a brief he has been given? Would the lawyer be professional by reducing his fees lest he be admonished for charging too much money? Would a lawyer be acting unethically if he gives a client what we call 'his day' in Court? Would he be professional if he navigates within the Rules of Criminal Procedure, Civil Procedure and Arbitral Proceedings in order to get the best of legal options for a person who has given him a brief? We live in challenging times and the lawyer is at a crossroad of deciding whether to go right or left on our road to professionalism and ethical conduct.

It is my belief that what the great but Late Lord Denning said in the celebrated case of *Rondel v Worsley* as far back as 1967 is still instructive in our prevailing circumstances and I crave your indulgence to repeat it here:

"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. This carries with it a corresponding responsibility. He must accept that brief and do all he honourably can on behalf of his client. I say 'all he honourably can' because his duty is not only to his client. He has a duty to the court, which is paramount. It is a mistake to suppose that he is the mouth piece of his client to say what he wants or his tool to do what he directs. He is none of these things. 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 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 of his client if they conflict with his duty to the court. The code which requires a barrister to do all these is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline. But he cannot be sued in a court of law, such being his duty to the court. This is a conflict often difficult to resolve and he should not be under pressure to decide wrongly if a barrister is to be able to do his duty fearlessly and

independently, he must not be subject to the threat of an action for negligence.”⁸

I am aware that Lord Denning's decision has been followed and adopted in this Country in *T. Oseni v. Brossettee Nig. Ltd.* (1981) Jan/March CCRCJ 310-320, *The Shell Petroleum Development Company of Nig. Ltd v. Chief George Uzoaru & 3 Ors* (For themselves and as representing the UMUNNAKA UKWU Village of OGUTA) (1994) 9 NWLR (Pt. 366) page 51. I have to acknowledge that *Rondel v Worsley* has its critics and its descendants but time will not permit me to dwell on the dimensions of the criticism that has trailed Lord Denning's epochal words. The important question that arises from Denning's vigorous reasoning is, if we remain immune to suit, can we be pulverized verbally in the press by the dogged opponents of this profession? Tentatively, my answer would be that we will remain relevant and central to what will happen and will continue to happen, both within our profession and within Nigeria. We need to remain vigilant and circumspect, guided by the long-standing and cherished traditions of one of the oldest professions in the world.

Distinguished Ladies and Gentlemen, that was a diversion but in Nigeria, the Rules of Professional Conduct establish minimal standards adopted to govern the conduct of legal practitioners; for example, the standard to which a lawyer must adhere in order to maintain a license to practice. One would hardly describe a lawyer as ethical, merely because the minimal standards of the profession are satisfied. One is not ethical, in the traditional sense, because

⁸ *Rondel v Worsley* (1967) 2 WLR 1666

he or she acts lawfully or even within the bounds of an official code of ethics. The term 'professional' generally is applied to the three earliest professions of law, medicine, and ministry. The term profession evolved to describe occupations that required new entrants to take an oath acknowledging their commitment to the ideals and practices associated with a calling that required education. Dean Roscoe Pound of Harvard Law School once described a professional as follows:

"The term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service, no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose."⁹

The 1996 Report of the Professionalism Committee of the American Bar Association, Section of Legal Education and Admissions to the Bar, Teaching and Learning Professionalism, extends and particularizes the definition to the practice of law:

"A professional lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and public good."

⁹ "The Lawyer from Antiquity to Modern Times" Roscoe Pound, 1953

Justice Sandra Day O'Connor set forth a description of professionalism. She said:

*"To me, the essence of professionalism is a commitment to develop one's skills to the fullest and to apply that responsibly to the problems at hand. Professionalism requires adherence to the highest ethical standards of conduct and a willingness to subordinate narrow self-interest in pursuit of the more fundamental goal of public service. Because of the tremendous power they wield in our system, lawyers must never forget that their duty to serve their clients fairly and skillfully takes priority over the personal accumulation of wealth. At the same time, lawyers must temper bold advocacy for their clients with a sense of responsibility to the larger legal system which strives, however imperfectly, to provide justice for all."*¹⁰

For you to make up your minds about the challenges you have faced so far, and the challenges that remain, I must draw your attention to excerpts from speeches by Pan Africanists of note and from voices beyond.

- Kwame Nkrumah, erstwhile President of Ghana, on the 4th of January, 1962 stated that: *"In a developing country, the first priority is not for lawyers trained to conduct*

¹⁰ Court of Appeals of Maryland Professionalism Course, "Professionalism Above and Beyond Ethics."

litigation between wealthy individuals... The lawyers needed in a developing state are, in the first place, those trained to assist the ordinary men and women in their everyday legal problems and particularly in the new problems likely to arise through industrialization... Secondly, and perhaps most important of all, we need lawyers in the service of the state, to deal with treaties and commercial agreements and with questions of private and public international law..."

- President Kaunda (of Zambia) in an Address to the Law Society of Zambia said: *"The lawyer in a developing society must be something more than a practicing professional man; he must be more even than a champion of the fundamental rights and freedoms of the individual. He must be, in the fullest sense, a part of the society in which he lives and he must understand that society if he is to be able to participate in its development and the advancement of the economic and social well-being of its members. The lawyer must go out beyond the narrow limits of the law, because... while the law is the instrument through which society is preserved, in its shape and character, it is the reflection of the society."*
- Again, Professor L.C.B. Gower (former Dean of Law at the University of Lagos), a jurist and well-known legal educator stated that: *"They need commercial, corporation, and property lawyers if they are to achieve an economic take-off. They need bilingual, international, comparative, and constitutional lawyers if they are to survive states*

and to enter into large unions which Pan-African sentiment and economic development demand... They need courageous lawyers with the highest ethical standards if the atrophy of the rule of law and of personal and academic freedom and the corrosive growth of corruption, nepotism, and elitism are to be arrested, and if military and police power is to be kept within bounds. Most of all, perhaps, they need constitutional lawyers sophisticated in other disciplines if they are to find a viable substitute for the Westminster Parliamentary Democracy."

- More recently, a Code of Conduct of Lawyers in the European Community was formulated. It states as follows: *"In a society founded on respect for the rule of law, the lawyer fulfills a special role. His duties do not begin and end with faithful performance of what he is instructed to do so far as the law permits. A lawyer must serve the interests of the just as well as those whose rights and liberties he is trusted to assert and defend; it is his duty not only to plead the client's cause but to be his adviser. A lawyer's function, therefore, lays on him a variety of legal and moral obligations (sometimes appearing to be in conflict with each other) towards the client, the courts and other authorities before whom the lawyer pleads his client's cause or acts on his behalf; the legal profession in general and each fellow member of it, in particular, owes a duty to the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, as an*

essential means of safeguarding human rights in the face of the power of the state and other interests in society."

See Professional Conduct of Legal Practitioners in Nigeria by J. Olakunle Orojo, 3rd Edition.

I am convinced that because of your station in life, you must be aware of the implications of these strident but diverse calls from acknowledged statesmen from different parts of Africa. In sum, the voices of Kenneth Kaunda, Kwame Nkrumah, L.C.B. Gower and other voices too many to reproduce, is that a lawyer in Nigeria has as much to do in terms of adherence to our ethics and professional calling just as another lawyer in any other corner of the world. Many lawyers have in the past emigrated from our shores to distant places and reports indicate that their training here, with further training in the place they presently find themselves, have served them well. It is now time to dilate on the first of our subtopics.

THE SENIOR ADVOCATE OF NIGERIA: A REBUTTABLE PRESUMPTION OF EXCELLENCE?

In our Law of Evidence as well as areas of substantive law, there is always one form of presumption or the other subdivided into rebuttable and irrebuttable. In the Law of Evidence for instance, it is taken for granted that children are playful and are accordingly not as careful as adults and this imposes a higher duty on the standard of care on those who are in charge of them than when dealing with adults and the presumption is irrebuttable. On the

other hand, a person not seen for seven (7) years is presumed to be dead, unless the contrary is shown. This makes that presumption rebuttable. When two (2) persons die at the same time, say in an accident, the older person is presumed to have died first but again, that is a rebuttable presumption. Guided by these examples, can it be said that wearing the badge of Senior Advocate means that the person is excellent without equivocation? The answer is a simple one and in terms of presumptions, the Senior Advocate rebuttably must be excellent in learning as well as in professionalism. This conclusion is inescapable, bearing in mind the guidelines for the conferment of Senior Advocate of Nigeria, 2017 (See Federal Republic of Nigeria Official Gazette Vol. 104, 13th October 2017) pursuant to which you will be adorned with that rank on the 24th of September 2018. The guidelines require you to submit an application together with specified documentation, which ordinarily will indicate the cases you have conducted at the High court level (High Court of different states as may be warranted, the Federal High Court, the National Industrial Court and other courts of equivalent jurisdiction), the Court of Appeal and the Supreme Court. By the guidelines, each one of you must have conducted a stipulated number of pro bono cases. You would have paid your practicing fees, local and national for an unbroken period of ten (10) years. You will show efforts you have made either at Bar level or at Community level to show your usefulness to society. There will be recommendations from Legal Practitioners as well as Judicial Officers to indicate that you are a dependable person. Your credentials will pass first screening at secretarial level; second screening at Legal Practitioners' Privileges Committee level; your office must have been inspected; your tax must have

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infamous, is sufficient to nullify the presumption of excellence, which the rank of Senior Advocate of Nigeria confers. Recently, as you all may be aware, the Legal Practitioners' Privileges Committee has had to dish out very harsh punishments to those who wittingly or unwittingly took active steps to diminish the rank.

What may be said about the two other subtopics namely; 'Understanding the Culture and Demands of Continuous Excellence' and 'Scholarship in Legal Practice' are already woven in the fabric of what has been said above. However, for the purpose of elaboration, it has to be understood that attaining a position or station in life requires nurturing and sustenance. If you plant a seed and it germinates, it will wither away without tender care. Excellence is not temporary and can be made permanent and permanence arises from, caution and discretion in what we say or do. On the other hand, Scholarship in Legal Practice is a demonstration of perfection. This is because, the **New Lexicon Webster's Encyclopedic Dictionary of the English Language (Deluxe Edition)** defines a 'scholar' as a "learned person; a person who has made a thorough study and acquired a wealth of knowledge of a subject."¹¹ Scholarship which is a noun is the "command of learning displayed by a Scholar; the methods by which Scholars work." Guided by these definitions, it is obvious that the Scholarship, which is an index in the presumption of excellence, must relate to legal practice. So if you are a Scholar in the culture of your people or your personal religion or in fashion etc, you are off the mark, having regard to the context of our discussion today. Let it be understood therefore, that the

¹¹ New Lexicon Webster's Encyclopedic Dictionary of the English Language (Deluxe Edition)

presumption of excellence which I understand to be rebuttable, must relate to continuity and your scholarship will only serve as a signpost of excellence. A person of high scholarship in legal practice, must therefore be a good Solicitor in the sense of work done in Chambers and in the sense of published works. We must therefore, be diligent and circumspect in what we write, what we publish in learned Journals, Newspapers and what we disseminate in any form to the general public, especially in these days of social media.

THE LEGAL SERVICES REVOLUTION

In dealing with this subtopic, I need to say that, candour and sincerity are part of the hallmarks of our profession. Consequently, I need to acknowledge that I am not an expert in the nuances of this subtopic. However, I take advantage of the fact, that at the earliest opportunity, I disclosed that the Nigerian Law School Class of 1978 celebrated its 40th Anniversary on the 21st July 2018. A significant part of that celebration was an Anniversary Lecture and the topic for that lecture was **'Advances in Technology: A Sign Post Or Requiem To Legal Practice?** The topic was dexterously and competently handled by Honourable Justice Kashim Zannah, Honourable Chief Judge Borno State of Nigeria. I will do no more than to excerpt from that lecture. In his opening remarks, the lecturer underscored the point that:

"We live in the age of disruption. In most professions including the practice of law, technology is enabling levels of performance that

were hitherto inconceivable. Consequently, it is also disrupting settled practices to such an extent and at such a speed that the Planning Committee may justifiably ask, if the disruption is leading up to the destruction of Legal Practice, at least as we know it. The scale and speed are truly outstanding."

Honourable Justice Zannah referred to Stephen T. Maher who wrote in April 1995 that:

"Technology will transform the practice of law as it transforms the world. Newly available technologies like voice recognition, digital video and high-volume data storage, will create new protocols governing how agreements are formed and monitored and how disputes are resolved. The rise of technology, or more accurately, the unbinding of technology from servant of our wishes to master of our destiny, is about to take place before our eyes. The technology currently making lawyers so much more productive and efficient may soon escape their control, change their routines, challenge the inefficiencies they enjoy and form the foundation of a new practice of law."

Stephen Maher made a prediction in 1995 and Honourable Justice Zannah indicated the nature of what has happened since that prediction was made. He referred to block chain technology, big data, cloud computing, advanced analytics, artificial intelligence (AI) and machine learning (deep learning,

particularly reinforcement learning) and he referred to other factors that are changing our way of doing business. He referred to liberalization which permits 'Setting Up of New Types of Legal Businesses and Cost of Legal Services, Alternative Business Structures (ABSs), so that non-lawyers can own and run legal businesses which in turn facilitates internal investments such as private equity or venture capital to be injected into legal businesses by outside investors and thus, lets non-lawyers become owners of law firms.' He underpinned the fact that technologically driven businesses have affected the cost of legal services, to the extent that 'a combination of three (3) forces, cost of legal services, liberalization and advances in technology combined to disrupt and will continue to destroy the trajectory of legal practice.' The further fallouts from the application of advances in technology to the legal and allied environment which Justice Zannah expertly referred to are: **document automation, the rise of Alternative Legal Service Providers (ALSPs); demand legal service providers, virtual law firms, gigging, legal question and answering, chatbots; robot lawyers and legal advise cloud sourcing.** In order not to disturb you with technological niceties on which I am not fully authoritative, I will give you the take-away from Justice Kashim Zannah. He said that:

"The legal market place of tomorrow can not be immune from the technology that will permeate the socioeconomic fabric of society. Paper based practices and practitioners will surely be as extinct as dinosaurs are today. Indeed, new services will emerge and for those who prefer for and change with the times, new opportunities."

His Lordship, relying on Richard Susskind said:

"It is often observed, not especially profoundly, that we cannot predict the future. This seems to give licence to the unimaginative, the shortsighted, and the indolent to discard any foresights as pointless speculation. In contrast, I join others who believe that we can anticipate many (but not all) broad trends, if not the specific details of the world yet to me. Given our economic conditions, the shift towards liberalization, the new providers in the marketplace, and the burgeoning, exponential increase in the power and uptake of technology, I find it unimaginable that our current legal institutions and legal profession will remain substantially unchanged over the next decade. Indeed, it seems to me that the least likely future is that little will change in the world of law."

Distinguished Ladies and Gentlemen, this represents my very feeble appreciation of the new terrain of law and technology. From my personal knowledge and interaction with a good number of you in the not too distant past, I know you to be individually competent in the handling of some tools, gadgets and devices that assist us in the work we do, but I need to say, that the mastery of your laptops, your iPads, your smartphones etc. is not the same as the technologically induced erosion of the perimeters of our professional practice. You may do well to look at Honourable Justice Zannah's expert write-up and if you so demand, I can assist you with copies. There are multiple sources from which you

may protect your practice from the encroachment that is bound to arise in the not too distant future. A stitch in time saves nine.

CONCLUSION

This is a one-day event by the Body of Senior Advocates (BOSAN) designed 'to help orientate the new Senior Advocates of Nigeria on their leadership role in the profession, professional ethics and conduct expected of them in the discharge of their duties to clients, the court and the society.' I am not unmindful of the fact that my colleagues who are from the academia are part of this exercise. To a large extent, and from my rusty academic background, I know that different considerations apply to the Ivory Tower when the issue of ethics and professionalism are upfront, but on account of time constraints, I offer them apologies. They know what they ought not to do and I will not belabor them. My former boss, Honourable Judge Bola Ajibola, SAN, KBE, former Honourable Attorney General of the Federation/Minister of Justice, Former Judge of the International Court of Justice at The Hague, taught me well. He said: **"that a good speech should like a lady's skirt, be short but long enough to cover the subject matter."**

I do hope ladies and Gentlemen, that I have not deviated from that which I was taught. I thank you all for your attention.

AWA U. KALU (SAN) FNIALS

13th September 2018.

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EXCELLENCE AND PROFESSIONALISM IN THE PRACTICE OF LAW
A SENIOR COUNSEL'S ROLE
**BEING A PRESENTATION BY JOSEPH BODUNRIN DAUDU SAN AT THE PRE-
INAUGURATION INDUCTION OF NEW SENIOR ADVOCATES OF NIGERIA AT
THE ORIENTAL HOTEL, VICTORIA ISLAND, LAGOS ON THE 13TH OF SEPTEMBER
2018**

INTRODUCTION

My relief and consolation is that I am addressing a truly learned audience. It absolves and relieves me of any responsibility of breaking down or over-digesting issues relevant to the foregoing discourse to this distinguished audience. This audience comprises of the 26 newly gentlemen appointed or elevated to the coveted rank of Senior Advocate of Nigeria. One of the points to skip is the examination of the statutory requirements for the qualification and appointment procedure of applicants to the rank of SAN. I can safely say that on this point you are qualified to give expert evidence. However, the attainment of the rank is not the end or ultimate in legal practice, it is actually the beginning of hefty responsibilities on their part not only to the legal profession but to the society at large.

I have always been persuaded that the rank of SAN is a leadership position since the day sometime in 1993 when I went to inform Alhaji Abdullahi Ibrahim SAN in his capacity as a father and doyen of the Bar that I had applied to the LPPC for the conferment of the rank of SAN. Before then I had thought that the rank was simply a reward for effective and/or brilliant advocacy. He however took time to school me on the point that it was a leadership position and that from the moment a practitioner is conferred with the rank he automatically becomes a leader in the profession including to those who were called to the Bar long before that practitioner. He said that a senior counsel is a person whom the Bar and members of the Public trust explicitly without equivocation. He was more concerned with the leadership quality and role that a senior counsel will play in the course of his interaction with the Bar and the Public. Since then, I have been an unrepentant convert to the theorem or thesis that a senior counsel SAN is first and foremost a leader of men and repository of good ethics than being an outstanding advocate of the law, even though the two must go together.

This event is novel and distinct in that it is the first time in the annals of Nigerian legal practice that newly elevated senior counsel are being taken through an induction course prior to the swearing-in ceremonies. Some school of thought

think it is unnecessary and overbearing. I do not think so. A clear example is apparent from the following event; About 10 years ago, at the swearing-in of new senior advocates in the ceremonial court room of the Supreme Court was congested, even the inner bar was crowded, and very senior silk had nowhere to sit because the younger SAN's had taken up all the sits in the front row and when asked to vacate their sits for the older SAN's turned deaf ears to every request. We reminded them that even among senior counsel there was priority gained as a result of seniority, but it remained a messy site until they were almost forcefully ejected and sent to their proper positions. The unpleasant situation and many others that I have observed first hand during my 6 – year sojourn in the Legal Practitioners Disciplinary Committee shows that SAN's are not immune from unethical conduct and this could have been averted with such educational interventions such as this event.

It is for the foregoing reason(s) that I subscribed to this programme and will now make some contributions on the following sub-topics;

- i. **The Senior Advocate of Nigeria: A rebuttable presumption of excellence?**
- ii. **Understanding the culture and demands of continuous excellence.**
- iii. **Scholarship in legal practice.**
- iv. **The Legal services revolution**

In conclusion, the future of the rank of Senior Advocate of Nigeria will be examined in juxtaposition with the current legal and political environment.

THE SENIOR ADVOCATE OF NIGERIA: A REBUTTABLE PRESUMPTION OF EXCELLENCE?

For clarity, it is important to take a glance at the identity of a Senior Advocate of Nigeria to understand the danger of a threatened conflict between his obligations to his professional family and the demands of his newly acquired rank. Now it is usually a mistaken impression prevalent among new SAN's that they are under a duty to jack-up their fees in consonance or in harmony with their newly acquired rank. In the past some new silk have been known to return files to clients who were unable to meet up with new table of fees issued

contemporaneously with the attainment of the rank. This is not only wrong but a breach of the existing contract between the SAN and his client. He is not at liberty to act on the *Novus actus interveniens* of his preferment to obliterate or obfuscate settled agreements. Indeed, the new SAN ought to dutifully use his new rank to the advantage of his old clients by employing the new privileges, particularly, the right to mention his cases out of turn and before other lawyers to speedily conclude the old set of pre-SAN cases. When he has done this then he can graduate to those new cases that he will charge SAN fees.

Secondly, there is consensus among lawyers that owing to the dignified stature of the legal profession in conjunction with the onerous duties and expectations from the legal practitioner, particularly senior counsel, the profession has evolved a set of Rules to guide the conduct of the legal practitioner in the discharge of his duties. These Rules are encapsulated in the **RULES OF PROFESSIONAL CONDUCT FOR LEGAL PRACTITIONERS 2007** under the hand of the then Chairman of the General Council of the Bar and Honourable Attorney General of the Federation Chief Bayo Ojo SAN. It must be stated from the outset that the SAN is not immune from observance of the Rules of Professional Conduct or discipline arising from its breach. Indeed, the reckless or careless SAN may in the face of a proven breach of the Rules of Professional Conduct face double jeopardy i.e. lose his silk and lose something greater courtesy of the Legal Practitioners Disciplinary Committee (LPDC).

Some stakeholders have opined that there seem to be a rule for other legal practitioners and a different rule of SAN's. Recently, there have been views expressed that these Rules do not cover emerging and indeed very adverse conduct of some senior advocates. It is now trending that in some extreme situations some senior counsel act in an extremely rude manner to the Court. In some recent instances, some senior counsel have been suspended from the rank because of conduct unbecoming and unbefitting of the rank of SAN. I am of the view that Rule 1 of the Rules of Professional Conduct in the Legal Profession 2007, which provides as follows;

"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 engage in any conduct which is unbecoming of a legal practitioner".

Needs to be re-examined and made more comprehensive so as to capture and redress the excesses of some of our colleagues.

In the case of Nwankwo v. Ononeze-Madu (2009) All FWLR (Pt. 461) P.995 at 1026 paras H-B, Saulawa JCA expounded the above Rule when he set out the duties and obligations of Legal Practitioners in these words:

"The appellants as legal practitioners have an onerous obligation not only to uphold, but also to observe the rule of Law, promote and foster the cause of Justice, maintain a high standard of professional conduct and to shun any conduct which is unbecoming of a legal practitioner; Rule 1, Rules of Professional Conduct for Legal Practitioners, made pursuant to the provisions of the Legal Practitioners Act Cap 20 LFN 1990. Most undoubtedly, the above provision of Rule 1 was meant to make the noble and learned profession not only a vibrant and honourable profession but also a formidable watchdog of the Public Service in particular and the society in general."

The 2007 RPC cover subjects like (a) The Practice of Law by a legal practitioner, (b) Relations with clients, (c) Relations with other lawyers, (d) Relations with the Court, (e) Improper attraction of business, (f) Remuneration and fees and (g) Miscellaneous. It is apt to state at this stage that the 57 sections that make up the RPC 2007 do not cover the widespread forms of professional misconduct that are now apparent in the activities of legal practitioners including those wearing the silk. Time and space will not permit a detailed examination of these manifestations of misconduct, but that they are fast being normal or even acceptable conduct gives cause for concern. For instance, a lawyer is forbidden from practising law and any other profession simultaneously; he is forbidden from sharing his legal fees with a non-lawyer, he owes his clients a duty to keep proper accounts of their monies, he has a duty to reduce important agreements between him and his clients into writing, he is expected to advise his clients to the best of his knowledge and within the ambits of the law and when his counsel is rejected, it is expected of him to withdraw his services from such client. A legal practitioner including SAN also owes numerous duties to the courts some of which include the duty to be decorous in conduct and language both in and out of the court. A lawyer is expected to hold the proceedings of courts in high esteem and resist the urge of debating pending cases outside the court, he is forbidden from filling frivolous cases/applications or citing authorities which he knows are inapplicable to his case. Suffice to say that **"the Legal Profession is a profession of gentlemen; that is why the lawyer is addressed as "esquire"- whether male or female. The legal profession is not meant for rabble rousers neither is it meant to provide license for extortionists to engage in free for all**

looting spree. That is why only those considered to be fit and proper persons are admitted to the Bar" per J B Daudu SAN NBA v Timipa Okponipere BB/LPDC/102 Directions and Rulings of the Legal Practitioners Disciplinary Committee Vol. 1 Pg 35 at 40.

From the foregoing, it is evident that compliance with the rules of professional conduct in the legal profession is more of abstinence from misconduct and therefore an exclusive preserve of principled gentlemen of esteemed integrity who must not only know the rules of self-discipline but also have a firm understanding of its exceptions. The legal practitioner, particularly the SAN is a professional, a watchdog, a gentleman and above all a role model to his community.

UNDERSTANDING THE CULTURE AND DEMANDS OF CONTINUOUS EXCELLENCE AND SCHOLARSHIP IN LEGAL PRACTICE

As opposed to Nigeria, in the United Kingdom, a lawyer on graduating from university first has to decide whether to practice as a solicitor or as a barrister. It is based on this decision that the period of training or pupillage will be determined. For a solicitor, it is called a training contract, and this lasts a period of 2 years before he or she can practice solely. For a barrister, it is called pupillage and lasts for a year. The essence of this pupillage is to further expose the pupils to the practical aspects of the profession. Therefore, if this is to be incorporated into the Nigerian legal system, then a law school graduate must undergo 3 years training or pupillage before being fully admitted to practice. This is because in Nigeria, graduates' practice as both barristers and solicitors.

In Nigeria, the only compulsory pupillage is that done as part of the law school programme and is only for a combined period of 3 months. As the pupils are yet to be called to the bar at this stage, they cannot be said to learn the practical aspects of legal practice since they are not allowed to address the courts unrobed.

Pupillage aids in the maintenance of standards because through it, newly called lawyers can perfect their acquired knowledge before taking on cases on their own. As Mr Emeka Maduewesi said; "Because of their role in society and their close involvement in the administration of law, lawyers are subject to special standards, regulation, and liability. Sometimes called legal ethics, sometimes professional responsibility ..." See *Lawyering: The Practitioners Sacred Duties* - by Emeka Maduewesi.

Now, when a legal practitioner attains the rank of Senior Advocate of Nigeria, does it mean that he now knows it all? That his learning and continuous education is at an end? That he does not need to improve himself or seek excellence as he has reached the apogee of his profession. I think not. The answer is whether in the utter or inner Bar, a lawyer must continuously and ceaselessly strive to improve himself and this can only be achieved by continuous legal education. A lawyer including Senior Counsel's primary research database is his library and the internet, with caution. The information on the internet can only be as accurate as the person who uploaded it into the system, therefore no lawyer, including silk, should be seen to build his work solely on internet-based research. In the present-day computer age where less people engage in reading, all lawyers, particularly SAN are encouraged to read more for themselves and their non-reading clients. This is the reason why they are watchdogs and role models to their society.

A senior lawyer SAN must vouch to plough a substantial portion of his resources to not only his own continuous legal education but to the education of his juniors, associates and Partners. Now is the time to attend strategic and indeed very relevant conferences, acquire new Diploma's and Post-Graduate Degrees, expanding one's horizon or vista, proceeding on sabbaticals, teaching, lecturing or any other activity bordering on giving back to the society. A senior Advocate henceforth should give more than he receives. This is the time to grant scholarships, bursaries and other educational grants to indigent students.

Where the new SAN engages in this activities, he adorns not only the toga of excellence but don's the helmet of good and continuous success.

THE LEGAL SERVICES REVOLUTION

This is a wide issue that requires more than a sub-heading as allotted herein to fully articulate the scope and ramification of the legal services revolution. Because the world' economies are growing at a rapid rate, there is a lot of diversification in the provision of legal practices. Globalisation has induced multi-jurisdictional or cross border practice. The effect is that if left unchecked multi or transnational corporations will bring lawyers from their jurisdictions to provide legal services in emerging economies and jurisdictions such as Nigeria. Their argument when confronted with the existence of local lawyers who are adequately equipped by way of training and experience to provide the same services is usually that local lawyers lack the training and discipline to meet the

needs and aspirations of their clients. This denigrating and indeed sweeping statement is clearly not true. Firstly, local lawyers include learned Senior Advocates of Nigeria, most of whom were trained in foreign jurisdictions and who by continuous legal education have trained themselves to deal with the eventualities described by the said transnational companies

Thirdly, even if areas of the law such as oil and law, communications law, etc are still in their infancy in Nigeria, there are by way of example 2 aspects of legal services that have acquired a trans-national or international flavour. They are; (a) documentation of transactions or legal contracts with international flavour i.e. contracts between multinationals or contracts between commercial entities of two or more nations or any other documentation on trade, industry or other services of an international flavour or character. With regard to these, the current dispensation will not wait for domestic legal systems to dictate the pace. All and sundry have therefore been compelled by GATS to grant market access to out of jurisdiction counsel to draft and frank such documentation in collaboration with or to the exclusion of local counsel. (b) Resolution of disputes arising from such international commercial transactions has also acquired a force of its own by way of international commercial arbitration. This is a branch of legal services whereby counsel from every country who have the requisite qualification can appear either as Arbitrator or counsel in a dispute resolution mechanism usually conducted in private with the express agreement of the contracting parties under a set of rules previously agreed upon or known to all the contracting parties. This process excludes recourse to local national courts except in permissible circumstances known and agreed upon by the parties from the tenor of the contracting document. Thus, by this medium which brings counsel from all parts of the world together, disputes arising from international commercial transactions are decided without exclusive recourse to local legal jurisdiction of the contracting nations.

There are so many other areas of local national economies whereby legal services have inexorably acquired international flavour and there appears to be nothing that domestic legal practitioners or systems can do about it. They include but are not limited to (i) Oil and Gas, (ii) Aviation, (iii) Shipping, (iv) communications, (v) Internationally financed construction, (vi) equipment leasing, (viii) Mining and mineral exploration, (ix) Privatisation by way of mergers, acquisition etc. It must be noted, at this stage, that the excuse for bringing foreign counsel, as stated above, was that local counsel were not equipped technically to deal with the demands of clients in those sectors. But this pretext has waned considerably as (taking Nigeria for example) local counsel

have gone in droves to acquire requisite expertise and experience in the aforementioned areas. However, such recourse to the excuse of lack of local expertise was unnecessary in view of the express provisions of the GATS.

In the long run, indigenous local firms will all but be wiped out just as our factories have been wiped out. But this may not be a correct assumption to make. Our factories have disappeared because other factors namely lack of Government protection and support by way of the provision of basic infrastructure and the debilitating effect of corruption. Of course, the same factors can inure to favour out of jurisdiction counsel in the provision of legal services if we do not straighten our act in this regard. Corruption in arbitral panels by local counsel from a notoriously corrupt nation can scare users from patronising every lawyer from that jurisdiction under the belief or stereotype that all lawyers therefrom are corrupt. The 2nd major ground is the absence of reciprocity from legal jurisdictions abroad. Nigerian lawyers are never allowed in to the 'big league' and the 'high calibre' stuff is reserved for their own citizens even though there are qualified Nigerians who are competent and capable. Our own are limited to acting 'for their own people' in immigration, family law and criminal law. Even in exceptional cases where there is collaboration Nigerian lawyers are relegated to advising on Nigerian law whilst foreign lawyers deal with the heavier stuff. The most annoying aspect is that they then determine fees for everybody even though payment is by the Nigerian client. Thirdly, the champion advocates for liberalisation are nations that have perfected the art of imposing barriers to trade in the form of visa restrictions and other kindred acts.

Thus, the contest between market access and national interest goes on. But for the moment it is not as bad as it seems. Nigerian lawyers have in the past 12 years acquired and or updated specialised skills in the law relating to International finance and commerce, something that they would not have bothered to do were there not calls for liberalisation of legal services on a global scale. Indeed, there is no move to instant liberalisation of legal services; that is not the concept in GATS. Article 19, which calls for a progressive move towards liberalisation is therefore relevant, let individual nations readiness be reviewed as required by the treaty every 5 years and at the next round Nigerian stakeholders such as the NBA and its specialised sections must be ready with facts and figures to justify the state of readiness of Nigeria to liberalise and whether it is indeed feasible owing to the conduct of our partners so to do.

CONCLUSION

In conclusion, the foregoing represent information and action that must be at the behest of all senior advocates. Indeed, our environment which is still largely autocratic in nature does not give room for the imbibing of mandatory and necessary Rule of law attributes. Every SAN must subscribe to a philosophy in life which takes its root in non-aggression and passive resistance. In my view, a non-philosophical SAN is not a leader. Finally, the search for money and money it self is not the common denominator or panacea to all evils. Money is a good reward for hard work and services rendered but when its love gets to the point where ethics, empathy, civility, fear of God, Rule of law, conscientiousness and other noble virtues are thrown overboard then it is time for the person concerned to retrace its steps before he is consumed by the looming danger. Thank you very much.

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2010-2012

Ethics and Legal Professionalism in Relation with the Courts: A Panacea to Smooth Administration of Justice

By
Sani Rabi'u Bello Esq.*

Abstract

Legal profession remain the a wheel where people undergone a rigorous training to become ministers in the temple of justice. Therefore the need to observe the ethics of the profession is very paramount. However, the court remains the last hope of the common man and therefore lawyers and judges must set an exemplary life in the society.

1. Introduction

When judges and lawyers discuss matters of ethics and legal professionalism, we usually focus on the performance of lawyers. We consider how lawyers relate to clients, how they relate to one another, how they behave in court...etc. Legal literature is chock full of analysis on these points, and the appellate disciplinary authorities issue multiple opinions covering much of the same territory. While our profession also examines judicial behaviour that part of the debate is but a sliver of the whole. The number of appellate opinions concerning judicial conduct is a fraction of those about lawyers, and applicable monographs are few and far between. Least explored of all is how lawyers and judges relate to one another, what issues derive from the interaction between advocate and adjudicator. While judges and lawyers are cut from the same cloth, judges have many obligations that practitioners do not. Many of the most ticklish of these have to do with the places where judges and lawyers interact.¹

2. Rationale behind Lawyer's Duty to the Court

A lawyer's duty to the court is a fundamental obligation that defines a lawyer's role within the adversarial system. However, a lawyer's duties are not carried out in a vacuum. While facing financial and competitive pressures, lawyers must fulfill and balance their duties to the client, opposing counsel, the administration of justice and society.²

While it is not difficult to agree that lawyers owe a duty to the court, defining those duties in a comprehensive way is not a simple task. This difficulty relates, at least in part, to the number of concepts that inform or are informed by a lawyer's duty to the court. These concepts include: duties to the public interest, the profession's independence, the limits of zealous representation of a client and the consequences of failing to uphold a lawyer's duty to the court.³

With these many related factors that strike at the heart of a lawyer's role, formulating a definition that satisfactorily balances and accounts for all of them is an important challenge. However, formulating a definition is not merely an academic task. It requires a better understanding of a

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¹ R. T. Shepard, 'Judicial Professionalism and the Relations between Judges and Lawyers' in *Notre Dame Journal of Law, Ethics & Public Policy* (Issue 1 Symposium on Ethics Article 8 February 2014, 5th June, 2015. 19:20) <<http://scholarship.law.nd.edu/ndjlepp/vol14/iss1/8>>

² See discussion in Furlong, Jordan "Professionalism Revived: Diagnosing the Failure of Professionalism among Lawyers and Finding a Cure" (Keynote Commentary to be delivered at the Chief Justice of Ontario's Tenth Colloquium on the Legal Profession March 28, 2008) (19 May 2015). <http://www.lsuc.on.ca/media/tenth_colloquium_furlong.pdf>

³ R. Bell & C. Abela, *A Lawyer's Duty to the Court* (19 March 2015). <http://www.advocates.ca/assets/titles/pdf/bibliography/duty_to_court.pdf>

lawyer's duty to the court and having this understanding is meant to serve very practical ends: to help identify and address the conflicts between different duties that may arise over the course of a career in law. Contrary to popular thought, it may not be sufficient to rely only on one's instinct and the notion that "I will know it when I see it". A lawyer's duty to the court relates to his or her status as a professional who serves, not only clients, but also the public interest. Historically, a professional was distinguished from a tradesperson by a public declaration – demonstrated today by the oath taken at admission to the Bar – to serve others and devote their intellect and efforts to the public good.⁴ This was captured by E.W. Roddenberry's 1953 article *Achieving Professionalism* in which he states:

It was probably inevitable that certain occupations requiring public avowals of faith or purpose should become known as professions. Originally, there were three: medicine, law, and theology. They were dignified by that title and set apart from other occupations because they were more than a livelihood: they represented a calling to some higher satisfaction than a commercial gain...Although rigorous asceticism was seldom required; doctors, lawyers and clergymen demonstrated enough selflessness down through the years to gain general respect.⁵

As E.W. Roddenberry suggests, dedication to serving the public good is not a matter of blind altruism. Rather, it is a foundation upon which lawyers earn the confidence of the community and, as a result, are able to play their essential role in the administration of justice. A lawyer's duty to the court also relates to the profession's independence, or what has been described as "the high degree of autonomy that lawyers experience from external controls other than those imposed by self-regulation."⁶ Self-regulation is a privilege that comes with substantial obligations that are intended to protect the rights of individuals. David W. Scott, Q.C. set this out as follows:

The Bar is independent of the State and all its influences. It is an institutional safeguard lying between the ordinary citizen and the power of the government. The right to counsel, which as mentioned, is inter-related with the law of privilege, depends for its efficacy on independence... In order to fulfill the heavy responsibilities imposed on lawyers as officers of the court, a meaningful and practical environment of independence is essential. It is always within the framework of this relationship that the commercial interest of the client and the lawyer's interests must give way to the overriding duty to the court. This is not an obligation shared by other professionals...Our duties as officers of the court could not possibly be discharged other than in an environment of total independence.⁷

⁴ Ibid

⁵ Roddenberry, E.W. "Achieving Professionalism" (1953) 44 *Journal of Criminal Law, Criminology, and Police Science* at 109 cited in Jordan Furlong, "Professionalism Revived: Diagnosing the Failure of Professionalism among Lawyers and Finding a Cure" (Keynote Commentary delivered at the Chief Justice of Ontario's Tenth Colloquium on the Legal Profession March 28, 2008) online: <http://www.lsuc.on.ca/media/tenth_colloquium_furlong.pdf>

⁶ Lesage, The Honorable Patrick J. Q.C., "Professionalism: The Tool-Kit (Session VI: How to Protect Your Professional Reputation)" (19 May 2015)

<<http://rc.lsuc.on.ca/jsp/pageFromCLE/loadPageCleMonth.do?id=46>>.

⁷ Scott, David W. Q.C., *Law Society of Upper Canada Report to Convocation of the Futures Task Force Working Group on Multi-discipline Partnerships* (September, 1998) cited in Paul Perell, "Elements of Professionalism"

In other words, a lawyer may not be able to act in a way that serves the client's best interests if doing so would put the administration of justice and the community's confidence in the profession at risk.⁸

A lawyer's duty to the court also helps define the limits of the zealous representation of a client. The need to create ethical boundaries within an adversarial system was addressed by Gavin MacKenzie in his article; *the ethics of advocacy*

Adversarial tactics tend to escalate despite the best of intentions in a competitive system. Lawyers adopt adversarial tactics...because to refrain from doing so would put their clients at a competitive disadvantage relative to the clients of lawyers who show no such restraint...We should be sceptical of justifications of questionable conduct that appeal to the ethics of the adversary system.⁹

On one hand, lawyers are asked to "raise fearlessly every issue, advance every argument and ask every questions, however, distasteful..."¹⁰ On the other hand, a lawyer's duty to the court may take priority over the interests of the client. Without such limits being adequately defined and respected, the profession risks an ethical race to the bottom.

The duty to the court is also important because there are consequences for lawyers who do not uphold it. This is demonstrated by the penalties attached to civil and criminal contempt.¹¹ However, contempt does not necessarily apply to all actions that may erode, tarnish or delay the administration of justice. For instance, contempt of court has proven to be a tool of limited use in efforts to curb incivility in the litigation process.¹²

It must always be remembered that a legal practitioner's duty to the court is higher and more important than his duty to his client. When a legal practitioner misleads the and unfairly obtains judgement for his client that is miscarriage of justice. It is on this premise, I advert the minds of lawyers and the aspiring ones to the English case of *MEEK v. FLEMING*,¹³ a judgement of the Court of Appeal in England on this point. It involved Victor Durand QC. A brilliant advocate who was one of the stars of the English Bar, he was also member of the Nigerian Bar. He used to appear in the Nigerian courts. The case resulted in the suspension of Victor Durand from practise for two years. His career was in ruins. What did he do? What did he fail to do? The court held that Victor Durand's decision to conceal certain fact from the Court, albeit made after made after anxious consideration, was wrong; his duty to the court was unwarrantly subordinated to his duty to his client.

(Chief Justice of Ontario Advisory Committee on Professionalism June 2002) online: <<http://www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf>> at 5

⁸ R. Bell & C. Abela, above n 2

⁹ MacKenzie, Gavin "The ethics of advocacy", *The Advocates' Society Journal* (September, 2008) at 26-7

¹⁰ Commentary to Rule 4.01(2) of the *Rules of Professional Conduct* (Law Society of Upper Canada)

¹¹ *Poje v. Attorney General for British Columbia*, [1953] 1 S.C.R. 516 citing *Oswald's Contempt of Court*, 3rd ed., at 36. "...the distinction between contempts criminal and not criminal seems to be that contempts which tend to bring the administration of justice into scorn, or which tend to interfere with the due course of justice, are criminal in their nature; but that contempt in disregarding orders or judgments of a Civil Court or in not doing something ordered to be done in a cause, is not criminal in its nature. In other words, where contempt involved a public injury or offence, it is criminal in its nature, and the proper remedy is committal--but where the contempt involves a private injury Only it is not criminal in its nature."

¹² Perrell, Paul M. "The Civil Law of Civility" (delivered at the Chief Justice of Ontario's Tenth Colloquium on the Legal Profession March 28, 2008) online: <http://www.lsuc.on.ca/media/tenth_colloquium_perell.pdf> at 12.

¹³ (1961) 2 Q.B. 366-385.

To summarise the fact of the case, Victor Durand was briefed to defend before a judge and jury, a case of assault the wrongful imprisonment brought against the Metropolitan Police. Chief Inspector Fleming was central in the case and a key witness. At the time the writ was issued, Fleming was a chief inspector, but at the time trial he (defendant) had been demoted by a disciplinary board to station sergeant for being party to arrangement to practise deception on a court of law in the course of his duty as a senior police officer. That was known to the defendant's legal advisers, but a decision, for which leading Counsel for the defence assumed full responsibility, was taken not to make it known to the court. Under cross examination Fleming was asked:

Q. "You are chief Inspector, and you have been in the force, you told us, since 1938?"

A. "Yes that is true."

That answer was a lie. Victor Durand did nothing to correct it throughout the trial. He won but judgement was set aside on appeal. Victor Durand paid dearly for his failure in his duty to the court.

3. Lawyer as Officer of Court

Lawyers as officer of the court is that, like judges, are bound by their position to look after the soundness of the legal system and must take steps to insure its justice-conscious, direct, and deliberate steps, not those indirect and unanticipated ones that lead the butcher and his friends from a preoccupation with their own advantage to the surprising and wholly unintended production of a public good. This is not to say that lawyers are exclusively concerned with the public good. Of course they are not. Lawyers represent clients and causes whose partisan interests often contribute nothing to the public good and sometimes conflict with it. But, a lawyer must always keep at least one eye on the public good and make sure it is well protected against the assaults of private interest, including those of his own clients.¹⁴

A lawyer is an officer of the Court and, accordingly, he shall not do any act or conduct himself in any manner that may obstruct, delay or adversely affect the administration of justice.¹⁵ A legal practitioner's duty to the court is much higher and more important than his duty to his client. A legal practitioner is expected never to go late to the court. He must at least be present 30 minutes before the court sits. The Rule is that it is the legal practitioners and litigants who wait for the court and not otherwise. But these days, it is indeed a sad commentary to see judges waiting in court for counsel and litigants. Some judges are magnanimous even in the absence of counsel and litigants to adjourn their cases at the consequence of striking out these cases. Punctuality to court is ethical.¹⁶ The cases of *OKONOFUA VS STATE*¹⁷ and *FRN VS ABIOLA*¹⁸ illustrate that a legal practitioner must attend to all sittings of the court unless he had obtained leave of court to be absent. Where for any reason a legal practitioner is to be absent, he should write to the court and the opposite counsel either requesting for a stand down or an adjournment.

In dealing with this subject, we may usefully set the scene by quoting some words of Crampton J. in *R. v. O'CONNEL*:¹⁹

¹⁴ Above n84

¹⁵ Rule 30 RPC 2007

¹⁶ Abdullah Ibrahim, 'The Marriage of Convenience Between Medical Ethics and Law' in S. I., Oji (ed) *Philosophical Legacy on issues in Nigerian Public Law* (Faith Printers and Publishers, 2008) 255.

¹⁷ (1981) 12 NSCC 233 also reported in (1981) 6 - 7 SCI

¹⁸ (1997) 2 NWLR (Pt 488) 444 at 467

¹⁹ (1884) L.R. Ir. 261, at p. 312; see also at p. 313 where his Lordship said that though an advocate for an individual is retained and remunerated for his services "yet he has a prior and perpetual retainer on behalf of truth and justice..."

This Court in which we sit is a temple of justice, and the advocates of the Bar as well as the Judge upon the Bench are equally ministers in the temple of justice. The object of all equally should be the attainment of justice.

Expounding the duty of advocate in this respect in the more recent case of *RONDEL v. WORSLEY*,²⁰ Lord Denning M.R. put in the following very instructive words;

As an advocate he is a minister of justice equally with the judge. He has a monopoly of audience in the higher court. no save he can address the judge, unless it be a litigant in person. This carries with it a corresponding responsibility. A barrister cannot pick or choose his clients. He is bound to accept brief from any man who comes before the courts. No matter how great a rascal the man may be. No matter how given the complaining. No matter how undeserving or unpopular his cause. The barrister must defend him to the end. Provided only that he is paid a proper fee, or, in the case of a dock brief, a nominal fee. He must accept the brief and do all he honourably can on behalf of his client. I say 'all he honourably can', because his duty is not only to his client. He has a duty to the court which is paramount...

The duties and the standard of conduct expounded in the above passage apply equally to the legal practitioners in this country (Nigeria).

A legal practitioner is expected to dress or be attired in a proper and dignified manner. The dress a legal practitioner wears in and out of court must reflect his state of mind. He is expected to be tidy (Not dirty), respectable and sober, not flamboyant.²¹ A dirty legal practitioner is not appealing not only to the court but also to his client. Such legal practitioner naturally incurs the wrath and irritation of judges. I am a living witness to such episodes. It is surprising that lawyers these days happen not to know even the mode of dressing to different courts.

As part of a legal practitioner's duty to the court, he is expected to be thorough in the presentations of his case and not to do anything calculated to be interpreted to mean causing delay in a case. This brings me to the issue of holding brief counsel seeking adjournment for their principals to handle cases personally. This is what most senior lawyers do to their juniors in chambers. When some senior lawyers are not ready to conduct cases, a junior counsel would be sent as a holding brief counsel to handle the case to the annoyance and irritation of the court. This annoyance and irritation have been displayed by the courts in different ways. This practice is actually unethical. Honourable Justice Niki Tobi JCA in the case of *MADU VS OKEKE*²² has very eloquently reinstated the position of the law while carpeting some young lawyers. He stated thus:

... It is now a fashion for young counsel to ask for adjournment on the ground that a more senior colleague would like to handle the matter personally. Frankly, I do not know what this is all about. It is strange that an advocate of the Supreme Court of Nigeria cannot reply to a simple Motion ... and ask for an

²⁰ (1966) 3 All E.R. 657 at p. 665.

²¹ Akinjide R. (SAN); (Advocacy, Ethics and the Bar) 89. See generally also Rule 36 RPC 2007.

²² (1998) NWLR (Pt. 548) 159

adjournment for a more senior colleague to handle it... This is very sad.

And in a more recent decision of the Kaduna Division of the Court of Appeal presided by Hon. Justice Isa Ayo Salami (presiding justice of the Division), in the case of *NEPA VS ANGO*,²³ the Court admonished this practice and stated as follows:

... I wish to observe for the benefit of Mr. Egwueme and the new wigs being churned from the Nigerian Law School in recent years that once a counsel accepts to hold his learned friend brief he had by his consent accepted full responsibility for the matter. He has no right to choose and pick the extent of his instruction. But if he is incapable of assuming full responsibility for the case either through lack of learning, experience or competence or whatsoever reason, the only option open to him was to decline the brief. It is most unbecoming of counsel to accept the brief only to start shuffling in court to the consternation and embarrassment of the court, legal practitioner and the litigants present in court.²⁴

This notwithstanding, what is good for the goose is equally good for the gander. If it is good to reprimand new wigs as was done in the above cases, it is perhaps even better to advise and warn senior members of the bar who are experienced and know the law better not to unduly and unfairly expose their innocent junior colleagues to this kind of unwarranted judicial assault. Legal practitioners who do this are not dealing with the Court fairly.²⁵ Perhaps, this explains why some judges cannot condone the presence of lawyers undergoing their youth corps programme on grounds of lack of proper presentation, and general deficiency in appreciating court room decorum.²⁶

4. Duty of Lawyers to Court and Conduct in Court

A lawyer shall always treat the Court with respect, dignity and honour.²⁷ Where the lawyer has a proper ground for complaint against a judicial officer, he shall make his complaint to the appropriate authorities.²⁸ A lawyer who fails to comply with any undertaking given by him either personally or on behalf of a client to a court is *prima facie* guilty of professional misconduct.²⁹ Except where the opposing lawyer fails or refuses to attend and the Judge is advised of the circumstances, a lawyer shall not discuss a pending case with a Judge trying the case unless the opposing lawyer is present.³⁰ A lawyer shall not deliver to the Judge any letter, memorandum, brief or other written communication without concurrently delivering a copy to the opposing lawyer except as provided by a rule or order of Court.³¹

A lawyer should act in a manner consistent with the fair, efficient and humane system of justice and treat participants in the legal process in a civil, professional and courteous manner at all times. These principles apply to the lawyers conduct in the courtroom, in office practice and in the course of litigation.

²³ (2001) 15 NWLR (Pt. 737) 627

²⁴ *Ibid*

²⁵ Above n14 r 32 (1)

²⁶ Above n23

²⁷ Rule 31 (1) RPC 2007

²⁸ *Ibid* r 31 (2)

²⁹ *Ibid* r 31 (3)

³⁰ *Ibid* r 31 (4)

³¹ *Ibid* r 31 (5)

The following aspects of the lawyer's duty to the court were highlighted within Ipp J's article:³²

1. The lawyer's duty to the court is paramount. It is acknowledged that there may be situations in which this duty is inconsistent with the lawyer's duty to their client. However, as Mason CJ observed in *GIANNERELLI v WRAITH*³³ 'The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary'.

2. A recognition of the lawyer's duty to the court does not imply that the duty is owed to a particular judge. The duty is actually owed to the community in general as a matter of the public interest in the administration of justice. When it enforces the duty a court will act as a guardian of the due administration of justice.

3. Lawyers' duties to the court are legal duties imposed under the general law. They are personal in nature and non-delegable.

4. A breach of the lawyer's duty to the court constitutes unlawful conduct. Such conduct may not necessarily be unethical. Furthermore, unethical conduct may not necessarily be unlawful.

5. Breach of a lawyer's duty to the court is generally the subject of sanction imposed by summary procedure.

6. A court's jurisdiction to proceed summarily against a lawyer who has breached his or her duty to the court is punitive, as well as compensatory.

7. Where a compensatory order is sought against the lawyer, some degree of causal connection needs to be demonstrated as between the lawyer's conduct complained of and the amount of financial loss sought to be recovered.

8. Usually the breach of the lawyer's duty to the court will not provide a basis for an independent cause of action for a purpose of founding a civil claim (in this context, the nature of the summary procedure referred to at 5, to which the lawyer is exposed, is of significance).

The legal practitioner's paramount duty to the court has become very well recognised. In 2001, in a disbarment application involving a legal practitioner who had misled a judge on a summary judgment application, by knowingly relying on a false affidavit and then attempting to suborn a witness in disciplinary proceedings, the President of the Queensland Court of Appeal acknowledged the practitioner's duty to the court by reference to *GIANNERELLI*. In the *COUNCIL OF THE QUEENSLAND LAW SOCIETY INC v WRIGHT*³⁴ McMurdo P (with whom Davies JA and Helman J agreed) said: "A practitioner's duty to the court arises out of the practitioner's special relationship with the court; it overrides the duties owed by a practitioner to clients or others: see *Giannerelli v Wraith*, [577 - 588]. The lawyer's duty of the court includes candour, honesty and fairness. The appellant abused her role as an officer of the court in relying on materials she knew to be false and in deliberately and recklessly misleading the court in an attempt to further the interests of her clients and family. Her conduct was made more serious by its repetition. The effect of administration of the justice system and public confidence in it substantially depends on the honesty and reliability of practitioners' submissions to the court. This duty of candour and fairness is quintessential to the lawyer's role as officer of the court; the court and the public expect and rely upon it, no matter how new or inexperienced the practitioner".

Furthermore, in Western Australia, r 5 of the Legal Profession Conduct Rules³⁵ enacted pursuant to the *Legal Profession Act 2008* (WA) provides, as regards practitioners:

³² Ipp J, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63

³³ (1988) 165 CLR 543, 556

³⁴ (2001) QCA 58

³⁵ (2010)

A practitioner's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty, including but not limited to a duty owed to a client of the practitioner.

Recent observations by Pembroke J in *THOMAS v SMP (INTERNATIONAL) Pty LTD*³⁶ under the heading 'Duty to Court' is pertinent. His Honour referred to counsel's duty to inhibit litigants from using their evidence as an opportunity to 'unburden themselves in unmanageable detail of the many facts which have preoccupied them in the years preceding the hearing of their case'. Justice Heydon's article ('Reciprocal Duties of Bench and Bar') was mentioned in this respect towards his Honour's cry for a curtailment of the 'strictly adversarial approach'.

There is now ample power, incentive and, I would suggest, protection for barristers, whilst remaining appropriately cognizant of a litigant's interests, to 'flex their muscles' as true quality controllers in relation to the issues, documents and evidence brought before the court.

A lawyer, as an officer in the temple of justice should be seen as someone who should abhor any form of illegality.³⁷ Akinkugbe, captured the essence of lawyer in the following words;

The lawyer has a vital and indispensable role in the society, for when passions are inflamed, when individual is lost in the mass, when the majority overrides the minority, the only defender and conservator of basic human rights in society is the lawyer. To his clients, he is a combination of an oracle and a comforting shoulder to weep on...³⁸

5. Candid and Fair Dealing

In appearing in his professional capacity before a Court or Tribunal, a lawyer shall not deal with the Court otherwise than candidly and fairly.³⁹ In presenting a matter to a Court, a lawyer shall disclose any legal authority in the jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by the opposing lawyer;⁴⁰ and the identities of the clients he represents and of the persons who employed him unless such disclosure is privileged or irrelevant.⁴¹

In appearing in his professional capacity before a Court or Tribunal, a lawyer shall not state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence;⁴² ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person;⁴³ assert his personal knowledge of the facts in issue except when testifying as witness, nor assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant or as to the guilt or innocence of an accused, but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein;⁴⁴ fail to comply with known local customs of courtesy or practice of the Bar or of a

³⁶ [2010] NSWSC 822 [19] - [22]

³⁷ C. C. Ani, 'Corruption in criminal Justice Administration in Nigeria: The Role of Legal Profession' (2011) 7 *Nigerian Bar Journal* 106

³⁸ O. O. Akinkugbe, 'The Role of Lawyers in the Society', in T. O. Elias (ed), *Law and Social Change* (Lagos: University of Lagos & Bros. Ltd, 1972). 89

³⁹ *Ibid* r 32 (1)

⁴⁰ *Ibid* r 32 (2) (a)

⁴¹ *Ibid* r 32 (2) (b)

⁴² *Ibid* r 32 (3) (a)

⁴³ *Ibid* r 32 (3) (b)

⁴⁴ *Ibid* r 32 (2) (c)

proceedings which proceedings did not exist and that it was desirable for another judge to have to have tried the matter instead of the Chief Judge. It was held;

The essence of contempt is action or inaction amounting to an interference with or obstruction to or having a tendency to interfere with or obstruct due administration of justice; (2) there is no doubt that the every private communication with a judge for the purpose of influencing his decision upon a pending matter, and whether or not accompanied by the offer of bribe or by personal abuse, is a contempt of court as tending to interfere with the cause of justice. Contempt of that nature has always been held to be criminal contempt. The reason being that this type of contempt tends to interfere with the course of justice, and proofs always be beyond reasonable doubts...

It is expedient from the above case, that it is the duty of a lawyer to educate his client on the conduct expected of him or her to the court and to all the persons involved in the matter during the pendency of the litigation.⁵⁵ Invariably, the duty of a counsel to the court to ensure trial publicity is also extended to his client. Thence, a client owes duty to the court in the administration of justice.

7. Relation with Judges

Not only must the practitioner not attempt to influence the court improperly, but he should not give the impression or allow the impression to be created that the court can be influenced. Such impression may arise by counsel attempting to discuss a case with the judge in chambers or even outside the court or giving the client that impression.⁵⁶ In *EVOYOMA v. DAREGBA*⁵⁷ the defendant's counsel, apparently thinking that the plaintiffs were acting in contempt of court, wrote privately to the trial judge, who acted on the letter and directed the police carry out some investigations which he later acted upon. The Supreme Court, expressing its strong disapproval of the action of counsel, said, *inter alia* '

"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 only with full notification to the counsel for the plaintiffs and then the learned trial judge would have been informed of the allegation which the defendants considered, in effect, amounted to contempt of court in open court".

Where such communication becomes necessary about matters in court, the practice is to address the matter to the registrar or clerk of the court, not to the judge or magistrate.⁵⁸

Dwelling down to the provisions of the Rules of Professional Conduct in relation to this subject matter, a lawyer shall not do anything, or conduct himself in such a way, as to give the impression, or allow the impression to be created, that his act or conduct is calculated to gain, or has the appearance of gaining special personal consideration or favour from a Judge.⁵⁹

The relation with judges as postulated above by the Rules of Professional Conduct is broad. Unfortunately, the provisions of the Rules of Professional Conduct are restrictive and failed to give a succinct appraisal of the said postulation above. The vital areas left uncovered include; the

⁵⁵ See: Rule 14 of RPC 2007

⁵⁶ Above n29, 57.

⁵⁷ (1968) N.M.L.R. 389

⁵⁸ See Practice Notes issued by the Bar Association (Lagos Branch) with the approval of the Justice of Lagos.

⁵⁹ Ibid r 34

particular Tribunal without giving to the opposing lawyer adequate notice of his client not to comply;⁴⁵ intentionally or habitually violate any established rule of procedure or of evidence;⁴⁶ knowingly misquote the content of a paper, the testimony of a witness, the language of the argument of the opposing counsel, or the language of a decision or a textbook;⁴⁷ with knowledge of its invalidity, cite as authority a decision that has been overruled, or a statute that has been repealed with intent to mislead the Court or Tribunal.⁴⁸ In argument, assert as a fact that which has not been proved or in those jurisdictions where a side has the opening and closing argument, to mislead his opponent by concealing or withholding in his opening argument positions upon which his side intends to rely;⁴⁹ produce evidence which he knows the Court should reject;⁵⁰ promote a case which to his knowledge is false;⁵¹ or in any other way do or perform any act which may obviously amount to an abuse of the process of the Court, or which is dishonorable and unworthy of an officer of the law charged, as the lawyer, with the duty of aiding in the administration of justice.⁵²

6. Trial Publicity

A lawyer or law firm engaged in or associated with the prosecution or defense of a criminal matter, or associated with a civil action shall not, while litigation is anticipated or pending in the matter, make or participate in making any extrajudicial statement that is calculated to prejudice or interfere with, or is reasonably capable of prejudicing or interfering with, the fair trial of the matter or the judgment or sentence thereon.⁵³

As a minister in the temple of justice, all hands must be on deck to ensure that the public interest is upheld in the conduct of one's case. During the course of the trial, a lawyer whether for the prosecution or defense must not engage in any extrajudicial statement in person or through any counsel of his firm or any other person so authorized by him, which may, or likely to prejudice the administration of justice. Trial publicity simpliciter connotes the smooth hearing of litigation without interference with the fair trial of the matter.

The administration of justice during the pendency of litigation is not only confined within a legal practitioner but also extend to any person who is one way or the other involved in the matter. Thus, in the case of *AWOBOKUN v. ADEYEMI*⁵⁴ the appellant in the case entered a caveat against the issue of a license to an intended marriage. The proceeding was before the chief judge of the Western State. During the course of the proceedings, the court called on the caveatrix to explain certain conducts. The court put certain questions to her and answers revealed that she telephoned the Chief Judge a day prior to the appearance in court concerning the proceeding. At the end of the question and answers' proceeding, the court ordered the caveatrix to enter in to a bond in the sum of £100 with a surety in the like sum, to be of good behavior for 12 months, and to come for judgment if and when called upon to do so in default of which she will go prison for three months with hard labour. On appeal, it was contended that the purported criminal

⁴⁵ Ibid r 32 (2) (d)

⁴⁶ Ibid r 32 (2) (e)

⁴⁷ Ibid r 32 (2) (f)

⁴⁸ Ibid r 32 (2) (g)

⁴⁹ Ibid r 32 (2) (h)

⁵⁰ Ibid r 32 (2) (i)

⁵¹ Ibid r 32 (2) (j)

⁵² Ibid r 32 (2) (k)

⁵³ Ibid r 33

⁵⁴ (1968) NMLR 289

relation of a Judge who was formerly associated in a law firm with a lawyer who is now appearing before the judge either as a party or representing a party; The relation of a Judge's former law clerk who appears in a pending case; Judge's prior representation of a party, and former partner's Involvement in prior related matter; Lawyer representing Judge as a technical part and many more. I am not unmindful of the various pronouncements of the Supreme Court in respect of the "Relation with Judges" and other legal ethics. However, since our Rules (RPC) is not explicit and detailed in its postulations regarding the foregoing, I got to search other legal system which made provisions for same.

8. The Relation of a Judge Who was Formerly Associated in a Law Firm with a Lawyer who is Now Appearing before the Judge Either as a Party or Representing a Party.

There are three general standards applicable to this factual situation. Generally speaking, the mere fact that a judge was once professionally associated with a lawyer who is representing one of the parties in a pending matter is not, without more, grounds for disqualification. Arthur Garwin et al., Annotated Model Code of Judicial Conduct,⁶⁰ However, a judge must disqualify if the judge, "was associated with a lawyer who participated substantially as a lawyer in the matter during such association."⁶¹ In addition, in some circumstances the judge's former association with a lawyer could be disqualifying for the judge, e.g. because of an unusually close Personal relationship or a financial relationship.

When disqualification issues arise based on a judge's former association with a lawyer, some jurisdictions employ a "totality of the circumstances" test to determine whether a reasonable person would question a judge's impartiality. The factors considered in these jurisdictions are: (1) the nature and extent of the prior association; (2) the length of time since the association was terminated; (3) the possibility that the judge might continue to benefit from the relationship; and (4) the existence of continuing personal or social relationships which derive from the professional relationship.⁶² The Board believes that these four factors may helpfully be considered in resolving disqualification issues when the judge was formerly associated with a lawyer or law firm appearing on a pending matter.

9. The relation of a Judge's former law clerk who appears in a pending case

The general rule is that disqualification is not necessarily required when a judge's former law clerk appears on a pending matter. *SMITH V. PEPSICO, INC.*⁶³ Garwin et al.,⁶⁴ Note that in Pepsico a period of more than a year had gone by prior to the former law clerk's participation in the pending matter. Several other jurisdictions, including the U.S. Bankruptcy Court in Minnesota, have either formally or informally adopted a policy to observe a one-year hiatus before law clerks may appear before the judge under whom they served.

However, disqualification may be required if the former law clerk was in any way involved in the matter that is now pending while serving as the judge's clerk.

10. Judge's prior representation of a party and former partner's Involvement in prior related matter

In *Town of Denmark*, the Court of Appeals held that "the district court judge would be subject to disqualification only if his prior partner participated substantially in the current matter." Because

⁶⁰ at 235 (2d ed. 2011).

⁶¹ Rule 2.11 (A) (5) (a) Minnesota Code of Judicial Conduct (2009)

⁶² Garwin et al., *supra*, at 236.

⁶³ 434 F. Supp. 524 (S.D. Fla. 1977);

⁶⁴ *Supra*, at 237-239.

the controversy at hand did not involve the same conditional use permit that the judge's prior partner had drafted, there was no substantial participation.

The *Town of Denmark* case stands for the following proposition: if the matter or controversy currently pending before the Judge is not the same matter that was in controversy when the judge was a lawyer, the judge may recuse, but he/she is not required to do so. The judge should, however, disclose the prior representation or the prior professional relationship with the law firm involved in the prior matter at the earliest practicable time.⁶⁵ Because *Town of Denmark* is an unpublished opinion, it is not precedential, but the Board nonetheless has found it persuasive.

11. Lawyer Representing Judge as a Technical Party

In *DESNICK v. MAST*,⁶⁶ the Court rejected a claim that a new trial should be granted because the Judge was represented on a malpractice claim brought against a former partner by a lawyer who represented a party on a matter currently pending before the Judge. The Court emphasized the Judge's nominal status as a party in the malpractice case, the technical, non-personal nature of the contact they had had on the case, and the limited nature of the relationship between them on the other matter. *Desnick* effectively stands for this proposition: the fact that a judge who has been named as a technical party in a case is now being represented on that matter by a lawyer who is also appearing before the judge in a currently pending case is not, without more, grounds for disqualification.⁶⁷ One problem in the *Desnick* case was that the Judge never informed the other lawyers in the pending matter about the lawyer's representation of the Judge in the malpractice lawsuit. Under the current Code,⁶⁸ of course, disclosure should be made.⁶⁹ From the foregoing entrenchments,⁷⁰ as obtainable from other legal system of legal ethics which delved into the nitty-gritty of lawyer and judge relation which is of great significance in this profession, I urge the constituted body/authority concerned with the review of our Rules of Professional Conduct to take into cognizance these loopholes embedded in this Rules and duly take necessary measures to curb this menace.

Lawyers and judges do so many things that help make ours a decent and prosperous society, like achieving compensation for the injured, combating discrimination, and punishing crime. We accomplish these ends through a working relationship characterized by both distance and close-order cooperation. How well we perform this unique balancing act makes an important difference in public and client confidence in what we do. Our profession and the legal system will be most likely to thrive if lawyers and judges alike regularly take the time to examine the best ways to order our relationship.

A lawyer appearing before a judicial tribunal shall accord due respect to it and shall treat the tribunal with courtesy and dignity.⁷¹

12. Courtroom Decorum

The behavior of legal practitioner in court is governed by certain rules which have developed over the years and have made relationship between the Bench and Bar a cordial one conducive to

⁶⁵ Above n60 Rule 2.11, cmt. 5.

⁶⁶ 249 N.W.2d 878 (Minn. 1976)

⁶⁷ See Garwin et. al, supra, at 235

⁶⁸ Minnesota Code of Judicial Conduct (2009)

⁶⁹ See Rule 2.11, cmt. 5.

⁷⁰ *Minnesota Board on Judicial Standards Advisory Opinion 2013* (6th June, 2015. 21:03)

<<http://www.bjs.state.mn.us/file/advisory-opinions/mnbjs-advisory-opinion-2013-2.pdf>>

⁷¹ *Ibid* r 35

the administration of justice. Some of the important matters to be borne in mind relate to dress, courtesy addressing the court, references to judges, citing law reports and reference to other counsel.

When in the courtroom, a lawyer shall be attired in a proper or dignified manner and shall not wear any apparel or ornament calculated to attract attention to himself,⁷² conduct himself with decency and decorum, and observe the customs, conduct and code of behavior of the Court and custom of practice at the bar with respect to appearances, dress, manners and courtesy;⁷³ rise when addressing or being addressed by the Judge;⁷⁴ address his objections, requests, arguments, and observations to the Judge and shall not engage in the exchange of banter, personality display, arguments or controversy with the opposing lawyer;⁷⁵ not engage in undignified or discourteous conduct which is degrading to a Court or tribunal;⁷⁶ and not remain within the Bar or wear the lawyer's robes when conducting a case in which he is a party or giving evidence.⁷⁷

A lawyer should speak and write in a civil and respectful manner in all communications with the court, court personnel and other lawyers. A lawyer should not engage in any conduct that diminishes the dignity or decorum of the court room. A lawyer should advise clients and witnesses of the proper dress and conduct expected of them when appearing in court and should, to the best of his or her ability, prevent clients and witnesses from creating disorder and disruption in the courtroom. A lawyer should not misrepresent, mischaracterize, misquote or wrongly cite facts or authorities in any oral or written communication to the court. A lawyer should be punctual and prepared for all court appearances. A lawyer should be considerate of the time constraints and pressures on the court in the court's effort to administer justice and make every effort to comply with schedules set by the court.⁷⁸ Counsel must rise when addressing the court except when in chambers. Even when counsel is not addressing the court but the judge is speaking to him, he should immediately stand up and remain standing until his attention is no longer required.⁷⁹ When the judge interrupts counsel, the latter should stop and pay attention to any point raised or question asked.⁸⁰ It has been said that the first rule to remember while speaking in court is "Never to speak while the judge is speaking to you and practically never while your opponent is speaking. Occasionally it may be necessary to interrupt your opponent but it is rare that this need be done in the middle of a sentence."⁸¹ Counsel should learn how to speak up, out, simply, clearly, deliberately and not too fast. The language of court is polished language, the language of honorable men. There can be no room for vulgar expressions or abuse in conducting a case. What the court expects is skill and argument that will assist it in arriving at what is true and just. It is trite that "abuse is no argument". It is worse still and mean when the person against whom improper language is used has no privilege of replying.

With regard to the formalities of addressing the court, this should not be overdone. It is customary to use the formal address in the beginning of a statement to court or when replying to

⁷² Ibid r 36 (a)

⁷³ Ibid r 36 (b)

⁷⁴ Ibid r 36 (c)

⁷⁵ Ibid r 36 (d)

⁷⁶ Ibid r 36 (e)

⁷⁷ Ibid r 36 (f)

⁷⁸ Above n155

⁷⁹ J. O. Orojo 'Conduct and Etiquette for Legal Practitioners' (1st Edition, London Sweet & Maxwell, 1979). 78

⁸⁰ Ibid

⁸¹ Ibid. 79

an observation or question. It is boring to punctuate every other word with "My Lord" or "Your Worship". A formal address to the court is as follows;⁸²

- (a) In the Supreme Court, Court of Appeal and High Court.. "My Lord"⁸³ or "May it please Your Lordship" When two or more judges are sitting..... "May it please the Court" or "May it please Your Lordships".
- (b) In the magistrates' and district courts..... "Your Worship," "May it please Your Worship" or simply "Sir".
- (c) In the customary court..... "Your Honour", "Mr. President", or simply "Sir"

13. Conclusion

The law profession in Nigeria has set some standard of ethics that is in line with international best practice. Lawyers and judges in Nigeria have guarded the law profession jealously. Though there are standard rules guiding the profession, there are equally some unethical behaviour demonstrated by both lawyers and judges in the administration of justice in Nigeria. Therefore, bodies like the Nigeria Bar Association, Council of Legal Education, National Judicial Council, Federal Judicial Service Commission should rise up and meet up with the challenges by making sure lawyers and judges exhibited good conduct in the administration of justice in Nigeria.

⁸² Ibid

⁸³ A woman judge is addressed as "My Lady", "Your Ladyship" following the English practice. In some other countries such as United States, Australia and New Zealand, the judge is addressed as "Your Honour" thus avoiding the complication of finding a suitable alternative for the fair sex.

LEGAL PRACTICE AS A SENIOR ADVOCATE OF NIGERIA

*Being a talk given by Honourable Justice Abdu Aboki,
Presiding Justice, Court of Appeal, Abuja at the Pre-
Swearing Induction Programme for New Senior
Advocates of Nigeria organised by the Body of Senior
Advocates of Nigeria on the 13th of September, 2018.*

Let me open my speech by heartily congratulating distinguished gentlemen whom by this eminent occasion, can be said to have attained the enviable peak in the revered legal profession. I must be quick to say that grace and industry are invariably the two factors that make for success at the Bar. By implication, we have gathered here today to celebrate individuals whose outstanding industries in the noble profession have been met with God's blessing in what is styled as grace. I make bold to say that no amount of industry can make any man attain the heights, but for the grace of God. It is grace that comes to play where human efforts fail.

It is important to briefly consider what the rank of a Senior Advocate of Nigeria (SAN) is. It is a title that may be conferred on legal practitioners in Nigeria of not less than ten years' standing and who have distinguished

themselves in the legal profession. It is the equivalent of the rank of Queen's Counsel in the United Kingdom, from which Nigeria became independent in 1960. **Section 5(1) and (2) of the Legal Practitioners Act, CAP. L 11, LFN, 2004** provides thus:

5 (1): Subject to subsection (2) of this section, the Legal Practitioners' Privileges Committee established under subsection (3) of this section may by instrument confer on a legal practitioner the rank of Senior Advocate of Nigeria.

(2) A person shall not be conferred with the rank of Senior Advocate of Nigeria unless he has been qualified to practice as a legal practitioner in Nigeria for not less than ten years and has achieved **DISTINCTION** in the legal profession in such manner as the committee may from time to time determine.

The above provisions, as succinct as the contents appear, are pregnant with a lot of demands and requirements a legal practitioner must meet before becoming eligible for consideration for the rank. It is also worthy of note that the rank is not conferred as of right, but as of privilege, and as such, it takes noticeable distinction in practice for a legal practitioner to be considered. What these suggest, is

that the rank of a Senior Advocate is an indication of not just at least, a decade in the practice, but an acknowledgement of class and distinction. The burden placed on a person conferred with the rank of a Senior Advocate of Nigeria is enormous, and it is summarised in the Oath taking, which is reproduced below:

"I.....upon whom the rank of Senior Advocate of Nigeria has been duly conferred declare that I will at all times faithfully serve the interest of the Federal Republic of Nigeria in the capacity of Senior Advocate of Nigeria and to that end will support and uphold the Constitution of the Federal Republic of Nigeria 1999; that I will to the best of my ability assist the courts of justice duly established in the Federal Republic of Nigeria in the performance of their judicial functions; and that I will at all times uphold the dignity of the rank of Senior Advocate of Nigeria."

Without mincing word, a careful consideration of the above Oath reveals that being conferred with the rank of a Senior Advocate of Nigeria is not the end, but a means to the end as far as serving the interest of the Federal

Republic of Nigeria and promotion of the rule of law is concerned. The instrument of conferment reflects that the rank is conferred on the bearer after the Legal Practitioners' Privileges Committee is fully satisfied with the loyalty, integrity and ability of the bearer. The instrument of conferment reads thus:

“Legal Practitioners’ Privileges Committee”

Instrument of Conferment of the Rank of Senior
Advocate of Nigeria

*TO ALL WHOM THESE PRESENTS SHALL COME,
GREETINGS*

WHEREAS, the Legal Practitioners’ Privileges Committee is fully satisfied with the loyalty, integrity and ability of, barrister AND Solicitor of the Supreme Court of Nigeria; and

WHEREAS, in consequence of the foregoing, the Legal Practitioners’ Privileges Committee has considered it proper to confer on, the right and privileges of Senior Advocate of Nigeria.

Now, by the terms of **THESE PRESENTS**, the Legal Practitioners’ Privileges Committee, in exercise of the

*powers conferred on it under section 5(1) of The Legal Practitioners' Act, do **HEREBY** confer on the rank and dignity of Senior Advocate Of Nigeria, to hold and enjoy ALL and SINGULAR Rights, Allowances, Privileges and Pre-eminences belonging to or appertaining to the rank of Senior Advocate of Nigeria on as full and ample a manner as the Legal Practitioners' Privileges Committee may, from time to time, determine AND ALSO the liberty of sitting and practicing within the Inner Bar of the Courts of Justice in Nigeria.*

*IN WITNESS WHEREOF I have set my hand and caused the Seal of the Legal Practitioners' Privileges Committee to be affixed to **these Presents**, at the Supreme Court of Nigeria, Abuja, this day of in the year ..."*

In his book, Justice for all and by all, Per Ephraim Akpata, JSC (Rtd) was of the view that the unsuccessful lawyer is not necessarily a mediocre. He could be a first class brain with all attributes that make for success at the Bar. But success eludes him either because he is unlucky to get good briefs that could project him to limelight or because he could not get into a good chambers where he

would be exposed to good practice. Invariably, gentlemen, you have recorded this success because you had the grace of God reflecting on the attributes that make for success at the Bar from the inception of your practice or at one point or the other.

Distinguished conferees, members of the Bar, well wishers, and pressmen, let it be noted that the general impression of lawyers in the minds of average men is not so flattering. By your calling and the nature of the profession that makes it cut across all spheres of life, no stage or success is the end; rather, it will always be a means to the end. This in my view is one of the reasons cases diligently contested and won speak for great lawyers long after they are gone in what we call judicial precedents. Who then is a lawyer? Who is this man or woman, whom by his calling can live forever in the book of history for good or bad by virtue of the type of practice he adopts as a member of the great Bar? The definition that strikes me as close to accurate was given by Judge J.W. Donovan in his book, *Tact in Court*. It is a long one, but it is worth an appraisal. He defined lawyers thus:

"Lawyers, the most trusted and distrusted: the men who make contracts and unmake them; who give

advice and sell counsel; who make money out of trouble and make trouble out of money; who create estates and distribute them-legally; who live by loaning money, and often subsist on borrowed capital; who hear and conceal marriage secrets, and drag out faded letters in bitter divorces; who please and persuade when they are lucky, but often go out of Court branded and dispraised by the side defeated-and with one side always the loser: what wonder that the slurs of character fall to the common lot of the lawyer! Without the smiles of the merchant's customer, he meets the frowns of business men in trouble. No time is to be lost, no delay for fees. He must win a victory or bear the blame for ever. Unlike the builder, who knows that, be it ever so perfect, the elaborate house he has finished can never suit the proprietor; unlike the machinist, he controls not his own enginery; carrying the double burden of care for self and client; invited to win what others have failed in; urged to mend the broken pieces of an ill- made contract; bound to account for unreasonable confessions, blunders, and letters; asked to replevin goods already secreted, to attach the

effects of a malicious merchant, to unearth fraudulent elections, to reclaim vast estates from costly lax titles, to keep one for years in plenty by restored possession and broken wills, often on doubtful evidence, by a lawyer's art and eloquence—what a happy condition! Fated from the start by uncertainty, where clients exact no less than absolute victory, they long to call reasonable what they know is only probable. By logic and argument on the theory of their client, with the facts only partially stated, and that part deeply shaded, they are often surprised by the other side and called to explain away their defeat in the end by a tirade on the perjury of witnesses and the depravity of human nature. The happy lawyers! The men who live so easily, flourish so long on the bounty of a grateful people, make the laws and settle the titles, defend the weak and protect the wealthy, enjoy the rich fruit of the world's praises and abuses, mingled and commingled in such rare harmony that none can define where censure ends and approval commences! Who would not be a lawyer?"

It is not my intention here to evaluate the image of the Bar as a whole, but a close examination of the above reveals the swinging perception of a lawyer. My purpose in delving into that description is to pin-point the varying perception of lawyers. When one does not have a settled image, he must keep working, and that is the fate your calling has vested on you. How much more a Senior Advocate? This has informed the need for me to say that becoming a Senior Advocate is not the end; it is a means to the end. The task has just begun, and the expectation on you is doubled by virtue of your new status.

This talk, which characteristically shall be a form of admonishment, is tailored towards what the legal profession expects from Senior Advocates. Choosing this topic for this occasion becomes essential given that Senior Advocates are at the vanguard of maintaining an ideal Bar and riding it of whatever rot threatens its existence and integrity. Where the Bar is stripped of its integrity, the rule of law is non-existent, and lawyers have no temple to apply the law. Being conferred with the honour of a Senior Advocate of Nigeria is a calling, and the inner Bar should not mirror or reflect the attitude and practices it has been called upon to condemn and correct. In the light of this, the expectation of the Country, the Courts, and the

legal profession from Senior Advocates of Nigeria shall be considered below.

PROTECTION OF THE CONSTITUTION

The Constitution is the grundnorm (Supreme law), upon which the state runs and other laws derive their validity/legitimacy. Constitutionalism refers to the whole process of governance based on the Constitution of a given State. It informs a government as instituted by Constitution with clear organs of government and functions of such organs of government clearly spelt out. It ensures obedience to the rule of law by people put in positions of authority other than rule arbitrarily. The true concept of constitutionalism envisages the supremacy of law. This supremacy of the Constitution is the case of Nigeria. To buttress this point, the Constitution of Federal Republic of Nigeria 1999 (as amended) provides in Sections 1 (1, 2, and 3) thus:

“This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria”.

“The Federal Republic of Nigeria shall not be governed, nor shall a person or group of persons

take control of government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution."

"If any other law is inconsistent with the provisions of this constitution, the constitution shall prevail and that other law shall be the extent of the inconsistency by null and void."

The 1999 Constitution of Nigeria is the grundnorm. It is the supreme law to which all other legal norms must conform. Where there is any inconsistency between the constitution and such other law, that other law to the extent of its inconsistency is null and void and of no effect whatsoever. Thus, it establishes the Nigerian democracy where the rule of law will prevail as held in A.G. FED. v. ABUBAKAR¹ and FRN v. IFEGWU.² Senior Advocates must be the chief mechanics of the legal system. They must drive and help fine-tune the engine, knowing that if it is not in working condition, it will not reach its destination. Lawyers are specially trained in the legal system's goals and have the greatest expertise about its operation. As Senior Advocates, this commitment to the protection of the Constitution must be

¹ (2007) ALL FWLR (Pt. 37) p.1264

² (2003) FWLR (Pt.167) p.703

taken a step higher, because to whom much is given, much is expected. In protecting the Constitution, Senior Advocates must be proactive and not given to fear or be subdued by any form of gains to watch the Constitution being disregarded. Without concerted efforts by legal practitioners, particularly the Senior Advocates, to protect the Constitution, the rule of law will suffer, and the nation will be thrown into anarchy and chaos.

RELATIONSHIP WITH THE COURT

Every Court of law in Nigeria owes Senior Advocates the duty of preference. This duty of preference is as to respectful treatment of Senior Advocates in a manner that recognises their distinction in practice. Sitting in the inner Bar or in the front row is also one of the privileges that come with the rank of a Senior Advocate. In turn, it is the duty of Senior Advocates to maintain towards the Court respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Senior Advocates against unjust criticism and clamour. Where there is proper ground for serious

complaint of a judicial officer, it is the right and duty of a Senior Advocate to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.³ In recent time, reports about the attitude of senior lawyers, particularly Senior Advocates towards the Court are becoming unbecoming, and Senior Advocates have a great role to play in addressing the rot. Senior Advocates must exude the finesse expected of their status in appearance, words and action. They owe the legal practice the duty to be dignifying in conduct, and in the discharge of their duties.

Senior Advocates are in duty bound to uphold the law; and no service or advice ought to be rendered or given by them to clients, corporate or individual, of any description or to any cause whatsoever involving disloyalty to the law or bringing disrespect upon the holder of any judicial office or involving corruption of holders of any public office. Improper service or advice in such circumstances as aforesaid is unethical and merits strong condemnation as unprofessional conduct. On the other hand, service or advice rendered or given that not only accords with the letter of the law but also embraces moral principle cannot

³ Rule 1 9a) Rules of Professional Conduct

be too highly commended. Senior Advocates must also observe and advise their clients to observe the statute law, save that until a statute has been construed and interpreted by competent adjudication, they are free and are entitled to advise as to its validity and as to what they conscientiously believe to be its just meaning and extent. Above all, a Senior Advocate finds his highest honour in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.⁴

One of the readily proffered reasons by some Senior Advocates for losing a case is that the judge was bribed or must have been bribed. I hold no brief for any judge. An allegation of bribery against a particular judge may be true. However, such must be made at the appropriate quarter. It is a misuse of a Senior Advocate's privileged position for him to tarnish the reputation of an honest judge before his client by making an allegation of corruption against the judge merely to cover up his (lawyer's) incompetence or deficiency for some ulterior motive. A Senior Advocate should realise that because of his position in the society and his function in the administration of justice, one careless adverse remark

⁴ Rule 24, Rules of Professional Conduct

from him to his client or a third party about a judge is sufficient to shake public confidence in the judiciary. As Senior Advocates, you must possess, apart from maintaining a high standard of professional integrity, a deep appreciation of ethical values, including the commandment to refrain from bearing false evidence against your neighbours-the judges. You should not be parties to scandalising the courts. Any adverse comment by a Senior Advocate of happenings in the judiciary is presumed to be authentic and its effect is very destructive of the temple of justice wherein he is regarded as ministers.⁵

There are reports of members of Senior Advocates staging walk out from the Court during proceedings, and even making unsuitable remarks about the Courts within and outside the Court. Practices like this demean the Court, and erode the faith of the common men in the judiciary and the legal profession. It is a bad example for other lawyers who look forward to attaining the prestigious rank. Becoming Senior Advocates is not a licence to treat or address the Court with disdain; it is an opportunity to show other lawyers the proper way to behave before the Court, and outside the Court. Senior Advocates must

⁵ Justice Ephraim Akpata: Mis-use and Abuse of Power by the Bar

exude the humility, candour, decorum, professionalism and respect that made them eligible for the honour more after the conferment. They must lead exemplary lives as lawyers and citizens, and must not allow anybody to question their status at the Bar because of improper conducts. Where the Court is treated with disdain and lack of respect, it affects the trust in the judiciary and paints the Court as an institution that is weak and incompetent. This will in turn invite disregard for Court Orders, and the legal practice as a whole.

RELATIONSHIP WITH OTHER LAWYERS

It is imperative that Senior Advocates respect each other and younger lawyers. Senior Advocates must see respecting other lawyers as a duty they must discharge at every time. The Constitution recognises the dignity of human person and as ministers in the temple of justice, Senior Advocates must know that this provision is breached when they assume a larger than life status and treat other lawyers with contemptible disdain or without courtesy. I reckon that there are privileges that come with the honour of Senior Advocate, however, such privileges must be activated and enjoyed with utmost discretion and

humility. Given, the inner bar and front seats are reserved for Senior Advocates when they are in Court. However, where other lawyers have to stand in Court as a result of space constraint, Senior Advocates should accommodate them in the inner bar. It projects the inner bar in an impressive light and inspires other lawyers to replicate the same.

Outstanding lawyers are not made Senior Advocates to bully other lawyers or oppress them by their status or privilege in the profession. Subject to the rules relating to precedence, all members of the Bar are equal. This principle involves the explanation that no member of the Bar irrespective of his rank or title shall regard himself as superior or inferior to other member of the Bar.⁶ The Silk is not a tool to oppress or stampede other lawyers; it is a sign of grace and eminence in the legal profession. It will defeat the essence if a Senior Advocate behaves in a manner that lacks decorum or refinement that is expected to flow with being a Senior Advocate.

There are reports of the degrading treatment of junior lawyers by some senior lawyers, unfavourable work condition, lack of requisite exposure, and unfair

⁶ Rule 38, Rules of Professional Conduct

remuneration are on the rise in the legal profession. Of striking worry is the report that some senior lawyers do not pay the junior lawyers because they consider it a privilege for junior lawyers to be learning in their firm. This must be condemned in clear terms. I admonish Senior Advocates to rise against this treatment. It runs against the grain of the legal profession for people to be treated in such manner, and does not secure the future of the legal practice.

To be in the right frame of mind to protect the future of legal profession, and aspire for a nation that is operated on constitutional tenets, young lawyers have to be adequately compensated and encouraged. The legal profession encourages continuous learning, and pupillage, but that is without prejudice to the fact that legal practice should also open the door for lawyers to earn in any establishment that considers their services necessary. A lawyer who is not paid for his service is dangerous to the profession as he is prone to compromise. Distinguished senior advocates, there is no dignity in a profession that enslaves its younger generations all in the name of learning. I beseech you to address this worrisome development, and secure the future of legal practice with your rank.

ADHERENCE TO THE RULES OF PROFESSIONAL CONDUCT

For any entity to thrive, it must ensure compliance with the rules or laws that regulate its operation and its members. This speech would not have been necessary if legal practitioners comply with the rules of professional conduct. However, the disregard for the provisions of the Rules and selective adherence are rampant as regards the rules.

It is one thing to record success at the Bar; it is another thing for the success to come with the glory that comes with success well obtained. Senior Advocates should know that when the rules of professional conduct is breached, whatever is done outside such rule is unprofessional, and a violation of the dignity of the profession. A lawyer who cannot adhere to the rules that bind the profession is a threat to the rule of law. Senior Advocates are called upon to lead by example in the area of compliance with the Rules of professional conducts and enforcement of its provisions. It is a disgrace to have a Senior Advocate convert client's money. Many Senior Advocates have had their ranks withdrawn and careers cut short for this practice and many more are caught in the

web of breaching the ethics of the profession. I call on Senior Advocates to look into this without creating exception for any lawyer, regardless of his status or other factors. Tyranny begins where law ends, and if the rules of professional conducts cannot be obeyed, the legal practice stands to suffer it all.

RELATIONSHIP WITH CLIENTS

Nothing operates more certainly to create or foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defence of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

A Senior Advocate should not assert in argument his personal belief in the integrity of his client or of his witnesses or in the justice of his cause, as distinct from a fair analysis of the evidence touching those matters.

A Senior Advocate owes entire devotion to the interest of his client, warm zeal in the maintenance and defence of the client's rights and the exertion of his utmost learning and ability to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavour or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of every remedy and defence that is authorized by the law of the land, and he is also entitled to expect his lawyer to assert every such remedy or defence. It must however be borne in mind that the great trust of the lawyer is to be performed within the bounds of the law. The rank of a Senior Advocate does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicanery. He must obey his own conscience and not that of his client.⁷ Some Senior Advocates care too much for victory and too little for justice, and that is dangerous. Most clients will insist on a Senior Advocate handling their matters in Court, hoping that Senior Advocates know the law and the judges. There is a duty on Senior Advocates to set the record straight, and not give an impression that by virtue of being silks,

⁷ Rule 14, Rules of Professional Conduct

the Courts are at their beck and call. Senior Advocates, and in fact all lawyers must know the law and the Court (judge). Putting it in context, knowing the law is being abreast of the relevant laws to each case they handle, and knowing how they apply to the facts of the case. Knowing the judge on the other hand means understanding the Court's atmosphere, the attributes typical of each judge in the lawful discharge of his duty on the Bench, and what the Court expects from every lawyer before it in the lawful discharge of his duty to his clients. Knowing the Court (Judge) does not extend beyond this; it does not suggest a personal affinity or relationship that tends to compromise the Court in the discharge of its duties. The fortune of your practice is likely to change as from this moment because of the perception and expectation of the average man of Senior Advocates. However, let it be engraved in their hearts that Senior Advocates are not miracle workers, but distinguished individuals in legal practice, and that other lawyers deserve as much opportunity to prove their worth as Senior Advocates. When a client approaches a Senior Advocate, one thing should be borne in mind: that another opportunity has presented itself to present the legal practice in a noble light without compromise. Never should it be an avenue

to fight teeth and nail to generate the non-existent and alter the obvious. Senior Advocates should be aware that when the heat of passion is calmed, and the client is relieved of imminent scourge of the law, courtesy of the spirited effort of the lawyers, he (Client) will think about how it all went and will form an impression as to the character of the lawyer. It is often said that where character is lost, the name goes with it. It is a time-honoured truism that a good name is better than a bag of gold and silver.

DUTY TO THE SOCIETY AT LARGE

Senior Advocates are unarguably the greatest ambassadors of the legal practice in Nigeria. They must be the torchbearer of justice and promoters of the rule of law. They owe the country the duty to expose corrupt or dishonest conduct in the profession without fear or favour before the proper tribunals, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owes it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. Senior

Advocates should aid in guarding the Bar against the admission to the profession of candidates who are unsuitable by reason of their moral character or insufficient qualification. The lawyer should strive at all time not only to uphold the honour and to maintain the dignity of the profession but also to improve the law and the administration of justice.⁸

Senior Advocates are in duty bound to uphold the law; and no service or advice ought to be rendered or given by them to clients, corporate or individual, of any description or to any cause whatsoever involving disloyalty to the law or bringing disrespect upon the holder of any judicial office or involving corruption of holders of any public office. Improper service or advice in such circumstances as aforesaid is unethical and merits strong condemnation as unprofessional conduct. The point that was made that a Senior Advocate must sound moral principles and represent his client within the bounds of law must be reiterated here. **He has a duty to also advise his client to observe all applicable laws in every transaction or relationship.** Above all, a Senior Advocate finds his highest honour in a deserved reputation for fidelity to

⁸ Rule 21, Rules of Professional Conduct

private trust and to public duty, as an honest man and as a patriotic and loyal citizen.⁹

Let me quickly address the relationship between the press and the Bar. An effective and efficient press is key in the administration of justice, without it, the administration of justice suffers a great setback. When the press accurately reports the efforts of Senior Advocates in promoting the rule of law and justice, it positively projects the image of the legal profession. However, a regimented press is worse than having none. It is a time bomb that promises disaster. Inaccurate news reports, distortion of facts, and misrepresentation of persons of judicial officers are highlights of what the judiciary suffers in the hands of some news outfits. The development is worrisome; given the manner some senior lawyers find it easy to malign the Courts before the press at any given opportunity. This should not be. The desecration of the Court by any Senior Advocate, by alluding to it as being partial, prejudiced, or corrupt does not only damage the image of the judiciary and erodes public confidence in it, it is an indictment on every well meaning member of the bar who earned his license to practice law on merit. My position is not that Courts should not be criticised, but same must be done

⁹ Rule 24, Rules of Professional Conduct

within the confines of the law, fairly, and at the appropriate quarters. I challenge Senior Advocates to be the keepers of the Courts, and stand against this troubling development. The legal profession and the Bench must not be exposed to ridicule or shame, especially when same is unfounded and ill-motivated.

Let me admonish the young lawyers on whom the burden of sustaining the tenets of the legal profession lies. Very few people consider the step by step processes required in reaching success in law practice. It will not come by accident. It may not come by years of earnest labour. It will most likely come by tact and art, honesty and eloquence. Actors reach their distinction by finding their forte and follow it artfully, but they have a stage and play to enforce attention.¹⁰ The Court of law is the biggest stage for a lawyer to thrive. You must wait like doctors for a first case, and maybe, for a dozen or more. To get in the procession is a great advance for a young lawyer. Once in the line, the rest depends on mettle, gift, grace and industry. I believe that the reward of these is what the gentlemen we are here to celebrate have reaped today, and will continue to reap.

¹⁰ J. W. Donovan-To be a lawyer

Finally, Senior Advocates of Nigeria must be outstanding in their conducts within and outside the Court, as they are in the best position to shape the perception of the bigger society about the legal profession.

Thank you for your time.

LEGAL PRACTICE AS A SENIOR ADVOCATE OF NIGERIA

BEING A PRESENTATION BY

CHIEF WOLE OLANIPEKUN, OFR, SAN, LL.D, FCI Arb, FNIALS

**(AS A FACILITATOR) AT THE PRE-SWEARING
INDUCTION PROGRAMME**

ORGANISED FOR THE NEW SENIOR ADVOCATES OF NIGERIA

**BY THE BODY OF SENIOR ADVOCATES OF NIGERIA
(BOSAN)**

ON 13TH SEPTEMBER, 2018

**AT THE FUNCTION ROOM ONE, ORIENTAL HOTEL
VICTORIA ISLAND, LAGOS**

**LEGAL PRACTICE AS A SENIOR ADVOCATE OF NIGERIA –
BEING A PRESENTATION BY CHIEF WOLE OLANIPEKUN,¹
(AS A FACILITATOR) AT THE PRE-SWEARING INDUCTION PROGRAMME
ORGANISED FOR THE NEW SENIOR ADVOCATES OF NIGERIA BY THE BODY
OF SENIOR ADVOCATES OF NIGERIA (BOSAN) ON 13TH SEPTEMBER, 2018.**

1.0 INTRODUCTION

1.1 By a letter dated 6th August, 2018, jointly signed by Chief Felix Fagbounge, SAN, and Mr. Olanrewaju Onadeko, SAN, respectively the Organising Chairman and Induction Coordinator of this event, I have been invited as a Facilitator to facilitate on the topic “**Legal Practice as a Senior Advocate of Nigeria**”, with the following sub-topics:

- i. **Client – Attorney Relationship**
- ii. **Relationship of Senior Advocates with other lawyers**
- iii. **Relationship of Senior Advocates with the Court**
- iv. **Duty of Senior Advocates to the Society**

1.2 The word ‘facilitate’ is defined as “to make easy or easier”²; ‘to make an action or a process possible or easier’.³ To my mind, therefore, as a facilitator, I am not expected to present any lengthy treatise on the topic assigned to me; but to speak to each of the sub-topics, drawing from my humble experience and, in the process, highlight a few points. In a manner of speaking, I am to act as or play the role of a mid-wife.

1.3 Permit me, therefore, to highlight a few of my thoughts on the sub-topics, seriatim.

¹ OFR, SAN, LL.D, FNIALS, FCIArb, Former President of the Nigerian Bar Association

² The New Lexicon Webster’s Dictionary of the English Language, Deluxe Encyclopaedic Edition

³ Oxford Advanced Learners Dictionary, International Students Edition (7th Edition)

2.0 CLIENT-ATTORNEY RELATIONSHIP

2.1 The client-Attorney relationship that exists between any client and a Senior Advocate of Nigeria cannot be much different from the client-Attorney relationship that should exist between a member of the Utter Bar and his client. We must bear in mind that a Senior Advocate of Nigeria is first and foremost a lawyer, subject to and bound by the Rules of Professional Conduct for the Legal Profession in Nigeria. Therefore, he is under a duty, not only to scrupulously subscribe to all the rules of professional ethics in the profession, but to also clinically comply with them. Be that as it may, this time around, as a Senior Advocate, he is acting as a leader, a role model, a mentor, an exemplar, a cynosure, a teacher, as well as a shepherd. In effect, he is under a duty to lead by example.

2.2 For ease of reference, I will advise all Senior Advocates to go through and meditate on Part B of the Rules of Professional Conduct for Legal Practitioners, 2007; particularly, paragraphs 14, which deals with dedication and devotion to the cause of the client; paragraph 15, providing for the duties of a lawyer to represent his client within the boundaries of the law; paragraph 16, which touches on the representation of clients competently; paragraph 18, which spells out agreements with clients; paragraph 19 on the privilege and confidence imposed on the relationship with a client; paragraph 20 on a lawyer acting as a witness for a client; paragraph 21, which deals with withdrawal from employment; paragraph 22, forbidding a lawyer from calling at a client's house or place of business; paragraph 23, on the relationship between a lawyer and his client's property; paragraph 24, which spells out the

responsibilities for litigation; and paragraph 25, on investigation of facts and production of witnesses.

2.3 In my view, the duty imposed on a lawyer qua Senior Advocate to maintain the privacy and confidentiality of his client is a very sacred and sacrosanct one and, in this type of discourse, it is necessary to expatiate a bit on it. Apart from the Rules of Professional Conduct earlier referred to, section 192(1) of the Evidence Act, 2011, prohibits any legal practitioner, particularly a Senior Advocate of Nigeria, without his client's express consent, from disclosing any communication made to him in the course and for the purpose of his employment as such legal practitioner by or on behalf of his client. Section 194 of the same Evidence Act states that the privilege provided in section 192 cannot be waived by volunteering evidence; while section 195 states that no one shall be compelled to disclose to the court any confidential communication which has taken place between him and a legal practitioner consulted by him, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known.

2.4 In a paper I presented at the **Gibraltar Human Rights Symposium** held at **Gibraltar** between 2nd – 3rd September, 2004, I addressed the gathering, which included the then **Chief Justice of Nigeria, Honourable Justice Mohammed Uwais, GCON**, extensively on the topic '**Privacy, Confidentiality and Privilege between a Lawyer and his Client**'. The text

of the paper is now contained in chapter 7 of Volume 1 of my book titled "The Voice of Law and Social Change".⁴

- 2.5 It is apt to draw attention to two or three judicial pronouncements on this all-important duty. In *Anderson v. Bank of British Columbia*⁵, Sir George Jessel, MR, enthused thus: "It is common ground that the basic principle justifying legal profession privilege arises from the public interest requiring full and frank exchange of confidence between solicitor and client to enable the latter to receive necessary legal advice. Originally it related only to communications where legal proceedings were being or in contemplation. This was the rationale which distinguished the solicitor and client relationship from that between any other professional man and his client."
- 2.6 In *Attorney General v. Mulholland & Foster*⁶, Lord Denning, MR, posited as follows: "The only profession I know which is given a privilege from disclosing information to a court of law is the legal profession, and then it is not the privilege of the lawyer but of his client. Take the Clergyman, the Banker or the Medical man. None of these is entitled to refuse to answer when directed to by a Judge. Let me not be mistaken. The Judge will respect the confidence which each member of this honourable professions receives in the course of it and will not direct him to answer unless not only it is relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered".

⁴ 2011, ____

⁵ 1876 2 Ch.D 644 at 648 - 649

⁶ 1963 2 QB 477 at 439

2.7 Pronouncing on Rule 10 (now Rule 14) of the Rules of Professional Conduct of the Legal Profession in *Professor A.C Ikeme v. Barrister Akuzamus Anakwe & Anor*⁷, Sanusi, JCA, posited thus: "The above provisions clearly set out the duty of a legal practitioner ... A counsel owes it a duty to maintain the confidentiality of his relationship and not to disclose any information he came across at the time of receiving instruction of any other or adverse party. A lawyer always has a duty to preserve his client's confidence. Such onerous duty starts to exist from the time he was employed or instructed and extends even to his employees. He and his employees alike should not accept any employment which may involve the disclosure or use of such confidence for private advantage of his client without the latter's knowledge and express consent ... confidential relationship between a legal practitioner and his client is presumed to have existed right from the time of transaction ...".

2.8 As far back as 1978, the erudite Ogundare, J., later JSC, in an unreported judgment delivered by him as a Judge of the Ondo State High Court, on 6th June, 1978⁸, held thus: "I am of the view that the confidential relationship commences the moment the client enters the chambers and starts talking to the managing clerk and other employees about the purpose of his coming to the chambers. Even if I am wrong in this view, I will still hold that there are circumstances other than the relationship of the solicitor and client in its stricter sense that will impose a duty on the solicitor to maintain confidence and one of such circumstances is the case here where a would-be client had in the belief that he was

⁷ (2003) 10 NWLR (Pt 829) 548 at 573 - 575

⁸ Had/10/75

instructing a solicitor passed some information regarding his case to the managing clerk of a solicitor”.

2.9 Recently, in a landmark judgment, a full panel of the Court of Appeal upheld the decision of **Kolawole J.** (now JCA) of the Federal High Court, Abuja, which nullified sections 5 and 25 of the Money Laundering (Prohibition) Act, 2011, as being contrary to section 21 of the Legal Practitioners Act, as well as Rule 19(1) (20 and (3) of the Rules of Professional Conduct for the Legal Profession.⁹ I enjoin all newly-appointed Senior Advocates to read this judgment, as it is the said decision that has given lawyers in Nigeria the unfettered liberty to practice their profession in spite of the inhibitive provisions of sections 5 and 25 of the Money Laundering Act.

3.0 RELATIONSHIP OF SENIOR ADVOCATES WITH OTHER LAWYERS

3.1 I will also draw attention to Part C of the Rules of Professional Conduct for the Legal Profession titled ‘**Relations with other lawyers**’, and posit that the provisions thereunder apply verbatim and seriatim to Senior Advocates, without any exception.

3.2 In particular, paragraph 27 spells out, in painstaking detail, the relationship of good faith and fairness amongst lawyers; paragraph 28 regarding associating with other counsel in any matter; paragraph 29 on change of lawyer qua counsel.

⁹ CBN v. Regd Trustees of the NBA & Anor CA/A/202/2015 delivered 14th June, 2017, affirming the High Court decision in FHC/ABJ/CS/173/2013 coram: Kolawole J. of 17/12/2014.

3.3 Let me add that as Senior Advocates, it is our duty to extend courtesy to our colleagues, both at the Utter and Inner Bar. Our language, in and out of court, and both in written and oral presentations should be decent, fair, polite, courteous, refined, civilised, cultured, measured and gentlemanly. A lawyer, particularly a Senior Advocate of Nigeria, should not write or talk like a ruffian or a road-side mechanic or a bus conductor. It is rather embarrassing, curious and unfortunate that nowadays, some Senior Advocates have indulged in the use of abusive, insulting, uncultured, denigrating language against their colleagues at the Inner Bar, to the embarrassment of the onlookers, both members of the Bar and litigants. Again, one or two decisions of our courts in respect of this ugly scenario and developments will be necessary to guide and even warn our colleagues who are to be formally called to the Inner Bar on 24th September, 2018, and also remind the older members of the rank of the need for all of us to submit and subject ourselves to re-examination and self-reappraisal. We have to apply the brakes now before we finally cross the red line. In *Madukaegbu v. State* [2018] 10 NWLR (Pt. 1626) 26 at 58, paras B-C, the Supreme Court, per Eko, JSC, held that "calling opposing counsel names smacks of professional misconduct as well as immaturity." This captures the crux of the problem adequately. For purposes of emphasis, I must state that the rank is not for Lilliputians. It is for the mature-minded.

4.0 RELATIONSHIP OF SENIOR ADVOCATES WITH THE COURTS

4.1 Part D of the Rules of Professional Conduct in the legal Profession titled 'Relations with the Court' becomes very handy.

- 4.2 Paragraph 30 is titled '**Lawyers as Officers of Court**'; paragraphs 31 spells out the duty of lawyers in court; paragraph 32, is on candid and fair dealing; paragraph 34 spells out relations with Judges; paragraph 35, explains duties of a lawyer while appearing at tribunals; paragraph 36 deals with courtroom decorum; paragraph 37, is on employment in criminal cases; while paragraph 38 spells out what a lawyer appearing for an indigent accused should and should not do.
- 4.3 The provisions of the Rules are not exhaustive as, on a daily basis, new developments crop up warranting lawyers' and, in fact and indeed, to reappraise their relationship with Judges qua courts. Of recent, it has become the pastime of some Senior Advocates to abuse, lampoon, condemn, castigate, deride, denigrate and verbally attack some of our Judges and their judgments either on the pages of newspapers or on televisions screens, even in cases such Senior Advocates do not appear, and the facts of which they know little or nothing about. The title 'Senior Advocate' is seen and used by them as a 'license to say all manner of things, however, reckless, irresponsible, unreasonable, unfathomable, illogical and irreconcilable with common sense they may be. Whenever a judgment does not go the way expected or anticipated by some lawyers, they cry foul and scream blue murder. To my mind, this is not what the legal profession used to be. It has also become the habit of some Senior Advocates to situate themselves around television houses, granting interviews on cases they do not initiate, commenting on what is likely to be the outcome of such cases, depending on their nuances or interests, trying to pre-empt both the proceedings and ultimate judgments forgetting or deliberately feigning ignorance that in any part of the civilised world, and, indeed, in the common law jurisdictions, it is

forbidden and sacrilegious, and also contemptuous of the proceedings in court for any person, however privileged, including a Senior Advocate of Nigeria, to comment on proceedings in court in such manner.

- 4.4 As at 18th September, 2017, the total number of Senior Advocates, both living and dead, were 480 in number. Come 24th September, 2018, 31 new Senior Advocates will join the rank. We must constantly remind ourselves that the title we bear is 'Senior Advocate of Nigeria', and not 'Senior Commentator of Nigeria', not 'Senior Critic of Nigeria', not 'Senior Showmanship of Nigeria', not 'Senior Town Crier of Nigeria'; not 'Senior Villifier of Nigeria' or 'Senior Complainant of Nigeria'. Our rank is not and should not be equated with a chieftaincy title. It is also not an alias. It is a rank calling us to duty, id est, duty of advocacy as an officer of the court. Advocates are seen more in court, and their exploits are showcased and ventilated in law reports, which are read by all and sundry. It is also not a retirement benefit or package. Regrettably, it has been noticed that while many of us repeatedly strive and struggle to make the rank, immediately or shortly after the objective is achieved, a sizable number of us never appear in court any longer; rather, they prefer answering the title on pages on newspapers, social events and gatherings, etc. In other words, after the date of swearing-in, they bid farewell to the Supreme Court in particular, and to the superior courts in general. With much respect, Senior Advocates who apply for the rank, knowing full well what the rank entails, should walk the talk and be proud to be advocates in fact and in deed. Therefore, our colleagues who are to be called to the Inner Bar on 24th September, 2018, God-willing, should always remind themselves of their foremost duty as Senior Advocates, who are expected to sit at the

Inner Bar, not for decorative purposes, but to transmit to the court their forensic skills in advocacy. The first Nigeria to take the Silk, the indomitable and irresistible Chief F.R.A Williams, SAN, (of blessed memory) manifested this great example. He practiced law as a Senior Advocate till he breathed his last.

5.0 DUTY OF SENIOR ADVOCATES TO THE SOCIETY

5.1 Sir Christopher Sapara Williams, the first Nigerian lawyer, and the patriarch of the legal profession in this country, captured the role of a lawyer in the following evergreen statement: **"A lawyer lives for the direction of his people and the advancement of the cause of his country."** It has been my conviction that right from the time of Sir Christopher Sapara Williams, the legal profession, as a collective body of lawyers, has been in the vanguard of change in the Nigerian society. Every Senior Advocate of Nigeria, not minding his biological age, is a leader in his own right. The entire citizenry looks up to him for direction. It is on record that 28 out of the 45 Presidents of the United States of America qualified as lawyers, from John Adams through to Barack Obama. In Great Britain, the likes of **Addington, Grenville, Percival, Canning, Disraeli Asfuith, Lloyd, Atley and Tony Blair** were/are lawyers who rose to become Prime Ministers. The legendary Nelson Mandela of South Africa was also a lawyer. The father of modern Singapore, **Lee Kuan Yew**, was a foremost lawyer. May I invite all of us, including our colleagues who are to be sworn in on 24th September, 2018, to submit and subject ourselves to reassessment and re-examination, and re-dedicate ourselves to the true positions of leadership in our country. In effect, the sacred duties to

our clients, to our colleagues at the Utter and Inner Bar and to the court dovetail to our ultimate duties to the larger society.

5.2 Before I am done, and lest I forget, let me reiterate the point again, that the rank of Senior Advocate of Nigeria is not a chieftaincy title. It is also not just another rank. It is a professional title. A title that is also rooted in antiquities, starting from 1597, when **Sir Francis Bacon** became the first Queen's Counsel, when he was granted the patent to take precedence at the Bar. Between 1975, when the first two eminent Nigerians, **Chief F.R.A Williams** and **Chief (Dr.) N.B Graham-Douglas** were called to the inner Bar, and 1999, the conferees of the title celebrated the conferment with soberness and sombreness, inviting friends, colleagues, associates and relations to luncheons, where good meals and decent drinks were served. However, a rather strange trend was introduced to the celebration, starting from 2000 and repeated in 2001, by which loud advertisements were placed in several Nigerian newspapers and on television screens, either by clients and relations of the new entrants to the Inner Bar, with or without their knowledge, lavishly congratulating them for their breakthrough in the profession.

5.3 As the President of the Nigerian Bar Association between 2002 – 2004, this curious development was brought to the attention of the Association's National Executive Committee (NEC), which, in turn, adjudged it as unethical. It was the reasoning of NEC that if Senior Advocates had the right to accept congratulatory messages by way of advertisement in national dailies and television screens, new entrants to the Bar equally have such right. Imagine what the situation would be if every one of the over 3000 entrants to the Bar accepts the type of

congratulatory advertisements being lavished on our SANs nowadays; or if every one of the newly appointed Judges/Justices to the High Courts, Court of Appeal and Supreme Court accepts or encourages such congratulatory messages? Your guess is as good as mine. In my speech at the swearing-in ceremony of the newly appointed Senior Advocates of Nigeria on 9th September, 2002, I emphatically and unequivocally drove home this point arising out of the decision of NBA-NEC. The then CJN agreed with me *in toto*. There was then a ceasefire of advertisements within the next three to four calls; but embarrassingly, the ugly phenomenon appeared to have resurrected unabated and unchecked, even up till last year. The NBA-NEC decision of 2002 has not yet been reversed. It remains binding. Besides, the logic and validity of the decision cannot be faulted.

- 5.4 It is repeated that there is a gulf of difference between taking the Silk and taking a chieftaincy title. If the Body of Senior Advocates of Nigeria (BOSAN) does not put its feet down to checkmate and halt this ugly practice, particularly, at this first unique opportunity of an induction being organised for new entrants to the Inner Bar, our profession, particularly the rank of Senior Advocate, will soon become a laughingstock through these ugly yearly rituals. May I urge all our colleagues who are to be called to the Inner Bar on 24th September, 2018, to refrain from sponsoring, accepting or soliciting advertisements on pages of newspapers or on televisions screens, etc. They do not, and they cannot add value to the rank; rather, they diminish its prestige and respectability.

6.0 CONCLUSION

- 6.1 Within the ambits of the topic allocated to me as a Facilitator in this round table event, and bearing in mind the fact that the very essence of the gathering is to interface and cross-fertilize ideas, I should draw the curtain at this juncture, with a caveat that I will elaborate more on the topic during presentation, giving some life and practical examples and illustrations, which ordinarily cannot be reduced into writing.
- 6.2 We must all commend **BOSAN** for putting this breakthrough program together; and also appreciate the **CJN** for suggesting it in the first instance. It is hoped that both the old and in-coming members of **BOSAN** will learn a lot from this good precedent, even as we all prepare for the new legal year. In essence, our coming together should serve as a wake-up call for us all to appreciate the fundamental and noble content of our calling, profession and rank, and act, talk, write, behave and carry ourselves as true leaders of the profession.
- 6.3 I thank you all for the invitation, as well as the audience.

Chief Wole Olanipekun, OFR, SAN, LL.D, FCI Arb, FNIALS.

Lagos

13th September, 2018