

Duty of a Lawyer to Disclose Conflicting Interests

Sandra Oke

The duty of a lawyer to disclose adverse and conflicting interests is closely tied to the duty of confidentiality discussed last week. We stated that the duty of confidentiality outlives a retainer. This week we address the ethical issues arising from a lawyer

being in possession of information that is prejudicial to a past client while acting on behalf of a new client in the same matter.

To begin with let us reflect on the comment of Richardson J

In **FARRINGTON v ROWE MCBRIDE AND PARTNERS** which explains the meaning of this duty he states that "a solicitor's loyalty to his client must be undivided. He cannot properly discharge his duties to one whose interests are in opposition to those of another client. If there is a conflict in his responsibilities to one or both, he must ensure that he fully discloses the material facts to both clients and obtains their informed consent to his so acting. And there will be some circumstances in which it is impossible, notwithstanding such disclosure for any solicitor to act fairly and adequately for both. But the acceptance of multiple engagements is not necessarily fatal. There may be an identity of interests or the separate clients may have unrelated interests. Such cases seem straightforward so long as it is apparent that there is no actual conflict between duties owed each relationship".

It is a possibility that in the course of practice, one might have conflicting interests. The Law Society of New South Wales has identified some of the factors that contribute to issues of conflict of interests namely: the increasing size of the profession, the increasing mobility of solicitors in legal practice and the greater likelihood of clients changing solicitors during the course of matters. Generally, a legal practitioner might find that he/she possess information from a previous client that might be detrimental to a prospective client.

English Case Law on a Solicitor's Duty to Disclose Conflicting Interests

The Courts in England have over the years developed principles to deal with situations in which a lawyer is faced with conflicting interests. These are discussed below:

When the lawyer acts for both parties on a matter:

In **MOODY v COX & HATT** [1917] 2 Ch 71. A solicitor and his clerk were vendors in their capacity as trustees of a will and acted on behalf of the purchasers of the same property. The court held that a fiduciary with two principals must ensure that there are no areas of conflict of duty so that he cannot fulfil a duty to one without neglecting his duty to the other principal.

2) When a lawyer acts against a former client in a matter which relates to the current client.

The general rule adopted by the courts is to determine if the act of the solicitor would result in mischief. This rule was adopted in **RAKUSEN v ELLIS MUNDAY & CLARKE** this case was about a small law firm with two partners, who carried out separate practice. The plaintiff obtained the services of one of the partners. After the termination of the retainer, the other partner who was not aware that the plaintiff was the former client of his partner was approached by the defendant on the same matter. The Court in discharging the injunction sought by the plaintiff observed that (i) there is no absolute rule of law in England that a solicitor may not act in litigation against the client of a

partner, who had been instructed on the same matter and (ii) that the solicitor may be restrained from acting if such a restriction is necessary to avoid a significant risk of the disclosure or misuse of confidential information belonging to the former client.

In **PRINCE JEHRI BOLKIAH v KPMG** [1999] 2 WLR 215, in that case the brother of the Sultan of Brunei sought an Injunction against KPMG from carrying out investigations on the acts of BIA (Brunei Investment Agency). He had engaged the services of KPMG previously and was concerned that confidential information could be obtained by those seeking an action against him.

The courts applied a two test approach in determining whether an injunction would be granted to a client to restrain a solicitor from using information obtained from a client for other purposes

1) That the solicitor is in possession of information which is confidential to the client and the client has not consented to the disclosure of such information

2) That the information is or maybe relevant to the new matter in which the interest of the other client is or may be adverse to his own.

Lord Craighead stated "that the court should bear in mind that disclosure by the firm may result in substantial damage to the former client for which there is no adequate redress. It will be very difficult to prove, after the event, how and when information was disclosed and by whom and to whom and with what consequence. Accordingly, if the court is not satisfied that the steps taken will protect the former client against the risk, it should grant an injunction. On the facts of the case KPMG had not shown that they can provide the protection to which the Prince is entitled to ensure no confidential information is disclosed and so the injunction should be granted to prevent further work on the BIA investigation yet allowing KPMG to continue its audit function for the BIA".

Rule Under Nigerian Law
Rule 10 of the Rules of Professional Conduct 2007 is the relevant law

a. It is the duty of a lawyer at the time of a retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

b. It is unprofessional conduct to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this rule, a lawyer represents conflicting interests when in respect of one client of whom he presently contends the interests of that client touch or concern confidences of another client to whom the lawyer at the same time, owes a duty of service.

Rule 10 (a) places a heavy burden on legal practitioners in Nigeria. The use of the phrase "all circumstances of his relation to parties" in the rule can be seen as requirement of full disclosure of any information about parties and any interests that apply to the client. This rule can be interpreted very broadly or in a strict sense.

While full disclosure to a present client is laudable, the lawyer should strike a balance and in doing this use good judgement to determine that the amount of information being provided to one party does not put the interests of the other at risk.

Rule 10 (b) strongly discourages lawyers from having conflicting interests and rightly so, because it is not possible to devote the same skill, and attention if one is acting on behalf of both parties in a case. The English case **MOODY v HATT** mentioned earlier illustrates this point clearly.

Let us consider the position of the courts on conflicting interests. There is a paucity of Nigerian case law on this topic. The few cases stated below give an insight to the position of Nigerian courts on this issue. The Court of Appeal in **IKEME v ANAKWE** (2008) 10 NWLR Part 829 made an attempt to state the law regarding conflicting interests. In this case a lawyer drafted a partnership agreement for medical doctors in partnership. That same lawyer brought an action on behalf of one of the doctors about ownership of the practice. The court held that such a party could not appear as counsel as it would be

detrimental to the interest of the other party and more importantly, the lawyer did not obtain the consent of both parties.

According to Ayuli Jemide, the guiding principle was laid down in **ANATOGU v IWEKA** 1995 8 NWLR Part 415 is that "a man ought to be restrained from doing any act contrary to the duty that he owes to another".

In conclusion, Rule 10 can be modified so it defines the scope and limits of a lawyer's duty of disclosure, of adverse or conflicting interests to his client taking into consideration the duty of confidentiality owed to past clients. The Model Rules of Professional Conduct of the American Bar Association model Rule 9 can serve as a guide for amendment. It states that "In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."

Conflicting interests are likely to arise as one makes progress in the legal profession, and it is a matter that calls for personal judgement. The rules are a guide to ensure that lawyers are mindful of such situations and handle them in a manner that maintains the individual's integrity and uphold the legal profession.

Sandra Oke is a counsel at Norfolk Partners

