

A CONFLICT BETWEEN LEGAL PRACTITIONERS' RULES ON CONFIDENTIALITY AND THE EFCC ACT?

BY

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1.1 INTRODUCTION

When information is given to a person under express or implied confidentiality, the person must respect the confidence. In other words, when a person undertakes to keep secrets, he imposes upon himself a moral duty of confidentiality and shall therefore not breach the confidence. He must not share such secret or confidential information with other people. This simple moral precept must have formed the basis of the rules guiding the relationship between a lawyer and his client which impose on the lawyer a legal (as opposed to moral) duty of confidentiality in this regard.

However, some legal practitioners have expressed their apprehension at various fora that there is a conflict between the discharge of this legal duty of confidentiality and some provisions of EFCC Act, thereby placing the lawyer between the proverbial 'devil and the deep blue sea'. Others are of the view that there is no conflict between the two laws.¹

The aim of this paper, therefore, is to discuss the relevant provisions of the Rules of Professional Conduct governing the privileged and confidential information given to a lawyer, in his professional capacity, by his client. The paper will also consider the relevant provisions of the Economic and Financial Crimes Commission (EFCC) Act, to see if there is actually any conflict between the two laws. Subsequently, the conflict between them, if any, will be discussed with a view to finding solutions to the conflict before finally drawing the conclusion.

1.2 THE RULES

For a lawyer to be in the best position to handle a client's brief, his client must disclose to him all facts or information relating to the brief. On the

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¹ For instance, the two views were strongly canvassed at the Nigerian Bar Association (NBA)/Economic and Financial Crimes Commission (EFCC) Joint Workshop on "The EFCC Act and Other Related Instruments: The Role of Lawyers", held on 3rd and 4th November, 2006 at Chida Internation Hotel, Utako District, Garki, Abuja. These views were subsequently re-echoed at various NBA National Executive Committee meetings.

other hand, a client will not hesitate to give a full disclosure of the facts if he is assured that whatever information given will be treated with utmost confidentiality by the lawyer. This is why it is imperative to fashion out rules to regulate lawyer/client relationship in this regard.

Facts or information given to a lawyer in relation to a brief by his client are classified as privileged and confidential under the Rules of Professional Conduct for Legal Practitioners, 2007² (hereinafter referred to as “the Rules”). A lawyer is therefore not generally allowed to divulge such information to a third party, without his client’s consent. Similarly, a lawyer is prohibited from using the information to the disadvantage of his client or using the information to the advantage of himself or of a third person, without the consent of the client after full disclosure.³

However, this Rule, like most rules, is not without exceptions. There are four exceptional situations in which a lawyer may reveal such information. These are:

- a. With the consent of the client affected, as stated earlier;
- b. When permitted under the Rules;
- c. Where the information relates to the intention of his client to commit a crime and the information is necessary to prevent the crime; and
- d. Where the information is necessary to establish or collect his fees or to defend himself or his employees or associates against an accusation of wrongful conduct⁴.

Let us briefly look at each of these situations.

1.2.1 Revelation of Confidences or Secrets by Counsel when Permitted Under the Rule

For this situation to avail a lawyer, it is not enough to disclose only those facts he knows will enable him get the client’s ‘consent’ while holding back those facts he knows may discourage the client from giving his consent. The

² Rules 19 (1) thereof.

³ Rule 19 (2).

⁴ Rule 19 (3).

lawyer must disclose all the available facts at his disposal to his client so that the client will be able to take an informed decision as to whether to give or withhold consent. Anything short of full disclosure will not avail a lawyer as a defence for unlawful disclosure of a client's confidence or secret.

1.2.2 Revelation of Confidences or Secrets by Counsel when Permitted Under the Rules

A lawyer may also divulge the information where the Rules so permit and all the necessary requirements for such permission are met. For instance, the Rules permit revelation of client's confidence or secret with the consent of the client, but only after full disclosure. But where the 'consent' is obtained without full disclosure, a lawyer cannot benefit from this exception because he has failed to satisfy the requirement. Similarly, any law or court order permitting revelation of client's confidence or secret after certain conditions are fulfilled, all those conditions must be strictly observed and complied with.

1.2.3 Revelation by counsel of His Client's Intention to Commit Crime

The client's confidence or secret permitted by the Rules to be divulged is not only when it pertains to the client's intention to commit an offence but it must also be necessary for preventing the commission of the crime. This means that where the confidential information is revealed after the commission of the offence, it will serve no useful purpose in this regard. In other words, the defence under this heading of the Rules will not avail a lawyer who reveals client's secret after the commission of the offence.

1.2.4 Revelation of Confidence or Secrets by Counsel Necessary to Establish or Collect His Fees

The scope of this exception is limited to only the lawyer himself and his employees or associates and does not extend to his professional colleagues outside this class. A lawyer is therefore not permitted to divulge such confidential information to his other professional colleagues even where it is necessary for them to establish or collect their fees or to defend themselves against accusation of wrongful conduct.

It is to be noted that it is not only a lawyer that is prohibited from divulging confidential information. He is also enjoined to exercise reasonable care to

prevent his employees, associates and others whose services he utilizes, from disclosing or using confidences or secrets of a client.⁵ Although a lawyer is allowed to reveal client's confidences or secrets under the foregoing exceptional situations, there is nothing to indicate that he cannot do so through his employees or authorized agents.

It is against the foregoing background that the relevant provisions of the EFCC Act will be considered presently before considering whether or not there is a conflict between the two enactments.

1.3 THE EFCC ACT

The Economic and Financial Crimes Commission (EFCC) Act, 2004 (hereinafter referred to as "the Act") is a law enacted for the establishment of the EFCC (hereinafter referred to as "the Commission") charged with the responsibility for the enforcement of all economic and financial crimes laws, among other things. This means that the Commission is saddled with the responsibility of enforcing not only EFCC Act but also some other enactments such as the Money Laundering Act, Advance Fee Fraud and Other Related Offences Act, Failed Bank (Recovery of Debts) and Financial Malpractices in Bank Act, etc.⁶ But as the title of this paper clearly indicates, the focus is limited to the EFCC Act and I do not intend to go beyond the Act.

The phrase 'economic and financial crimes' is defined to mean the non-violent criminal and illicit activity committed with the objectives of earning wealth illegally either individually or in a group or organized manner thereby violating existing legislation governing the economic activities of government and its administration and includes any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, looting and any form of corrupt malpractices, illegal arms deal, smuggling, human trafficking and child labour, illegal oil bunkering and illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes and prohibited goods, etc.⁷

⁵ Rule 19 (4).

⁶ Section 42 of the Act.

⁷ Section 46, *ibid*.

The offences the Commission is empowered to investigate and prosecute under the Act are as contained in sections 14(1) and 18(1) of the Act.

Section 14(1) of the Act provides that a person who, being an officer of a bank or other financial institution or designated non-financial institution –

- (a) fails or neglects to secure compliance with the provisions of this Act; or*
- (b) fails or neglects to secure authenticity of any statement submitted pursuant to the provisions of this Act, commits an offence and is liable on conviction to imprisonment for a term not exceeding 5 years or to fine of five hundred thousand naira (N500,000) or to both such imprisonment and fine.*

The term ‘designated non-financial institutions’ means dealers in jewellery, car and luxury goods, chartered accountants, audit firms, tax consultants, clearing and settlement companies, legal practitioners’.⁸

The implication of the provisions of section 14(1) is that a lawyer does not only have to ensure that his client complies with the provisions of the Act but he also has to verify any statement he prepares for his client before its submission in line with the provisions of the Act. Failure to do so will amount to an offence punishable with imprisonment or fine or both.

Section 18(1) of the Act provides that any person who-

- (a) engages in the acquisition, possession or use of property knowing at the time of its acquisition, possession or use that such property was derived from any offence under this Act;*
- (b) engages in the management, organization or financing of any of the offences under this Act;*

⁸ Ibid.

- (c) *engages in the conversion or transfer of property knowing that such property is derived from any offence under this Act; or*
- (d) *engages in the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to or ownership of property knowing that such property is derived from any offence under this Act, commits an offence under this Act.*

The penalties prescribed for the offences shall be imprisonment for a term not less than two years and not exceeding three years.⁹

The foregoing provisions are aimed at forestalling a situation where a lawyer would collude with his client to perpetuate fraud or commit any of the economic and financial crimes, under the pretext that he is only performing his professional duty.

To enable the Commission to discharge its statutory responsibility of enforcing the laws creating the offences, it is empowered to seek and receive information from any person, authority, corporation or company without let or hindrance.¹⁰ 'Information' and 'any person' here are all encompassing and therefore inclusive of confidential information and legal practitioners respectively.

However, this provision is not a licence for a lawyer to divulge client's secret outside the scope of the enquiry by the Commission. In other words, a lawyer will not be protected by this provision if he reveals more secrets of his client than the Commission is asking for.

Similarly, a lawyer cannot hide under the canopy of this provision to supply or reveal his former clients secret to the Commission without the prompting of the Commission.

⁹ Section 18 (2) of the act.

¹⁰ Section 18 (1), Ibid.

What happens to any person who refuses to give the Commission the required information, for whatever reason? The Act provides the answer thus:

A person who –

- (a) willfully obstructs the Commission in the exercise of any of the powers conferred on the Commission by this Act; or*
- (b) fails to comply with any lawful enquiry or requirements made by any authorized officer in accordance with the provisions of this Act, commits an offence under this Act and is liable on conviction to imprisonment for a term not exceeding five years or to a fine not below the sum of N500,000.00 or to both such imprisonment and fine.¹¹*

1.4 CONFLICT BETWEEN THE TWO LAWS?

Going by the foregoing provisions of the Rules vis-à-vis the confidentiality of information given to a lawyer by his client coupled with the exceptions thereto, on the one hand, and the provisions of the Act concerning the power of the Commission to seek and receive information from any person, on the other hand, can we say that there is a conflict or confrontation between the two laws? A glance over the provisions of the two enactments may appear to some that there is a conflict or confrontation between them and therefore constituting a sword of Damocles dangling over the head of the legal practitioner.

However, a critical appraisal of the provision of Rule 19(1) will reveal that it is not an absolute rule, as it makes reference to exceptions under sub-rule (3). It provides: "Except as provided under sub-rule (3) of this rule, all oral or written communications made by a client to his lawyer in the normal course of professional employment are privileged." Sub-rule (2) of the same Rule 19 provides:

¹¹ Section 38(2). Ibid.

Except as provided in sub-rule (3) of this rule, a lawyer shall not knowingly –

- (a) reveal a confidence or secret of his client; or*
- (b) use a confidence or secret of his client to the disadvantage of his client; or*
- (c) use a confidence or secret of his client to the advantage of himself or of a third person unless the client consents after full disclosure.*

Sub-rule (3) clearly states under what circumstances a lawyer may reveal his client's confidence or secrets and of particular relevance here is paragraph (b) of sub-rule (3) which permits a lawyer to reveal confidences or secrets of his client "...when permitted under these rules or required law or a court order;" (underlining mine).

In the light of the foregoing, it is our submission that the relevant provisions of the Act fall squarely within the purview of paragraph (b) of sub-rule (3). The operative words of paragraph (b) of sub-rule (3), for our purpose here, are as emphasized above. These are 'under...required law...' Where paragraph (b) of sub-rule (3) of Rule 19 permits the revelation of a client's confidence or secret and sub-section (1) of section 38 of the Act empowers the Commission to seek and receive such confidential information, can we say that there is actually a conflict between the provisions of the two laws? Our answer to this question is in the negative. We do not see how a lawyer can be held liable for a breach of Rule 19 for revealing a client's confidence or secret where a law so demands or on the order of a court of law, and when the rule itself so clearly permits him.

In the final analysis, we do not see any conflict or confrontation between confidentiality required by the Rules and access to information without let or hindrance required by the Act, necessitating any resolution and solutions. Those who are apprehensive of the provisions of the Act, as stated earlier in this paper, have nothing to worry themselves about, as the provisions of the two laws have no point of disagreement between each other.

1.5 CONCLUSION

The paper has briefly discussed the relevant provisions of the two laws and concluded that there is no conflict or confrontation between the Rules and the Act that requires solutions. Since the two laws are in harmony with each other, the legal practitioners have no cause for alarm.