ETHICS, ETHICAL CONDUCT –
CHALLENGES AND OPPORTUNITIES IN
MODERN PRACTICE

Paper presented by Musa Mwenye, SC to the Law Association of
Zambia 5th Annual Law Conference on Friday, the 15th of April, 2016
at Avani Victoria Falls Resort
Introduction

Honourable Judges Present, the Learned Attorney General, the Learned Solicitor General, the President of the Law Association of Zambia, former Attorneys General present, former Solicitors General present, State Counsel Present, distinguished Learned colleagues. I am grateful for the opportunity to present this paper on Ethics, Ethical Conduct – Challenges and opportunities in modern practice.

The theme of this Law conference is “Back to the basics: the Role of the Legal Profession”.

This theme is very fitting. It gives all of us an opportunity for introspection. But, that is not all that this theme does. The theme also raises important foundational questions. The following are some of the questions it raises: what basics are we going back to? have the basics of the legal profession remained frozen in time? In modern legal practice, can some of the basics of legal practice be justified?

Clearly, some of the things we considered as universal basics of the legal profession ten or fifteen years ago have changed. In addition, the environment in which the modern practice of the law is being conducted has also changed and continues to change. My hope is that, through this paper, I will provoke debate on the changes that have occurred and the possible adjustments we must make as a profession in Zambia, to keep pace with the market in which we conduct the business and practice of law and international trends.

The Clementi Review

Most if not all the professional ethics and traditions we espouse as a legal profession in Zambia are derived from England and Wales. England, the jurisdiction from which we have derived most of
our traditions, has made significant reforms in the way the legal profession is regulated and managed.

The Government of England and Wales appointed Sir David Clementi to review the regulatory framework for legal services and to make recommendations by the end of 2004. This resulted in the Clementi Review and the Legal Services Act 2007. The Clementi Review and the subsequent enactment of the Legal Services Act 2007 is important in two material respects:

(1) It emphasized the primacy of the client above the insular interests of the profession; and

(2) It introduced alternative business structures for lawyers.

I will not delve into the detail of the changes introduced by the legal Services Act 2007, for want of time. What is important to note is that the recent changes in England and Wales have changed some of the basics of the legal profession by abolishing the insulation that the profession enjoyed against competition. The changes introduced more competition for regulation of professionals, for clients and work and for ownership and capital of law firms.

The Legal Services Act introduced Multi-Disciplinary Practices (MDP’s) in which, members of other professions can acquire ownership of law firms and Legal Disciplinary Practices (LDP’s) where Solicitors, Barristers, legal executives, conveyancers and other legal professionals can now partner together. It appears that in varying degrees, the trend may be catching on in other jurisdictions. Notwithstanding the changes, there is still a requirement that Lawyers and alternative business structures should:

(a) Act with independence and integrity;

(b) maintain proper standards of work;
(c) act in the best interest of clients; and

(d) Keep clients affairs confidential.

In addition advocates and other litigators are still required to comply with their duty to the court to act with independence in the interests of justice. Increasingly, the discerning multinational client may come to expect the provision of legal services in Zambia, to be conducted in line with alternative business structures, with the result that Zambian firms may, by and large, be engaged to provide services to international law firms on behalf of multinational companies with little or no direct contact with the mutual client. Although the alternative business structures may present too drastic a change for the legal profession in Zambia, the emphasis on competition in the interest of the client may be a lesson worth learning.

Social media

The changes in communication and information technological are dizzying and sometimes very scary for the more conservative members of our profession. The Social media platforms keep increasing and lawyers are not shy to participate on social networking platforms and blogs.

Social media presents the profession with access to legal information and resources. It also allows for promotion of legal debate and discussion. For those jurisdictions where advertising is permitted, social media allows lawyers to have increased visibility and to increase their client base across borders. But social media also presents a myriad of professional challenges. It creates a potential risk to confidential information, lack of privacy for the lawyer and the client, potential perception of lack of judicial independence, the risk of acquisition of phantom client (i.e people who rely on your legal professional advice and consider themselves your clients without your knowledge) and the risk of practicing in other jurisdictions without a licence via social media platforms.
My view is that, in the near future, additional challenges of allegations of perceived bias on the part of judicial officers will arise from social media connections and there is need for extreme caution on the part of both lawyers and judges in this area. In addition, as social media expands and gains more universal acceptance, subject to limitations on admissibility, discovery in court proceedings may increasingly begin to include requests for disclosure of social media platforms on which parties participate and the contents of such platforms.

Because of the perceived challenges and potential opportunities presented by social media, the Legal Projects Team of the International Bar Association (IBA) commissioned a research on the impact of social media on the legal profession in March, 2011. The survey was conducted between May and August 2011 and one of the Respondents to the survey was the Law Association of Zambia, of which I was privileged to be President at the time of the Survey. As a result of the survey, the IBA adopted the International principles of social medial conduct for the legal profession on the 24th of May, 2014. The introduction to the principles states that that the purpose of the principles is “to assist bar associations and attorney regulatory bodies around the world to promote social media conduct within the legal profession that conforms to relevant rules of professional responsibility as well as considerations of civility”.

The following are the principles in brief:

1. **Independence** – before entering into an online relationship with any one, lawyers should reflect upon the professional repercussions of being linked publicly;

2. **Integrity** – even in online associations, lawyers should maintain their integrity and must avoid unprofessional or unethical comments on all social media platforms including those that are private;
3. **Responsibility** – lawyers should exercise responsibility over their social media participation by:

   a. Understanding the use of social media;

   b. Clarifying the capacity in which they are commenting and ensuring that they warn the readers not to place reliance on their posts;

   c. Using social media appropriately. As a general rule, lawyers ought not to do or say anything online, that they would not do or say in front of a crowd;

   d. Adhering to practice promotion, advertising and solicitation rules; and

   e. Avoiding conflicts of interest. Lawyers must be sensitive to postings and use of social media that may reveal a position that is contrary to that taken by their clients and may impact on their clients matters.

4. **Confidentiality** – social media is not appropriate for dealing with client matters or information unless you can ensure the protection of such data.

5. Lawyers should maintain public confidence in their social media communications by portraying characteristics essential for a trusted lawyer such as independence and integrity. Statements made by lawyers online should be true and not misleading.

6. **Policy** – when a legal practice engages in social media, employees of the practice should be given clear guidance and instructions on their use

Having regard to the foregoing, LAZ may need to issue a well thought out guidance note to the profession on the use of social media. In addition, our firms must now embark on developing social
media policies to guide our employees, including non-lawyer employees, on what they can and cannot do on social media and online.

Confidentiality generally

It is indisputable that one of the biggest attractions of the Legal profession to the ordinary man in the street is the perceived honour and integrity that lawyers are known for. The duty to keep the clients information confidential is at the center of the justice delivery system because the ends of Justice are better served when clients are secure in the fact that all the information conveyed to their lawyer is safe. As shall be seen shortly in this paper, the Zambian Lawyer is no longer a safe haven for confidential information and, like his counter parts in other jurisdictions, the Zambian lawyer’s position as the unassailed repository of confidential information is no longer assured.

Rule 35 (2) of the Legal Practitioners Practice Rules 2002 (The Practice Rules) obliges every Legal Practitioner to keep the affairs of each client confidential. The duty extends to current and former clients and outlives the retainer i.e it continues even after the end of the client/lawyer relationship. In this respect, Legal Practitioners are specifically prevented from using information entrusted to them in confidence by their clients for their benefit or for the benefit of any other client without the written permission of the client to whom the duty of confidentiality is owed. What is interesting about Rule 35 (2) is that it only provides for the existence of the duty of confidentiality where the information is entrusted to the lawyer in confidence.

Rule 32 (4) e of the Practice Rules is however more roving in its effect as it provides a blanket restriction against disclosure of all or any information communicated to a Legal Practitioner in his capacity as a Legal Practitioner unless permitted by Law or under an order of Court. Therefore all information given in the course of a retainer is given to the Lawyer in confidence and should not be
disclosed. What should be borne in mind is that Rule 32 (4) e does not require the information to have been communicated to the Lawyer by the client. It is implied therefore that all the clients’ affairs are confidential no matter what the source of that information is.

It would appear that in its most liberal interpretation, Rule 32 (4) e protects even the fact that a client is a client from disclosure. similar repercussions as those contained in the Solicitors Code of Conduct which entail non disclosure of the clients’ identity without the clients’ permission. Lawyers in Zambia are not allowed to act for any prospective client where so acting would put an existing or former clients’ confidential information at risk.¹

In England and Wales and Canada for example, Lawyers are allowed to act for a client even where so acting may put confidential information of another client in Jeopardy as long as sufficient information barriers are put in place. Such Information Barriers or Chinese walls include the *sequestration* of all lawyers who possess the confidential information in a separate building or separate part of a building from where the Lawyers acting for the new or prospective client are. In addition, other safe guards such as internal procedures for separate maintenance of both physical and electronic mail and separate maintenance of telephone answering machines have to be instituted.

In practice, Chinese walls are very difficult to implement in the Zambian legal terrain because of the relative small size of firms here.

Up to now we have looked at the Legal Practitioners duty of confidentiality as it relates to the Practitioners client but our consideration of the subject would be incomplete without considering a *species* of this duty that is owed to the Court. It is accepted that the ends of justice are better served

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¹ Rule 33 (1) g of the Legal Practice Rules
by parties to litigation disclosing to each other all documents relevant to the matter in the course of discovery. The Courts have determined that for parties to be encouraged to make full disclosure of material facts in litigation, lawyers have a duty not to use information disclosed to them by another party to the proceedings during the discovery process other than for the proper conduct of the matter in which the documents are disclosed. The Legal Practitioner therefore owes a duty of confidentiality in these circumstances, not to his client or to the other party but to the Court which issued the order of discovery. Lord Diplock stated the following in the case of Home Office –v-Harman²;

“This is why an order for production of documents to a solicitor on behalf of a party to civil litigation is made on the implied undertaking given by the solicitor personally to the court (of which he is an officer) that he himself will not use or allow the documents or copies of them to be used for any collateral or ulterior purpose of his own, his client or anyone else; and any breach of that implied undertaking is a contempt of court by the solicitor himself.”³

The foregoing notwithstanding, one would naturally ask whether this duty of confidentiality and the attendant protection of confidential information is absolute. Statutory enactments clearly answer this question in the negative. The Financial Intelligence Centre Act⁴ includes Legal Practitioners in its definition of Reporting Entities. Section 22 (1) of the said Act provides as follows:

“A Reporting entity shall maintain all the books and records with respect to its customers and transactions as set out in subsection (2), and shall ensure that such records and the underlying information are available, on a timely basis, to the center.”

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² (1982) 1 ALL E.R 532
³ Ibid. Page 538
⁴ Act No. 46 of 2010
According to the **Financial Intelligence Center Act** all Legal Practitioners are required to maintain client transactional information for at least ten years\(^5\). In addition to maintaining the information, Legal Practitioners, as reporting entities are required to make clients confidential transactional information available to the Financial Intelligence Center. Coupled with the statutory duty to keep information and to make the same available to the centre, every Legal Practitioner is required to report his/her client to the Financial Intelligence Centre if he/she suspects that the financial transaction he/she is conducting for his/her client involves proceeds of crime or is related to terrorism or terrorist acts\(^6\) unless the information was obtained while assessing the clients legal position or as a consequence of representing the client in Court. Section 31 of the **Financial Intelligence Centre Act** obliges the Law Association of Zambia, which it defines as a Supervisory Authority, to report any Legal Practitioner, where it appears that the Legal Practitioner is not complying with the provisions of the Act.

It would have become apparent that the Financial Intelligence Centre Act has vastly altered the position of the lawyer as the repository of confidential information particularly as it relates to the Financial Intelligence Center.

A related duty which most Legal Practitioners are oblivious to is the duty to disclose all information and matters that are relevant to any particular clients’ case.

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\(^5\) Section 22 (2) of the Financial Intelligence Center Act  
\(^6\) Ibid. Section 29 (3)
The Duty of Disclosure

Section 52 (h) of The Legal Practitioners Act Chapter 30 of The Laws of Zambia provides as follows:

“No practitioner shall –

(i) Deceive or mislead any client or allow him to be deceived or misled in any respect material to such client.”

The duty contained in Section 52 (h) of The Legal Practitioners Act encompasses not only the duty not to deceive or mislead a client but also the duty not to allow the client to be misled. Where the Legal Practitioner possesses information that is relevant to the clients’ case, failure to place such information at the clients’ disposal would amount to misleading the client or at the very least would amount to allowing the client to be misled.

Generally, Lawyers have a duty to disclose to a client all information that is relevant to a clients’ case. The following statement in Specta –v- Ageda aptly states the Common Law position;

“A Solicitor must put at his clients’ disposal not only his skill but also his knowledge, so far as is relevant; and if he is unwilling to reveal his knowledge to his client, he should not act for him. What he cannot do is to act for the client and at the same time withhold from him any relevant knowledge that he has.”

Where the Legal Practitioner possesses confidential information that is relevant to a prospective clients matter, he should refuse to act for the prospective client because he would be obliged to disclose otherwise confidential information to the prospective client.

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7 (1973) Ch 30 at 48
Every Legal Practitioner is an officer of the Court and as such owes the Court a parallel duty not to mislead or to allow the court to be misled\(^8\). In this regard, Legal Practitioners are under a duty to disclose all relevant cases and statutory provisions that are relevant to a matter notwithstanding that the said cases and statutory provisions do not support his/her clients’ case. The Legal Practitioner should however first advise the client of his duty to disclose relevant law to the Court and if the client objects to the exercise of such duty, the Legal Practitioner should stop acting. The duty not to mislead the court extends to situations where the Legal Practitioner fabricates facts that are relevant to his clients’ case but does not extend to revealing to the Court facts that have been disclosed by the client to the Legal Practitioner.

The duty to disclose all information relevant to a clients’ case can however be limited by the provisions of any relevant law. Examples are in case of Money Laundering where tipping off is prevented even where the Legal Practitioner knows that his client is being investigated\(^9\) or under the Financial Intelligence Center Act\(^{10}\).

Client care

The Zambian lawyer is fast transitioning from merely conducting the practice of law to conducting the business of law. In this regard, the legal duty to provide a good and efficient client service is not only a professional imperative but an invaluable tool for the competitive conduct of the business of law. This is particularly so, because of the emergence of a wide array of sophisticated clients who look for superior client care and are not easily taken by the presumption that all lawyers are of equal competence.

\(^8\) Section 52 (b) Legal Practitioners Act
\(^9\) Section 11 of the Prohibition and Prevention of Money Laundering Act No.14 of 2001
\(^{10}\) Section 33 of the Financial Intelligence Centre Act
In the increasingly competitive world of the Law, client care has become a major differentiator. Surveys continue to show that clients are most disappointed with their Lawyer’s responsiveness and accessibility, this is also evidenced by a lot of cases before the Legal Practitioners Committee which could be resolved by simple but effective communication with clients.

As indicated in the introduction, good client care and service is not only a professional duty owed to the client by every Legal Practitioner but is a valuable tool for the differentiation of every legal practice and is an effective aide to increased client retention. Rule 14 of the Practice Rules requires every Legal Practitioner in private practice to ensure that “clients are at all relevant times given appropriate information as to the issues raised and the progress on the matter”. The Practice Rules require Legal Practitioners to inform clients about charges or fees and the basis of such charges or fees at the time of taking instructions. The Practice Rules require Practitioners to act at all times in good faith towards their clients. The duty to offer high standard of client care extends beyond the client up take and includes the conduct of the Practitioner at the time the Practitioner is withdrawing from acting for a client. The Practice Rules prevent a Legal Practitioner from ceasing to act for a client without first explaining to the client the reasons for doing so. In addition, every Legal Practitioner is required to inform the client forthwith, if it becomes apparent that the Practitioner will not be able to do the work within a reasonable time after receipt of instructions or if there is an appreciable risk that the Practitioner may not be able to undertake instructions or fulfill any other professional engagement which the Practitioner has accepted.

With respect to client uptake, we have to bear in mind that the Financial Intelligence Centre Act requires all lawyers to fulfill Know Your Client (KYC) procedures which include the retention of

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11 Rule 17(1) of the Legal Practitioners Practice Rules 2002
12 Ibid. Rule 32 (3)
13 Ibid. Rule 34(2)a
14 Ibid. Rule 35(1)b
historical data about the client and also acquisition and retention of the clients’ identity documents\(^\text{15}\). Previously a complaint for insufficient or unacceptable client service could only be lodged against the Practitioner to the Legal Practitioners Committee of the Law Association of Zambia, but now a complaint can be lodged against any Legal Practitioner to the Competition and Consumer Protection Commission. Section 49 (5) and (6) of the **Competition and Consumer Protection Act** Number 24 of 2010 provides the following:

“(5) A person or an enterprise shall supply a service to a consumer with reasonable care and skill or within a reasonable time or, if a specific time was agreed, within a reasonable period around the agreed time.

(6) a person who, or an enterprise which contravenes subsection (5) is liable to pay the Commission a fine not exceeding ten percent of that person’s or enterprises annual turnover”.

In addition, to a fine of up to ten percent of the annual turnover, Legal Practitioners are liable to refund fees paid or to complete the work for which they were engaged\(^\text{16}\).

**Conclusion**

In the introductory part of this paper I asked, *inter alia*, whether the basics of the profession have remained frozen in time. It appears that the answer to this question is yes and no. Yes with regards to the professional duties of lawyers to their clients the basics have largely remained the same. The significant change in this respect is the duty of confidentiality in non-litigation matters where there is suspicion of criminal activity. No with regards to the privileges that lawyers enjoyed to insulate

\(^{15}\) Section 16 of the act

\(^{16}\) Section 49 (7) of the **Competition and Consumer Protection Act**
themselves from competition for clients. There is a growing shift towards opening up the profession to advertising and competition for the greater benefit of clients.

Modern practice can be stressful and may lead to extremely undesirable effects on the modern practitioner. For the benefit of those who may have joined the profession recently, let me use a quotation I used some years back at an ethics seminar organized by the Legal Practitioners Committee. Professor Martin Seligman, famed ex-President of the American Psychological Association said:

“Lawyers are trained to be aggressive, judgmental, intellectual, analytical and emotionally detached. This produces predictable emotional consequences for the legal practitioner; he or she will be depressed, anxious and angry a lot of the time......by any measure, lawyers ..are disproportionately unhappy and unhealthy. And lawyers know it...” 17

A study by John Hopkins University revealed that lawyers generally suffer from depression at 3.6 times higher than any other occupation18. If these statistics are true for the Zambian Legal Practitioner, then our clients are bound to suffer the major brunt of the depression, anxiety and anger leading to bad client care and increased complaints at the Legal Practitioners Committee and the Disciplinary Committee. The good natured Legal Practitioner therefore stands himself in very good stead to retain his clientele and to access new clients through client referrals.

18 Ibid at 1829