MISGUIDED (PUBLIC) REGULATION OF LAWYER'S PROFESSIONAL CONDUCT: AN ECONOMIC ANALYSIS OF RULES OF PROFESSIONAL CONDUCT FOR LEGAL PRACTITIONERS (RPC) 2007*

It may be true that morality cannot be legislated, but behaviour can be regulated. The law may not change the heart, but it can restrain the heartless- Martin Luther King, Jnr., 1962.

The first thing we do, let's kill all the lawyers. Dick in Henry VI, Second Part, scene ii (The Complete Work of William Shakespeare, NY: Random House Value Pub., 1975, 579.

Introduction

Some readers of the title of this paper would be quick to pick quarrel with it. Why should any person deride our rules of professional ethics designed to stem the tide of prevalent misconduct in Nigeria? Is conduct regulation, especially as stipulated under the present rules of professional ethics meant to sanction infamous conduct in a professional respect not a thing to applaud?[1] Worse still, most would query why we have chosen to evaluate professional responsibility from an economic perspective, rather than from law. In their considered view economics is a distant discipline from law and its primary concern of justice and morality. We think such a stance is judgmental without more. Without attempting to be more controversial, permit us to first trace in brief the history of lawyers' conduct regulation and thereafter offer possible answers to the queries, why we have chosen to evaluate professional responsibility law using economic logic.

This paper has a simple roadmap. To ground our criticism that present conduct regulation is nothing but philosophical surplusage, we begin this discourse in Part II, with a brief history of professional ethics, which indicates the slow but sure transformation of professional responsibility from a largely unregulated market to a high level of regulation, as we see it enacted as the Rules of Professional Ethics [RPC] 2007. This part also

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[1] The Rule of Professional Conduct for Legal Practitioners, 2007 [hereinafter called RPC] was enacted by the Attorney-General of the Federation and Minister of Justice on 2nd January, 1990, as Chairman of the General Council of the Bar, in furtherance of powers conferred by s. 12 (4) of the Legal Practitioners Act, 1990. The RPC sets out the kind of conduct which would be considered infamous in a professional respect.

provides justificatory reasons for regulating the profession. It is next followed (Part III), by identifying four paradigmatic models of enforcing professional norms and why we have chosen to examine only the disciplinary model governed by the RPC. Part IV, shows how law and economics and professional responsibility connects, and why lawyers need to pay some attention to the methodology of economics as an evaluation tool, especially in matters of ethics, now narrowly described in the form of minimum allowable standards. Part V and VI, are critical analysis of how the RPC responds to the two main challenges of regulating professional responsibility- "agency costs" problem and the challenges of "negative externality". Part VII, is our proposed alternative for reformulating the RPC. It is next followed by conclusion.

Just before we attempt to address the challenge of why any lawyer would quarrel with the RPC, designed (supposedly) to shore professional conduct of lawyers in society, permit us to make one mundane, though not unimportant point that should help readers appreciate the position taken in this paper on the RPC. Economics does not ascribe to itself with what ought to be proper conduct required of the profession. That is not the business of economics. It is rather the business of the legal profession to prescribe accepted conduct for its members. Economics is not a discipline that provides justificatory argument to defend given goals (of society or profession), whether they are good or bad. But it does something related. By appealing to accepted goals (set by others, whether by society or professions) it can show how a change in policy one way or the other, can bridge the gap between the set (agreed) goals and reality. For example, in its analysis of a society's efficiency, it may appeal to generally accepted societal goal, such as wealth maximisation (even if it provides no justificatory argument to defend the goal) to show why there may be need to reformulate certain policies. In this respect, it can show how monopoly, say in the cement market results in a reduction in value of output, and since maximising that value is a generally accepted goal, it can empirically show why monopoly is harmful and so should be regulated or prohibited. Transposed to our context (regulation of lawyers' conduct) it can reveal how present public (professional) regulation of conduct may not necessarily maximise the goals and aim of the RPC (to "promote and foster the cause of justice, maintain a high standard of professional conduct)[2] and why reformulation is imperative.[2] Normative law and economics is the branch of economic analysis of law concerned with the social desirability of legal rules, e.g. whether our system of liability for accidents is socially good, given its various consequences. We have therefore chosen to roadmap regulation of professional responsibility from an economic perspective because it can in an unconventional way

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[2] Rule 1 of RPC.

sometimes demonstrate to us that many legal assumptions stand on faulty predicates.[3]

History of Lawyers' Conduct Regulation

The history of the profession is revealing. In the late nineteenth century when professional practice of law began in Nigeria, three class of persons were permitted to practice law. Professionally qualified lawyers who were either qualified as barristers or solicitors in the United Kingdom upon application to the Chief Justice of Nigeria could practice law. The second group were those who had undergone internship of not less than five years in a law chamber in Nigeria or the Gold Coast and have passed any examination thereafter prescribed. The third category were persons with basic academic qualifications that pass the prescribed examination set by the Chief Justice of Nigeria.[4] The bulk of lawyers in the country were those who qualified to practice under the apprenticeship system which remained in force until it was abolished in the early 1960s with the establishment of the Council of Legal Education and the Nigerian Law School. Given the predominance of the "pick-up" method of legal education then prevalent prior to the 1960s, professional responsibility was largely learnt from seniors who passed on to juniors the sterling traditions of the Bar. There was therefore no explicit regulation of lawyers' behaviour. However, this changed with the enactment of the Legal Practitioners Act, 1962. The legislation empowered the General Council of the Bar to make rules governing professional responsibility. Explicit conduct rules were thus first made by the General Council in 1967.[5] The present RPC was enacted in 2007 to replace the 1967 rules (amended in 1979).[6] It is thus undisputed that present regulation is a positivist shift in matters of professional ethics.[7]

Some may however object to plotting a connection between professionalism and regulation. Our simple answer is this. The existence of law as a profession is at a level of generality, due to regulation itself.

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[3] For example, Deborah L. Rhode, *Moral Character as a Professional Credential* (1985) 94 Yale L. J. 491 at 516 (the commentator's comprehensive study published in 1985, shows that standard for moral character and fitness standard for admission is administered in an unpredictable way and rests on unsubstantiated and implausible factual assumptions. Her concluding summary, that "[a]s currently implemented, the moral fitness requirement both subverts and trivializes the professional ideals it purports to sustain.").

[4] Supreme Court Ordinance, 1876.

[5] The rules were amended in 1979, with 52 provisions governing many aspects of lawyers conduct.

[6] Though, the RPC 2007 retained some of the broad ethical statements in the 1979 rules, it goes further by stating the minimum allowable lawyers conduct. For a comparison of similar fossilization of ethical rules in the United States, see, Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers* (1999) 32 Vand. J. Transnat'l L. 1117; Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics* (1995) 80 Iowa L. Rev. 901 (presenting the shift from standard to rules as reflection of positivist approach to ethics). For detail of history of the profession in England and America, see Bruce Frohnen, *The Bases of Professional Responsibility: Pluralism and Community in Early America* (1995) 63 Geo. Wash. L. Rev. 931; Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States* (1994) 7 Geo. J. Leg. Ethics 911; William R. Johnson, *Education and Professional Life Styles: Law and Medicine in the Nineteenth Century* (1974) 14 Hist. Educ. Q. 185; Henry S. Drinker, *Legal Ethics*, Columbia Univ. Press, 1953.

[7] Strassberg Above n 6

[8] Roscoe found, *The Lawyer From Antiquity to Modern Times*, 1953, 7, cited in Benjamin H. Barton, *Why Do We Regulate Lawyers: An Economic Analysis of the Justifications for Entry and Conduct Regulation* (2001) 33 Ariz. St. L.J. 429 at 450 ft. nt. 97. Thus, the most recent ethical code promulgated

The entailment has not been doubted. Roscoe Pound, for example, long stated that the profession is what it is because of regulation, thereby making itself distinct from mere trading. He said: "It must not be supposed, however, that an organised profession of lawyers or of physicians is the same sort of thing as a retail grocers' association..."[8] Think for once, if there were no entry and conduct regulation into the profession, there undoubtedly would hardly be a defined group as lawyers under the umbrella of the Nigerian Bar Association (NBA), talk more of a group forming itself into a profession.[9]

Many would justify regulation on the basis that law is a profession and that the existence of regulation such as the RPC more pointedly affirms its professional status. Many policy arguments have been advanced for regulating lawyers. Some argue that lawyers are intricately connected with the justice system, and so some form of regulation is necessary to promote the interest of justice. It is reasoned that well-trained lawyers help the justice system to run smoothly. Others take a philosophical view of regulation in terms of justice, the purpose behind democratic governance, and the intrinsic value of human life.[10] Lawyer are said to protect the architecture of the rule of law which is fundamental to autonomy, personal freedom and development.[11]

It is a widely acknowledged fact that licensure and regulation of behaviour are necessary ingredients of professionalism.[12] This no doubt is weighty. After all, maintaining law as a profession benefits the society. In fact, it can be argued that regulation is the *quid pro quo* of a limited monopoly for the profession in return for an undertaking by the profession of various social obligations, such as that of standing as the bulwark between man and man, man and the state, in protecting and promotion of freedom and autonomy.

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by the American Bar Association ("ABA") states: "The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest."

[9] See RPC Rule 9, for instance, requires all lawyers to pay annual practicing fees.

[10] Benjamin H. Barton, *Why Do We Regulate Lawyers: An Economic Analysis of the Justifications for Entry and Conduct Regulation* (2001) 33 Ariz. St. L.J. 429 at 474;

[11] There no doubt are cases where lawyers can act as enemies of the rule of law, such as when some promote indeterminacy of rules and zealously promote divergent goals that turn the rule of law on its head.

[12] Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar* (1995) 70 N.Y.U. L. Rev. 1229; Milton Friedman, *Capitalism and Freedom*, 1962; For common rationale for occupational regulation is generally to protect the public from substandard practitioners, see, Ira Horowitz, *The Economic Foundation of Self-Regulation in the Professions*, in Roger D. Blair & Stephen Rubin, (eds.), *Regulating the Professions: A Public Policy Symposium*, 1980, 3-28; Jonathan Rose, *Occupational Licensing: A Framework of Analysis* (1979) Ariz. St. L.J. 189. It has been suggested that the that the American Bar Association (ABA) justifies regulation of the profession on the basis that 'the profession should be organised in such a way as to assure the public and the courts' that its members are competent. See, Commission on Professionalism, American Bar Association, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, 1986, cited in Barton, above n. 10 at 435 ff. n. 24. That is also the position of the Nigerian Bar Association.

While this may be true in certain degree that the Bar can and has used the ideology of professionalism to support self-interested and bigoted causes, it must be admitted that professionalism also serves as an important way to develop and marshalling group identity to promote useful ends. For example, the 1992 MacCrate Report insists that the practice of law is "a single public profession of shared learning, skills and professional values," and that self-regulation is essential to ensure "independence so that the Bar remains an important force in preserving government under law." The profession does this in two interrelated ways. First, professionalism dictates that the profession should ideally be independent from the State. From that vantage position, it is able to ensure that government abides by its own laws. Second, lawyers are independent from clienteles. This allows them to protect the public and guide the rule of law from the selfish grasp of powerful factions. As separate estate, it guards against the power of both government and substantial private interests. It is plausible to think guarding these set objectives provides grounding for the rule that bars outside investors in law practice.[13] There is no question about it. A history of the profession as developed in America and England, reveal that lawyers by training constitute a "brand of aristocracy" to check excesses of government and man.[14] Even functionalist sociologists support and encourage professionalism as necessary to articulate and promote shared values in a world that is increasingly becoming atomised and commercialised.[15]

It is therefore plausible to reason, why should anyone quarrel with regulating professional conduct of lawyers, if so much benefit to society accrues from regulation? Please for once, keep an open mind, especially in the context which this paper seeks to question current regulation-an assessment of the gap between aim and legal policy on regulation. The goal here is to prevent regulatory mismatch, by identifying the justifications for regulation, examining whether present regulations promote the goals, and if not, how lawyers' regulation should be reformulated to match the defensible objectives.

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[13] RPC Rules 3-5.

[14] See for example Federalist 35, where Alexander Hamilton wrote: "Will not the man of the learned profession, who will feel a neutrality to the rivalships between the different branches of the industry, be likely to prove an impartial arbiter between them, ready to promote either, so far as it shall appear to him conducive to the general interest of the society?" He suggested that while landowners would be motivated to promote their financial interest, legal professionals were perfectly situated to direct the nation toward its general interest. But cf. Marxist critique of professionalism, Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, (1977) 90 Harv. L. Rev. 702; Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, (1994) 44 Case W. Res. L. Rev. 531 (both conservative economists and Marxist analysts view professional regulation as designed to enhance professions, form no distinct interest: Bradley E. Starr, *The Structure of Max Weber's Ethic of Responsibility* (1999) 27 J. Religious Ethics 407.

[15] For current debate on the desirability of professionalism in the legal profession, see, Edward D. Re, *The Causes of Dissatisfaction with the Legal Profession* (2012) 68 St. John's L. Rev. 86.

What are these goals? The answer is fairly easy to find. Read the report of LPDC and judgments on professional misconduct. Almost all reveal that regulation is designed to protect the client, public and the justice system.[16]

This agrees with the economic analysis for justifying regulation or licensure of the professions or occupations.[17] The history of professionalism (as previously discussed) clearly reveals that most occupations began as a band of people with common concern to protect the public and trade. Regulations develop over time to foster the objects. The legal profession developed along similar lines. Up until the nineteenth century in England and the United States, the legal market remained largely unregulated.[18] The process from an unregulated market to a high level of regulation as we see it today occurred gradually.[19]

The shift to explicit *ex ante* regulation is justified for two basic reasons: (i) to protect the public from incompetent and unethical lawyers, and (ii) to protect and foster confidence in the justice system.[20] We shall therefore

[16] See Olakunle J. Orojo, *Conduct and Etiquette for Legal Practitioners*, London: Sweet & Maxwell, 1979; Niki Tobi, *The Nigerian Lawyer*, Lagos: Law Research & Dev. Forum, 2002; O. Doherty, *Legal Practice and Management in Nigeria*, London: Cavendish Pub., 1998; Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States* (1994) 7 Geo. J. Leg. Ethics 911. But cf., empirical studies from scholars like Deborah Rhode which shows that "ethical regulation do not protect the public as much as it ensure the spoils of victory to those who control Bar politics. See Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers* (2000) 4 Geo. J. Leg. Ethics 209; Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes* (1981) 59 Texas L. Rev. 689, in which she argues that "the plain import and content of ABA codification makes plain that the Bar bothers because it pays so to dictate. Id, at 689. See also, Nancy J. Moore, *The Usefulness of Ethical Codes* [1989] Annual Survey Amer. L. 7 (legal regulation drafted, interpreted, and applied as law in a process that does not allow public participation). In *Ndukwe v LPDC* (2007) 5 NWLR (pt. 1026) 1 (affirming the direction of LPDC, at 48 paras. G-D, stated that misconduct is viewed "with great concern not only for the protection of the public ... but also for the protection and preserving the good name of the legal profession." For a survey of some of the cases, see *In Re Idowu* (1971) 1 All NLR 147; *Balogun v Akanji* (1992) 2 NWLR (pt. 225) 591 at 606, per Salami, JCA; *Labode v Otubu* (2001) 7 NWLR (pt. 712) 256; *Alice v Umaru* (2002) 14 NWLR (pt. 787) 369 at 393, per Nzeako, JCA; *NBA v Ohioma* (2006) 13 NWLR (pt. 998) 438; *NBA v Koku* (2006) 11 NWLR (pt. 991) 431; *Ndukwe v LPDC* (2007) 5 NWLR (pt. 1026) 41; *Iteogu v LPDC* (2009) 17 NWLR (pt. 1171) 614; *Okike v LPDC* (2005) 15 NWLR (pt. 949) 471; *Jide Aladejobi v NBA* (2013) 15 NWLR (pt. 1376) 66; *Sunday Williams Akingboun v LPDC* (2014) 13 NWLR (pt. 1423) 1. See also *In re Echoles* (1970) 430 F.2d at 349 (7th Cir.) This explains why legal education is now tilting towards professionalism in the universities. For example, the MacCrate Report in, "A forward to best Practices" said, "The central message in both Best Practices and in the contemporaneous Report of the Carnegie Foundation is that law schools should broaden the range of lessons they teach, reducing doctrinal education that is taught via Socratic dialogue and case method; integrate the teaching of knowledge, skills and values; and not treat them as separate subjects in separate courses; and give greater attention to instruction in professionalism." See also P.A. Joy, *The MacCrate Report: Moving Toward a More Professional Education* (2008) 7 Int. J. Legal Profession 239; James R. Maxeiner, *Educating Lawyers Now and Then: Two Carnegie Critiques of the Common Law Case Method* (2007) 35 International J. Leg. Info. 1.

[17] Economists argue that ex ante regulation finds justification to combat consumer information asymmetry where consumers cannot evaluate the product or services at issue. See, Thomas G. Moore, *The Purpose of Licensing* (1961) 4 J. Law & Econ. 93; Jonathan Rose, *Occupational Licensing: A Theoretical Framework*, in Simon Rottenberg, ed., *Occupational Licensure and Regulation*, 1980, 180; Richard Posner, *Economic Analysis of Law*, 4th ed., 1992, 367-368.

[18] Barton, above n. 10 at 429; William R. Johnson, Education and Professional Life Styles: Law and Medicine in the Nineteenth Century (1974) 14 Hist. Educ. O. 185; For detalled reading on the history of the legal profession, see, J.H. Baker, An Introduction to English Legal History, 3*ed., London: Butterworths, 1990, 177; P. Brand, The Origin of the English Legal Profession (1987) 5 *Law and History Rev.* 31. See RC Palmer, The Origins of the Legal Profession in England (1976) 11 Irish Jurist *(new series)* 126 and David M Walker, *The Oxford Companion to Law*, Oxford: Clarendon Press, 1980, 1133.

[19] For a history of transition from standards to rules in Nigeria, See also for useful reading, Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics* (1995) 80 Iowa L. Rev. 901

[20] Generally, regulation finds economic justification to correct market failures such as monopolies, information asymmetry, and negative externalities. Non-economic justification can take the form of encouraging professionalism. See Posner, above n. 17.

[21] Most of the case scenario that come within the agency costs square generally would revolve around issues concerning matters of conflict of interest, breach of confidentiality and non-devotion to duties by lawyers. See RPC, rules 14-25 & 48-54 (rules governing relation with clients and remuneration for legal services).

examine how the RPC furthers or negates these objectives by responding to "agency cost" challenges[21] and problems of "negative externality."[22]

Paradigmatic Models of Enforcing Professional Norms

There are no doubt many ways lawyers' conduct is regulated in Nigeria. Conduct regulation is generally governed by four interrelated (and sometimes alternative) models: disciplinary controls, liability controls, institutional controls, and legislative controls.[23] While the models share many features, each enforcement system accomplishes its objectives through different structures and practices. This paper would however narrow itself to the model of disciplinary control of lawyers conduct within the confirms of the rules of professional ethics, largely governed by the RPC. Even at that, we adopt an economic analysis of the RPC from two main challenges that the Rules seeks to minimise or control-agency costs and negative externality. In our view, the RPC should respond to two main challenges of professional misconduct. First, is what legal economist term "agency costs issues". This captures situations where lawyers misconduct primarily harms the client. Situations that easily come within the bracket would be conflict of interest situations, breach of confidentiality and non-devotion to duties by lawyers. Second, is the challenge of "negative externality."[24] This would ordinarily cover cases where lawyers and clients in collusion impose unjustified harm on either third parties, or the general public, or the justice system. Cases that commonly come within this square are instances of malicious litigation, abuse of process, assisting clients to present perjured evidence, fraud and the like.

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[22] Externality challenges often arises in cases where lawyer and client, acting in collusion impose unjustified cost on third parties (and the general public), and the justice system, such as where they employ the legal process to harass an opponent, present perjured evidence, file frivolous suits, abuse of process, assisting clients to present perjured evidence, fraud and the like. See RPC rules 30-38 (rules governing relation with the court).

[23] David B. Wilkins, *Who Should Regulate Lawyers?* (1991) 105 Harv. L. Rev. 801. Disciplinary controls involve independent agencies like the LPDC acting under the supervision of the NBA or Supreme Court to investigate and prosecute violations of rules of professional conduct, with a basic structure consisting of disciplinary bodies. Liability controls works through torts or contracts to which clients and to a limited extent, third parties, can under statute or the common law sue for unwholesome practices. Institutional controls include sanction imposed on lawyers who render services under institutional models, such sanctions a judge may impose for litigation-related misconduct or those the Security Exchange Commission may impose under its regulatory regime on lawyers. Legislative controls can be in the form of specific statutory enactment on specific aspect of the lawyer's operations such as the courts. The enactment of the Legal Practitioners Act, 1975 is a good example. On whether there is a difference between disciplinary cases and malpractice litigation, Michael J. Hoover, *The Model Code of Professional Conduct and Lawyer Malpractice Actions: The Gap Between the Code and Common Law Narrows* (1988) 22 New Eng. L. Rev. 595.

[24] Pollution is a paradigmatic example that illustrates externality. Externality often arises from issues concerning tort liability and property right. Externalities are described as outside of property by a person affects (positively or negatively) the welfare of others. One party's action imposes on another an externality, if it affects with a probability, the wellbeing of others, in comparison to some standard of reference. An example, of negative externality, would be the case of a textile mill that discharges effluent waste into a body of water; the harm/externality reduces the utility of others who use the water. Same argument goes for positive externality where one uses his property for chemical spraying to kill mosquitoes, his property also rids his neighbours of the pests. For a classical discussion on externality, see Ronald H. Coase, *The Problem of Social Cost* (1960) 3 J.L. Law & Econ. 44; Steven Shavell, *Foundations of Economic Analysis of Law*, Cambridge, Mass: Harvard Univ. Press, 2004, 77. Generally, litigation or private bargain or regulation is used (in economic language, to internalise) to handle problems of negative externality.

Admittedly, entry and conduct regulation of the profession has moved from general principles of conduct to narrow explicit rules and regulations.[25] No longer is responsibility governed by statement of ethics, but by rules describing the minimum standards allowable. The trend is global.[26] Most lawyers think it proper a direction. We have no quarrel with the position. Unfortunately, a critical analysis using the economic model reveals that much of these regulations are misguided, harmful to consumers of legal services, and are designed to further professional self-interest.

This is why we have narrowed our analysis to the RPC. Barton, offers three additional reasons.[27] First, is the growing demand by a number of economists and political scientists for general deregulation, especially of occupations.[28] Second, that it is only by establishing the rationale for professional conduct that we can fairly judge the success of present regulation, like the RPC, because "regulation mismatch" can arise without introspective evaluation. Third, once the justification is identified, regulation can be reformulated to match the defensible purposes.

Connecting Economic to Professional Responsibility

How does economics connect with issues of professional conduct? It is easy to be dismissive of any connection between both. At a level of generality, the objection can be raised that that economics is all about mathematised study of inflation, monetary policies, unemployment, growth analysis, public taxation, markets, business and the like, remote from the every concern of the law and its institutions, talk more of lawyers professional conduct.[29] This is so because most people associate economics with the science of rational choice rooted in exploring the

[25] See Legal Practitioners Act. The medical profession is not different. For instance, the Hippocratic oath was the main statement of ethics for doctors, But today, a doctor's conduct is regulated by extensive rules such the 22 sections of the Medical and Dental Practitioners Act, 1998 in Nigeria.

[26] Barton, above n. 10 at 429, where the commentator reveals that by the middle of the nineteenth century the legal profession in the U.S was virtually unregulated, and some states permitted any registered voter to practice law. Professional standards were largely unwritten rules and principles lawyers enforced amongst themselves, passed on from older lawyers to newly called ones, save for enforcement of conduct was generally supplemented by common law torts and criminal sanctions for attorney misbehaviour. See Bruce Frohnen, *The Bases of Professional Responsibility: Pluralism and Community in Early America* (1995) 63 Geo. Wash. L. Rev. 931; Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States* (1994) 7 Geo. J. Leg. Ethics 911; William R. Johnson, *Education and Professional Life Styles: Law and Medicine in the Nineteenth Century* (1974) 14 Hist. Educ. Q. 185. In fact evidence showed that

[27] Barton, above n. 10.

[28] Global demand for deregulation is grounded on the assumption that free market is better than government regulation. See Herbert Hovenkamp, *Enterprise and American Law*, 1991; Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State*, 1990, both cited in Barton, above n. 10 at 433. Pointedly responding on call for deregulating the legal profession, se Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibition* (1981) 34 Stan. L. Rev. 1; Barlow F. Christensen, *The Unauthorized Practice of Law: Do Fences Really Make Good Neighbours-Or Even Good Sense?* (1980) 1 Law & Social Inquiry 159; Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters* (1999) 67 Fordham L. Rev. 2581.

[29] Gary S. Becker, *The Economic Approach to Human Behaviour* (1976).

implications resulting from dealings by rational parties seeking to maximize their ends in life, while law is primarily concerned with rules and regulations of human behaviour. We have no quarrel with such reasoning, even though we think it is more wrong than right.

It is now undoubted that economics stylized quantitative model has proved to be a significant evaluative criteria for law in showing the gap between aim and legal policy, thereby providing a rational, empirical basis to discuss and soberly reflection on both aims of law and its institutions in the context of means and ends, cost, and benefits. We shall not belabour the overt connection. Richard Posner, for example, has powerfully shown in his seminal work that all the substantive and remedial doctrines of the common law traditions are rooted in economic logic and imperatives.[30] In the learned writer's view the doctrines of the common law form a coherent and consistent system for inducing people to behave efficiently in explicit markets and a whole range of non-market relationships (social interactions).[31]

But sceptics may question further. If the connection between law and economics is taken as given, that does not itself draw economic claws into matters of professional responsibility. In fact, if anything, lawyers knowledgeable in elementary economics could argue that the Coase theorem asserts that under certain conditions legal rules do not matter as parties would negotiate their way around rules for optimal value.[32] From

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[30] Posner, *Economic Analysis of Law*, p. 315: 'Economics is the deep structure of the common law, and the doctrines of that law are the surface structure.' See also Richard Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law* (1981) 9 Hofstra L. Rev. 774. But cf. Ronald Dworkin, *Why Efficiency* (1980) 8 Hofstra L. Rev. 563; Lucian Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?* (1980) 8 Hofstra L. Rev. 671; Mario Rizzo, *The Mirage of Efficiency* (1980) 8 Hofstra L. Rev. 641. William N. Landes & Richard Posner, *The Influence of Economics on Law: A Quantitative Study* (1993) 36 J. of Law & Econ. 385 (study which shows that the major American law journals cite articles using the economic approach more than articles using other approaches). For readings on legal problems using the economic approach, see Festus Emiri, *Connecting Economics to Concrete Legal Problems* [2011] Legal Science Review 1.

[31] Generally, commentators posit that as an analytical tool, law and economics developed from two branches of scholarship in the eighteenth century. One was rooted in Adam Smith, sometimes referred to as old economic analysis. It focuses on how law regulating economic systems (law and explicit market) to as old economic analysis is concerned with how law affects the economy and market, such as the effect of law on competition, industries, performance of markets, and economic variables such as prices, investment, profits, income distribution and resource allocation. In this context it is captured by competition law, tax and trade laws, and industry regulation law. Its supply-side application is responsible for the introduction of privatization, commercialization and liberalization of nationalized industries. The other branch originated with Jeremy Bentham, sometimes referred to as new economic analysis of law. It focuses on how law can be used to evaluate nonmarket behaviours such as crime, pollution, accident, marriage, legal and political systems, especially as it takes on the whole gamut of law and regulatory systems irrespective of whether or not the law governs economic relationship. It covers areas as the law of obligations, family law, criminal law, legal processes and procedure, medical ethics and more. This area of market model provides a template within which traditional legal problems may be conceptualized and resolved. It helped convinced in the 1960s that economics thought to be just about explicit markets can luminate areas hitherto thought immune to it, thereby improving large areas of law until then thought to be dominated by considerations of 'fairness' or 'justice remote from economics. A good example of conceptual positive economic analysis of law is Ehrlich article on deterrent effects of law enforcement. See Isaac Ehrlich, The Deterrent Effects of Criminal Law Enforcement 1972) 1 J. Leg. St. 25%. See also Robert Cooter, Lapses, Conflict, and Akrasia in Torts and Crimes: Towards an Economic Theory of the Will (1991) 1l Int. Rev. Law & Econ. 149

[32] Coase theorem is the most celebrated application of the concept of opportunity cost. See Ronald H. Coase, *The Problem of Social Cost*, (1960) 3 J. Law & Economics 1; see reprint in Coase, *The Firm, the Market, and the Law*, Chicago Univ. Press, 1988. See also R. H. Coase, *The Nature of the Firm* (1937) 4 Economica 386. The theorem postulates that under conditions of rational cooperation, full information and zero transactional costs, parties will negotiate around inefficiencies to allocate rights in order to establish optimal level of resource deployment. See also George Stigler, *Economics: The Imperial Science?* (1984) 86 Scand. J. Econ 301 at 304. Economists also think so of law.

this perspective it can comfortably be argued that from an economic standpoint rules do not matter, so rules governing conduct have little bearing in economics.[33] This sound interestingly. But that would be to put the Coase theorem upside its head. The theorem also supports the opposite position that rules really do matter. Whatever, the position, one thing stands out. The concept introduced a whole new vocabulary for explaining and justifying legal rules.[34]

Even though the application of economic methodology to law has long existed,[35] it has been suggested that the symbiotic relationship between economics and professional regulation began in the 1980s as fallout from the development of the agency theory to business organisations and corporate law.[36] It was therefore natural to extend the theory to the emergence of growing corporate law practice in the form of law partnerships and entrepreneurial lawyering.[37] What is more, it is conceivable to think that the entailment is a result of the hunger of

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[33] Economics also think so of law. For example, see C. A. E. Goodhart, *Economics and the Law: Too Much One Way Traffic?* (1997) 60 MLR 1. economists/system because most of the time they reason that legal underpinnings is a given constant and, therefore, the law does not represent a variable whose adjustment becomes involved in our standard exercises of constrained maximization.

[34] Coase has always insisted that legal rules do matter. See R. H. Coase, *The Firm, the Market, and the Law*, (1988) 28, where the writer stated that 'Economic policy involves a choice among alternative social institutions, and these are created by the law or are dependent on it." See George M. Cohen, *When Law and Economics Met Professional Responsibility* (1998) 67 Fordham L. Rev. 273.

[35] Generally, commentators posit that as an analytical tool, law and economics developed from two branches of scholarship in the eighteenth century. One was rooted in Adam Smith, sometimes referred to as old economic analysis. It focuses on how law regulating economic systems (law and explicit market) Old law and economics is concerned with how law affects the economy and market, such as the effect of law on competition, industries, performance of markets, and economic variables such as prices, investment, profits, income distribution and resource allocation. In this context it is captured by competition law, tax and trade laws, and industry regulation law. Its supply-side application is responsible for the introduction of privatization, commercialization and liberalization of nationalized industries. The other branch originated with Jeremy Bentham, sometimes referred to as new economic analysis of law. It focuses on how law can be used to evaluate nonmarket behaviours such as crime, pollution, accident, marriage, legal and political systems, especially as it takes on the whole gamut of law and regulatory systems irrespective of whether or not the law governs economic relationship. It covers areas as the law of obligations, family law, criminal law, legal processes and procedure, medical ethics and more. This area of market model provides a template within which traditional legal problems may be conceptualized and resolved. It helped convinced in the 1960s that economics thought from economics can illuminate areas hitherto thought immune to it, thereby improving large areas of law until then thought to be dominated by considerations of fairness or justice. See Isaac Ehrlich, *The Deterrent Effects of Criminal Law Enforcement* (1972) 1 J. Leg. St. 259. See also Robert Cooter, Lapses, Conflict, and Akrasia in Torts and Crimes: Towards an Economic Theory of the will (1991) 11 *Int. Rev. Law & Econ*. 149.

[36] The agency theory is based on the divergence of interest between the principal and agent. In agency relationship the principal is the owner of the productive assets, while the agent controls the assets. "Because the agent does not reap the full reward from his efforts on the principal's behalf, and because the agent knows more than the principal about what the agent is doing (what economists refer to as "asymmetric information"), the agent has the incentive and opportunity to act--whether in the form of inattentiveness (shirking), or self-dealing--in a way that decreases the principal's wealth. The theory is that which seeks to explain and minimize agency cost of control. See George M. Cohen, above n. 34.

[37] See generally Sanford J. Grossman & Oliver D. Hart, *An Analysis of the Principal-Agent Problem* (1983) 51 Econometrica 7 (1983) (discussing an alternative approach to the principal-agent problem); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure*, (1976) 3 J. Fin. Econ. 305 (1976) (integrating theories of agency, property rights, and finance to develop a theory of the firm's ownership structure); Stephen A. Ross, *The Economic Theory of Agency: The Principal's Problem*, (1973) 63 Am. Econ. Rev. 134 (1973) (describing the agency relationship in economic terms), all of which are in Cohen, above n. 28 at 274.

economics to bring within its 'colony' new territories of conquest.[38] Professional regulation of lawyers provided it the needed new incentive, especially as ethical rules metamorphosed from their historical hortatory and aspirational nature to solidified coercive regulations.[39] This is what makes apposite our aim to examine the RPC from the lens of economics.

Agency Costs Challenges and the RPC

In the main, the RPC regulates conduct in three main fronts: duties to client, professional colleagues and the court. A lawyer in relation to his client is obliged to use his skills and knowledge to the best of his ability to secure the client's interest.[40] He is not to further the client's fraud or dishonesty.[41] He is obliged to maintain the fiduciary nature of the relationship and maintain the client's confidentiality.[42] In relationship to professional colleagues, a lawyer must deal honestly with them and implement undertakings to them.[43] In relation to the court, a lawyer is under a duty not to participate in any fraud on the court by putting forward false evidence, and must honour any undertaking he gives on behalf of his client.[44] Put at a level of generality, it translates to say that rules of professional ethics seek to make central the common tension between the duty the lawyer owes to the client and the duty he owes to others.

The main thrust of the RPC, gleaned from its numerous provisions suggest that it sets out to regulate tendencies of self-interest. Self-interest behaviour has long been an area of interest in the study of economics concerned with implications of the assumption that man is a rational maximiser. This is what makes professional responsibility a congenial area for 'economic imperialism.'[45] To the extent that the RPC regulates

[38] Robert D. Cooter, *Law and the Imperialism of Economics: An Introduction to the Economic Analysis of Law and Review of the Major Books* (1981-2) 29 UCLA L. Rev. 1260; Robert Cooter, *Law and the Unified Social Theory* (1995) 25 J. Law & Soc'y. 263; George Stigler, *Economics: The Imperial Science?* (1984) 86 Scand. J. Econ 30. See Symposium, *The Future of Law and Economics: Looking Forward* (1997) 64 Univ. Chi. L. Rev. 8. 1129.

[39] The profession developed a substantial body of principles of professional ethics, much of it not in writing but absorbed by new wigs from older lawyers. It appears that the earliest element of professional regulation was a ban on deceit. In 1275 it was enacted (Statute of Westminster I, c. 29) that a professional lawyer found guilty of deceit should be punished. See J.H. Baker, *An Introduction to English Legal History*, 3rd ed., London: Butterworths, 179. Prior to the RPC ethical rules were honorary in nature. See Olakunle J. Orojo, *Conduct and Etiquette for Legal Practitioners*, London: Sweet & Maxwell, 1979; Niki Tobi, *The Nigerian Lawyer*, Lagos: Law Research & Dev. Forum, 2002; O. Doherty, *Legal Practice and Management in Nigeria*, London: Cavendish Pub., 1998.

[40] RPC rule 14

[41] RPC rule 17, 18 & 19

[42] RPC rule 26 & 27

[43] RPC rule 32

[44] See above n. 38. See also Reuven Brenner, *Economics-An Imperialist Science?* (1980) 9 J. Legal Stud 179 (economic approach provides "the uniform framework on which social sciences will be based."); Ronald Coase, *Economics and Contiguous Disciplines* (1978) 7 J. Legal Stud. 201.

lawyers' conduct, especially those connected with self-interest, economics provides a friendly, evaluative tool for its analysis.

Think for a moment. Why are conduct regulation enacted? Usually rules are made to prevent *ex ante* behaviour observed from the vantage point of the harmful effects of *ex post* misconduct. So rules are in effect made to prevent further future occurrences, and if not preventable, to punish offenders.[46] That being the case, even if most lawyers act ethically most of the time, the assumed few who do not (in economic terms referred to as 'marginal lawyers') are the ones who make the rules imperative to curb self-interest behaviours for financial gain.[47] That being so, the obvious place to start an economic analysis of professional responsibility would be the agency costs theory designed to reduce self-interest conduct and costs.[48] We shall therefore analysis the RPC through the lens of the agency theory which help identify the conditions, behavioural patterns, and structures that increases the incentives and opportunities for self-interest behaviour and how this harmful costs can be minimised.

Legal economists are of the view that conduct regulation is the profession's response to agency costs challenges that arise from the lawyer-client relationship.[49] It is suggested that the danger of self-interest is what invites into professional responsibility the "agency costs theory" as economic justification for regulating conduct. The reason is not farfetched. Lawyer-client relationship is one where the parties [principal (as client), and the agent (as lawyer)], both have divergent interests. Taken from classical principal-agent relationship in business transactions, the theory rest on the separation of ownership from control. The principal is the owner of the property in the business relationship. But control over it is vested in the agent. In the relationship, the principal gets the benefit of the agent's work, from which he pays a certain percentage to the agent for his labour. This notwithstanding, the agent has incentive and opportunity to harm the principal because he knows more than his principal about the business, so he can act either alone or in consort with others to harm his principal.[50] The principal must therefore find ways to control the

[45] Cohen, above, n. 34 at 276. ("legal rules are largely the fossilised remains of prior misconduct").
[46] Cohen, above, n. 14 at 276.
[47] See generally above n. 11. For useful reading on agency costs theory, see also Cohen, above n. 9 at 280. See Sanford J. Grossman & Oliver D. Hart, *An Analysis of the Principal-Agent Problem*, (1983) 51 Econometrica 7 (an economic analysis of the costs and benefits accruing to the principal where the agent takes a particular action); Stephen A. Ross, *The Economic Theory of Agency: The Principal's Problem*, (1973) Amer. Econ Rev. May 1973, at 134; Stephen A. Ross, *The Economic Theory of Agency: The Principal's Problem*, Proceedings of the AEA-NSF Conference on Decision Making and Uncertainty; S. Shavell, *Sharing and Incentives in the Principal-Agent Relationship* (1979) 10 Bell J. Econ. 55; B. Holmstrom, *Moral Hazard and Observability* (1979) 10 Bell J. Econ. 74; Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law*, 1991.
[48] Richard A Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest* (1992) 60 Fordham L. Rev. 579.
[49] Epstein, above n. 49; Cohen, above n. 34 at 279.

attendant agency costs. The primary means of control are through monitoring, and bonding.[51] Agency costs is therefore the economic equivalent of what lawyers call the 'conflict-of-interest' challenge. The principal in the relationship, realising his vulnerability would ordinarily seek means of monitoring or bonding that is cost efficient to control opportunistic behaviour of the agent. So, regulations such as those enjoining the lawyer to observe the no-conflict of interest rule, observe the client's confidence, and the like can be equated as the necessary gap-filler rendering explicit monitoring or bonding in the form of contract superfluous.[52]

How does this play out in the client-lawyer relationship? Simply. Lawyers are agents of people who hire them. The lawyer, as agent, provides services of value to the client, as principal. The value of the service (property, as the case may be) is higher than the fees paid to the lawyer. The lawyer, is however, happy because the cost of providing the service is less than the fees he charges. Both enjoy optimal utility from the relationship, which can loosely be termed a contract of service.[53] In any contract however, 'it is easy to promise the moon, but tempting to deliver only a slice of green cheese.'[54] This explains why it is suggested that contract law aims to deter opportunism by contracting parties, while at the same time encouraging optimal timing of economic activities in a way that eliminates costly self-protective measures.[55]

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[51] Cohen, above n. 34 at 280. See Sanford J. Grossman & Oliver D. Hart, *An Analysis of the Principal-Agent Problem*, (1983) 51 Econometrica 7 (an economic analysis of the costs and benefits accruing to the principal where the agent takes a particular action); Stephen A. Ross, *The Economic Theory of Agency: The Principal's Problem*, (1973) Amer. Econ. Rev. May 1973, at 134; Stephen A. Ross, *The Economic Theory of Agency: The Principle of Similarity*, Proceedings of the AEA-NSF Conference on Decision Making and Uncertainty; S. Shavell, *Sharing and Incentives in the Principal-Agent Relationship* (1979) 10 Bell J. Econ. 55; B. Holmstrom, *Moral Hazard and Observability* (1979) 10 Bell J. Econ. 74; Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law*, 1991.

[52] That explains why Grant Gilmore said: "In heaven there will be no law, and the lion will lie down with the lamb. In hell there will be nothing but law, and due process will be meticulously observed." See Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State* (1995) 63 Geo. Wash. L. Rev. 1105 at 1105 (where the learned scholars stated: "many of the rules of professional responsibility are directed at reducing this agency-cost problem by providing a set of default rules that fill in the gaps in the contractual relationship that exists between lawyers and their clients, thereby reducing agency costs."). See also Gilmore, *The Age of American Law*, 1977, 111, cited in George M. Cohen, above n 34 at 276 ft. nt. 20.

[53] Generally, the services of a lawyer to a client creates a contract. See RPC rule 18.

[54] Epstein, above n 49 at 580.

[55] Richard Posner, above n 17 at 117. But cf. Commentaries that contract aims to promote the morality of promise. See for example the American Restatement (Second) of Contract (1981) states in Art. 1 that "a contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty". On Decide this point as well, Civile states E.A. Farnsworth, *Changing Your Mind: The Law of Regretted Decisions*, 1998; Samuel Stoljar, *Promise, Expectation and Agreement* (1988) Cambridge Law Journal 193. See also materials on the nature of promises and their morality - Raz, *Promises and obligations* in Hacker and Raz (eds.) *Law Morality and Society* (1977); Patrick S Atiyah, *Promises, Morals and Law* (1981); Fried, *Contract as Promises: A Theory of Contractual Obligation* (1981); Raz, 'Book Review' (1981) 95 Harv. L. Review 916 and Collins, *The Law of contract* (2nd ed. 1993) 51-68, Festus Emiri, *Promise and Fail in the Law of Regretted Decisions* (forthcoming).

How so? Once contract terms are agreed upon it is assumed that the parties will perform their respective sides of the obligations agreed. But it is rare to have the obligations performed simultaneously. Often time, the obligations do not enjoy simultaneity. For example, in a typical sale of goods contract, one party will have to deliver goods and wait for payment thereafter. It can be the reverse-down payment, goods delivered latter. Whatever the situation, two challenges can arise from the space of performance time. They are the danger of opportunism and unforeseen contingencies.[56]

This basic proposition (on contractual risk) or agency costs which is constant across a variety of transactions, equally applies to the lawyer-client relationship. The contract between the parties determine their respective obligations. The lawyer gets as fees, only a part of the total gain of his action (because the marginal difference is appropriated by the client). There is therefore risk of self-interest, by the lawyer not undertaking actions that work for the benefit of the client. The principal devise to prevent contractual backsliding is that which ordinarily applies in transactional settings or monitoring and bonding.

To a large extent an economic analysis of law focuses on how legal rules affect incentives of parties *ex ante* rather than how parties behave *ex post*. It is therefore from this perspective that we would attempt to analysis some of the primary rules of conduct prescribed by the RPC. Let us consider in seriatim as possible, some of the regulations on professional responsibility from the agency costs perspective.

(i) Abuse of Client's Information and Confidence.[57]

Incentive and opportunity for self-interest is pervasive with respect to the client's information and confidence. The risk of its abuse by lawyers to harm the client is real. In principle, information can be equated with property to his use or misuses it.[58] Because information is power, there is need for regulatory rules to safeguard its misuse. This is what necessitates the obligation of confidence.

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[56] The party who receives the benefit of the others' performance, the non-performing party may immorally seek advantage to subjectively devalue the enrichment or trump up extenuating circumstance that make performance of his side of the obligation impossible. To illustrate, if C agrees to build a house for D for N10m, payment after completion, D on completion may claim that the house does not meet the requirements agreed and so force C to accept a sum less than agreed. Even if no such complain is made, he could seek to postpone date or sum of payment for (perceived) unforeseen contingency reasons, in both situations, C will to some extent be at D's mercy.

[57] RPC rule 19 stipulates that all communication between the lawyer and his client shall be privileged, and must not be revealed by a lawyer or used against the client. He is only authorized to reveal the confidence of the client with the client's consent, or in furtherance of permission by law or to prevent the commission of a crime or in defence of a suit against the lawyer.

[58] See *Boardman v Phipps* [1967] 3 All ER 721, [1966] 3 WLR 1009, per Lords Hodson and Guest (information is trust property); *E.I Du Point Nemours Powder Co v Masland*(1917) 244 US 100 at 102, per Holmes, J ("the word property is applied to ... trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that law makes some rudimentary requirements of good faith"). But cf. Ernest J. Weinrib, *The Fiduciary Obligation* (1975) 25 Univ. Toronto L.J. 1. See also Festus Emiri, *Law of Restitution in Nigeria*, Lagos: Malthouse Press, 2012, 440.

Does the RPC encourage reposing more confidence in lawyers? Not necessarily. It can be argued that it does not necessarily encourage client's to trust lawyers more in seeking out legal advice.[59] In fact, some have argued for its outright abolishment, because they posit that the rule benefits lawyers while harming clients and the public. All of us know that confidence is an essential ingredient of the principal-agent relationship. If it were otherwise, the agent would have the incentive and opportunity to act-whether alone or in consort with others to harm the principal's interest.[60] The confidentiality duty and the rules governing conflict of interests should ordinarily be means of controlling or monitoring agency costs associated with confidence and good faith. Thus, the confidentiality rule would appear at face value to be in the client's interest, while painting the lawyer as either neutral, altruistic, or victims of client manipulation. In effect, the rule obviates the need for specific bargain over fiduciary breaches.[61]

Observing the client's confidence is however not absolute. The lawyer is authorised to reveal the client's confidence if the client consents; or if required by the RPC, law or court order; or to prevent the client from committing or preventing a crime; or in defence of a malpractice or disciplinary proceeding.[62] While the first two exceptions are understandable, the latter two are skewed to further lawyers' self-interest. Obviously, the last exception is nothing but a valve of protectionism.

The essence of the confidentiality rule rather than it being a response to agency cost, greatly benefits clients at the expense of the public, and ultimately lawyers, who in an economic sense, are in a position to sell their confidential services to clients. For instance, it is known that when confronted with proposal to declare that lawyers cooperation with those who commit fraud-often fee-motivated, should be minimised by at least authorising lawyers to disclose client fraud perpetrated with the assistance of lawyers' work product, the Nigerian Bar Association has always resisted the proposals, suggesting that "maintaining confidentiality" is a higher-order policy objective.[63]

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[59] Daniel R. Fischel, *Lawyers and Confidentiality* (1998) 65 Univ. Chi. L. Rev. 21; Steven Shavell, *Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality* (1988) 17 J. Leg. Stud. 123; Thomas D. Morgan, *The Evolving Concept of Professional Responsibility* (1977) 90 Harv. L. Rev. 702; But cf. Ronald J. Allen et al., *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine* (1990) 19 J. Leg. Stud. 359.

[60] Agency law is generally contractual and the relationship is often referred to as fiduciary or confidential. "The fiduciary principle is the law's answer to the problem of unequal costs of information. See Posner, above n. at 142. It allows you to hire someone with superior information to deal on your behalf with others having superior information. By imposing a duty of utmost good faith ... it minimizes the costs of self-protection to the fiduciary's principal." See also, Posner, id. at 556. See also Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest* (1992) 60 Fordham L. Rev. 579; Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation* (1997) 82 Iowa L. Rev. 965.

[61] Macey & Miller, above n. 59.

[62] See RPC rule 19 (3).

[63] See for instance, Brickman, states that the American Bar Association, has resisted the use of confidence rules for self-employ. Brickman *ABA Resisted It In Rule Regulating Contingent Fees: Money Talks, Ethics Walk* (1996) 65 Fordham L. Rev. 247 at 253 ("the ABA House of Delegates voted for ... proposed rule ... instead, the House of Delegates enacted a rule eliminating all lawyers discretion, including the more limited form granted in the Model Code of Professional Responsibility, to disclose fraud, and in particular barring lawyer disclosure of ongoing client fraud perpetrated with the assistance of lawyers' services, except that fraud perpetrated against a tribunal. This provision purported to preserve client confidentiality but in reality maximized the prices that lawyers could charge clients who intended to use the lawyers services to commit fraud"). The situation in Nigeria is no different. In *NBA v Fed. A-G* (the NBA adopted a similar stand).

Further to this is the argument that "the very lawyer self-interest that makes the protection of confidentiality necessary also makes the abuse of confidentiality possible."[64] Yes, confidentiality rules bars lawyers' from using confidential information against the client. But that is just one side of the coin. Think a bit. By the rule giving confidence to clients that their secrets would be kept, they invariably would be willing to give more information to the lawyer. That being so, the lawyer enjoys more (free flow) information than he ordinarily would have were the relationship one between person dealing under market moral situation. More information about the client reposed in the lawyer could translate to 'leg-up' on future business. Future business depends on how successful the client is, which in turn, depends on how many risks the client is willing to take. If clients bear the downside legal risks, while lawyers do not, then lawyers have an incentive to advise or permit clients to take "aggressive" legal positions, which at some point may spill over into criminal or fraudulent acts. If the risky action succeeds, the lawyer is rewarded; if it fails, the lawyer does not expect to suffer.[65] Thus, the flip side of rule is self-serving of lawyers' interest.

(i) Unauthorised Practice

All familiar with the word 'profession' know too clearly that it is often invoked for self-serving purposes, to advance the status of members, shield them from moral responsibility, minimise public scrutiny and justify restrictive practices. Unlike governance structures, the legal profession remains almost exclusively under those who regulate it.[66] For instance, with a view to sustain monetary benefits of a competitive market, the RPC promotes a supply and price monopoly. It prohibits unauthorised practice, which historically was used to suppress competition from lay persons seeking to perform services at less cost than those provided by lawyers.[67] What the Bar has done is simply to claim that its self-interest is sublimated to public interest, but careful look reveals the opposite. Public interest rhetoric is merely used to mask professional self-interest.

The rules explicitly bans unauthorised practice of law. Present barriers to entry in term of character and learning requirements which shuts out a sizable number of persons wishing to become lawyers translates to reduced supply of legal services. The effect is invariably increase in the cost of legal service. The regulation is akin to ban on substitute goods which exacerbates costs. Barring unauthorised practice on the ground that incompetent lawyering would cause serious harm to the public is

[64] Cohen, above, n. 34.
[65] Ibid.
[66] Deborah L. Rhode, *Institutionalising Ethics* (1994) 44 Case W. Res. L. Rev. 665.
[67] RPC Rule.

curious when considered from the perspective that regulations allow proceedings *pro se*. The famous Professor Awojobi litigation was one such instance.[68] So, if the real intention for barring unauthorised practice is to protect the public from serious harm, that would invariably necessitate banning prosecution *pro se*. Allowing *pro se* proceeding while barring unauthorised practice paints a picture more of suppressing competition than protection of the public.

Furthermore, much of current regulation restricting advertisement and client solicitation is skewed to restricting the flow of information that lawyers provide to clients, decrease competition and reduce education to clients about costs and nature of legal services.

Also, given the variety and difficulty of entry regulations governing competence, it would be reasonable to think that the Bar would be equally concerned about competence of existing practitioners.[69] Yes, there has recently been a drive on mandatory continuing legal education (MCLE) for lawyers. The reality on ground shows that more attention is given to entry qualifications than post-call competence requirement for existing lawyers. Even when the Bar certifies lawyers for the MCLE programmes undertaken, the programmes hardly guarantee any level of competence. Attending the annual conference of the Bar is one such programme. In truth, how many lawyers sit in the programme when they attend? Few only, the majority sometimes concerned with professional shopping, and the like. Even for programmes of the various sections of the Bar, that enjoy more robust attendance, they are no programme examinations to test and measure received competence. Whatever, it must be admitted that these programmes are not designed to identify or correct incompetence of lawyers. They are at best designed to reinforce skills and knowledge of competent lawyers.[70]

(ii) Devotion to Duty

It is axiomatic, if not paradoxical, that lawyers are expected to be both zealous advocates for their clients and ye be deemed officers of court. Rule 14 enjoins a lawyer to show dedication and devotion to the cause of the client, while rule 30 explicitly confers the status of an officer of the court on a lawyer. It is however, plausible to think that because the client pays his fees, there is a natural inbuilt incentive to guard more the client's interest as against the justice system, more so that there is little or no requirements associated with the dress-up title "officer of the court."[71] In

[68] Ayodele Awojobi, a professor of engineering at the University of Lagos, conducted a sensational case before the High Court of Lagos in 1988, without the help of a lawyer.
[69] State entry qualifications.
[70] Barton, above n. 10 at 444-46.
[71] Eugene R. Gaetke, *Lawyers as Officers of the Court* (1989) 42 Vand. L. Rev. 39.

practice, client's dominate lawyers' activities. Lawyers depend on their clients for reputation, prestige, and wealth, so it stands to reason that most lawyers will perceive maximisation of their client's welfare as paramount.

(iii) Professional Fees and Remuneration

Let us next consider the rule on professional fees. Rules 48 to 54 can hardly be defended as response to agency costs. A client can hardly determine the reasonability of lawyers' fees. This being an agency costs, it is expected that the provisions on lawyers' remuneration and fees would seek to control this aspect. But alas, fees are fixed by the Bar, with minimum fee schedule.[72] Rule 52, which permits lawyers to charge reasonable fees, with the many allowable variables that determine 'reasonableness' listed in sub rule (2) offers little protection to clients, or guidance to lawyers.

If anything, the rule on contingent fee arrangement is skewed in the interest of the profession.[73] The provision on contingent fees enacted in rule 50, allows too many variables that simply work in the interest of lawyers without addressing agency costs challenges. For example, it does not answer questions such as, what amounts to standard contingent fees;[74] whether it is ethical for a lawyer to charge standard contingent fee on an entire recovery if the lawyer knows or has reason to know that a significant settlement offer is likely to be made without the need of significant effort by him, whether it is ethical violation for a lawyer to charge a contingent fee from a client who can otherwise afford to pay on a non-contingent basis or in a matter where liability is clear and some recovery is likely; whether a claim must be contingent for the lawyer to charge under a contingent arrangement; and how to determine the contingent nature of a brief?[75] The ambivalence respond of the RPC and the Bar to address these questions is display of ethical insensitivity to current practice of overcharging contingency fees in cases without meaningful risk, especially in cases where liability is not in issue and substantial rewards yield fat fees to lawyer.[76]

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[72] For example, see Legal Practitioners (Remuneration for Legal Document and other Related Matters) Order, 1991 (which regulates non-litigious lawyers' business connected with any sale, purchase, lease, mortgage and other documents).

[73] See for analysis of similar provision in the United States, see Lester Brickman, *ABA Regulation of Contingent Fees: Money Talks, Ethics Walk* (1996) 65 Fordham L. Rev. 247

[74] For example, the federal judge who presided over the litigation resulting from the DC-10 air disaster in May 1979 in Chicago stated: "You have to get a little worried when you see some of these percentage fees in disaster cases ... particularly ... cases in which there is no contested liability, and the amounts are substantial." Transcript of Nov. 6, 1980 Hearing, *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979* (MDL No. 391), cited in Lester Brickman, *Contingency Fees Without Contingencies: Hamlet Without the Prince of Denmark* (1989) 37 UCLA L. Rev. 260 at 274 ft. nt 95.

[75] Brickman, above n. 74 at 268.

[76] Brickman, above n. 74. Interestingly Brickman, states that as politics of contingency fees in the United States, the ABA speaks up on public issues like abortion, slavery, apartheid and the like, but chooses to remain mute on the issue of litigation and limitations on such litigation by the adoption of no-fault laws, even though these suits are essentially non-dispute yet they are used as mechanism to the generation of higher contingency fees earning for the Bar. See Brickman, above n. 70 at 260-262.: For some useful judicial decisions rationales and ambits for charging contingent fees, especially in big litigation, such as windfalls from air disaster compensation, see *Pennsylvania v Delaware Valley Citizens' Council* (1987) 483 US 711; *Attorney Grievance Comm'n v Kemp* (1985) 496 A 2d 672.

Response to Negative Externalities (Harm to Adversaries, Court System and Public)

The profession justifies conduct regulation as target response to negative externalities caused by lawyers' behaviour in furtherance of client's interest that can harm others, the court system and the general public. Harm of this nature can be therefore be divided into categories of those that affect adversaries, the court system and the general public.

(i) Harm to Adversaries

There are numerous ways a lawyer's misconduct can benefit his client while causing harm to the opposing party. These range from not playing fair at an *ex parte* or the *inter partes* stages of proceedings, abuse of court process, hiding of relevant information, aiding and assisting perjury, and the like. While many of these misconduct are remediable under existing common law remedies, such as torts of abuse of process, malicious prosecution, etc.,[77] it is plausible to construct situations that fall below the threshold of common law remedies that nonetheless harm adversaries. Regulation which enjoins the lawyer not to present perjured evidence, or assist clients from making false statements to the court, not to delay suit, etc, also serve to deter negative externalities upon the court system.

(ii) Harm to the Public

No doubt, there are a number of lawyer-client dealing that generates negative externalities to the public. For instance, if a lawyer were to advice his client to circumvent or violate law, society would invariably bear the costs of circumvention or violation. The commonest example, is the popular saying that tax evasion is unlawful, but tax avoidance is not. Proper legal advice can lower a person's tax liability which would translates to less revenue for government. There could also be certain legal tactics employed by lawyers which can gravely erode public confidence in the justice system. When for example, the defense in Ibori's trial secured his acquittal by presenting a no-case to the 170 count-charges against him, the client was the beneficiary. But it would appear from the furry of public comments against the legal tactics used in the case that it did not inspire confidence of many in the judiciary.[78] The South African, Oscar Pistorius trial is in the same mould.[79]

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[77] See RPC rule 15 (3) (a) - (j), and rules of court.

[78] In 2007, the Federal High Court sitting in Asaba, Delta State, dismissed the over 170 count charge of corruption against James Ibori, without full trial. He was later arrested in Dubai in 2010, extracted to the United Kingdom and convicted in 2012 on his admission of guilt to money-laundering charges.

[79] In the Pistorius trial, the judge held that he was merely negligent in killing Reeva Steenkamp, and so was not liable for murder.

Do present rule respond to this externality problem? A critical analysis of the rules reveal that most of the regulations addressing the issue of negative externalities are non-mandatory. They are couched in permissive terms.

Let us deepen the discussion further. One justification for conduct regulation is the thinking that by regulating conduct, the public can rest assure that all who render services would be at least ethical (and competent). The rules and the disciplinary structures it invites, it is reasoned, would send out of the market unethical and incompetent lawyer. By so doing, the public is protected by otherwise bad lawyers. The public protection from incompetent and unethical lawyers, rest on three separate but related closely faulty hypothesis. One, that there exist high information asymmetry and that in the absence of conduct regulation, consumers of legal services would be unable to discern between good and bad lawyers. Two, that incompetent and unethical lawyers would cause irredeemable harm to consumers of legal services. Three, that regulation is necessary to ensure that the courts have qualified and efficient lawyers to oil the machinery of justice.[80]

Let me take the first two justifications. As stated previously, *ex ante* regulation is generally necessary to protect the public from substandard goods when information asymmetry is high i.e. where consumers lack sufficient knowledge to determine the quality of a product.[81] Is it true that there is information asymmetry with regards to legal services provided by lawyers? Is it not true that most who seek legal service collect information about lawyers from family and friends? If so, a system that largely relies on reference ought to be powerful enough to cancel out most talk of information asymmetry in this respect. Further, is competition in the legal profession which is now driving solo practitioners to merge into large firms, not providing a platform for more public information? Is the fact that a large section of consumers are now companies with in-house solicitors not changing the game? These put together no doubt are likely to render the information asymmetry hypothesis less prevailing.

What of the irredeemable harm theory? Misconduct cases are again revelatory. Most damages for lawyers' errors can be stated in money terms. For example, in *Labode v Otubu*, *Ndukwe v LPDC*, *NBA v Udeagha*, *NBA v Koku*, *Iteogu v LPDC*,[82] and a host of others which form the bulk

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[80] This side of the hypothesis would be discussed under negative externality result from harm to the legal system.

[81] Thomas G. Moore, *The Purpose of Licensing* (1961) 4 J. Law & Econ. 93; Jonathan Rose, *Occupational Licensing: A Framework for Analysis* (1979) Ariz. St. L.J. 189.

[82] See citation in note 22 above. Courts traditionally adopt the incapacitative role in matters of lawyer discipline. See Stephen G. Bene, *Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanction* (1991) 43 Stan. L. Rev. 907. See also *In re Echoles* (1970) 430 F.2d 347 at 349 (7th Cir.) (the purpose is "to protect the courts and the public from the official ministration of persons unfit to practice."); But cf. ABA Commission on Evaluation of Disciplinary Enforcement, American Bar Association, Report to the House of Delegates iii (1991) [hereinafter McKay Report] (which recommends that the distinction between punishment and compensation should be abolished, while recommending that disciplinary agencies should establish programmes to help complainants obtain compensation. See MacKay Report at 13.

of malpractice litigation against lawyers, the real issues at stake were misappropriation of money-fungibles. Fungible is equated with bare property in the sense that it is property appropriate for measure in pure economic or instrumental terms.[83] That being the case, the irredeemable harm theory is also less prevailing.

True, errors in criminal defence work can take the other turn, but that should not ordinarily be the basis for regulation of the legal market as a whole, because the entire market is not susceptible to information asymmetry or serious irredeemable harm. As both hypothesis increasingly mirage, the need for *ex ante* regulation undoubtedly lessens. As harms from incompetent lawyers become more quantifiable and foreseeable, the need for ex ante lawyer's regulations, in the form of RPC, certainly weakens, because danger of an irremediable harm lessens.[84]

(iii) Harm to the Legal System

Barton has suggested that the single strongest justification for conduct regulation is the positive externalities that competent, ethical lawyering offers to the court system.[84] It is reasoned that competent, ethical lawyers would observe the various court rules and ethics on filing of pleading, conducting litigation and non-litigious services in such manner that reduces administrative costs to the courts, allowing judges to focus upon their primary goal of expediting the fairest possible solutions to lawsuits. Yes, the court relies on a group of competent lawyers who understand the justice system to present disputes in recognised form, within regulation of time etc. In this respect, we are of the view that current conduct regulation offers little by way of competence regulation, and where it does, the nominal regulations (such as MCLE) are not enforced by regulators.

Most of the rules that ordinarily should curb agency costs and negative externalities are couched in mere aspirational terms. A reader of the RPC will note that the obligations to clients, adversaries, colleagues and the court, though phrased as duties are hortatory.[86] What is more, much of

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[83] Margaret Radin, *Reinterpreting Property*, Chicago: Univ of Chicago Press, 1993.

[84] Barton, above n. 13 at 440. Failure for instance includes preventing monopoly, information asymmetry, insufficient public goods and other negative externalities. See Richard Posner, *Economic Analysis of Law*, 8th ed., NY: Aspen Pub, 2011, 361; Steven Breyer, *Analyzing Regulatory Failure: Mismatch, Less Restrictive Alternatives, and Reform* (1979) 92 Harv. L. Rev. 549. However some market failures are addressed by ex post regulations. For example, the court through common law and statutory remedies do award damages for injury. Sometimes however, market failure does not trigger ex ante or ex post remedy because regulation is simply impracticable in the circumstance.

[85] Barton, above n. 13 at 448.

[86] Patrick L. Baude, *An Essay on the Regulation of the Legal Profession and the Future of Lawyer's Character* (1993) 68 Indiana L. J. 45. The learned writer stated: "I have never found a case of a lawyer disbarred for not performing pro bono service. In most states, however, a lawyer who steals from a client will be gone almost automatically. Yet it appears as though the enforcement apparatus applies equally to both situations. Thus the coercive force of the state both subsidizes the public relations process and allows the profession to corral the free riders who might not otherwise be willing to support the expense of maintaining generalized client confidence."

what the RPC seeks to prevent are remediable under present common law. For those who subscribe (like us) to the Ockham razor, the question is bound to be, why repeat in the RPC what is already provided for by the common law? Present regulations appear skewed on philosophical surplusage. Consider for example, the rules on devotion to client's, communication with the client, safekeeping of client's property, etc. These are already required by common law rules on contracts, fiduciaries and agency. Insofar as conduct regulation duplicates them, they are of questionable value.

Suggested Framework for Reformulating Conduct Regulation

We are not here advocating a scraping of present regulation for lawyers but we think that a measure of reformulation is imperative. For example, we can reason with those who side with increasing slide in conduct regulation as measure to assure competence and ethics for lawyers this way: most persons who go to tomatoes market know that there are varying levels of quality in the market. Why have government not regulated the market to eliminate substandard sellers? The answer is simply. A free-market system relies upon a combination of consumer expertise and *ex post* damages action to control the product. It is when the option fails that it makes sense to choose *ex ante* regulation. The market for legal services is in many respects no different. So, extensive regulation, as is the case with the RPC may just be a case of regulatory mismatch. For instance, in the United States, enforcement of conduct regulation has long been criticised as egregiously lax, because only about five percent of complaints result in sanction against lawyers.[87]

Sadly the current regulatory system under the RPC can only sanction, suspend or disbar erring lawyers. It does not compensate persons harmed by lawyer's misconduct. This gap can be filled by empowering disciplinary bodies with powers to grant compensation in addition powers of sanction. A reformulated rule should also require all lawyers to take out malpractice insurance as condition for licensure, in addition to payment of annual practice fees.[88]

To break the (supposed) information asymmetry about legal services, the rules should be reformulated in a manner to break barrier to information. Current regulations restricting advertisement, client referrals, solicitation should be abolished or restructured. The benefit to the public is increase

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[87] Leslie C. Lewin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions* (1998) 48 Amer. U.L. Rev. 1.

[88] Some states in the United State require attorney's to carry malpractice insurance. Insurance is a pre-condition for licensure in Canada, Australia, England and Ireland. See Barton, above n. 10 at 473.

competition, which can drive prices downwards and client better education about legal services. Disciplinary proceedings should enjoy greater publicity. Mandatory disclosure or report of discipline by erring members to potential clients can be required. Incompetence of lawyers should be a ground for discipline, as is the case with judicial officers. This is call for mandatory competence monitoring and education.

The RPC should be recast as narrowly as possible to serve the rationale for lawyers conduct regulation in the light of the interest of society. That way we can eliminate those regulations that harm the public to the benefit of lawyers. Justified regulations (wheat) should be separated from lawyers self-serving regulation (chaff). It is not possible to do a specific redrafting of the RPC in a work like this. That is beyond the scope of this paper. Space constraint also makes it less compelling.

It is conceivably to think that most lawyers would fight against reformulating the RPC, but that is of little consequence. Change is here to stay. Law is fast becoming business than a vocation. Globalisation, internet lawyering weaken the castle of the law's empire.[89]

We suggest that conduct regulation necessary to reduce agency costs and negative externality must closely fit the rationale, so the benefits of conduct regulation does not itself add unnecessary costs to society. As currently structured, there is reason to think that there are multiple conduct regulations under the RPC that inflict costs upon the public with little accompanying gain in court efficiency, especially in increasing the provision of justice. The common place to start is the regulation barring unauthorised practice of law. Strangely, the regulation is not limited to court-related activities. Most non-court related matters, such as advise and drafting of documents, should be deregulated to give consumers of legal services opportunity of substitute goods.[90] If the profession remains jealous (about its misplaced argument of protecting the public), the alternative of certification could ameliorate the feeling. Under a certification arrangement, experts in certain fields of law, not necessary lawyers, can be licensed or certified to render non-court services to consumers. Certification makes available substitute for services.[91]

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[89] Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers* (1990) 4 Geo. J. Leg. Ethics 209; John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century* (2000) 69 Fordham L. Rev. 83.

[90] Rhode, above n. 89.

[91] Barton, above n. 10 at 446. See also Judith Kilpatrick, Specialist Certification for Lawyers: What is Going On? (1997) 51 Univ. Miami L. Rev. 273 (growth of programme that certify lawyers as experts in certain areas of the practice).

Conclusion

Current conduct regulation are poorly equipped to serve the purpose of protecting clients, the public and the legal system. The system is structured under a regime that sanctions, suspend, or debar lawyers. It does not recompense for harm. Arguably, most the provisions of the RPC are open to conflicting analysis. While most lawyers would argue that they are designed to protect the public, the justice system, and the profession, converse argument that they are largely self-serving of professional narrow interest is not less rational. This accounts for why some suggest that the rules are designed (like most occupational licensure) to manipulate supply of legal services to maximise income of lawyers. One thing must be accepted. As the profession slowly transforms into business, with increasing availability of legal advice and service through the internet, with globalisation in the wings, anti-competition barriers would certainly weaken, requiring rational rethinking of many conduct regulation of the legal profession.