Whistleblowing and Whistleblowers: the law, the practice and the limitations

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At the end of this presentation you would be able to:

• identify key features of whistleblowing
• pin down best practices of whistleblowing throughout the world
• underline the importance of protecting whistleblowers
Literally:

as bringing an activity to a sharp conclusion as if by the blast of a whistle

Legally: no one definition

However it involves:

Speaking out publicly or to the authorities concerned about something wrong which may harm the public taking place in an organization either private or public, by a current or ex-employee of that organization or even by a member of the public who does not have any relationship with that organization.
• **WRONG-DOING?**
  1. financial scandal or cheat
  2. corruption or mismanagement
  3. health and safety issues
  4. breach of regulation/law

which consequently will harm or cause injury to **members of public**

**The disclosure must be in the public interest not of the public interest**
A POTENTIAL WHISTLE-BLOWER OPTIONS: HE MAY

- Decide to keep silent, why?
- Decide to blow the whistle internally
- Blow the whistle outside ------ by alerting the media --------- the most dangerous cause
- Anonymously blow the whistle ---- by leaking the information to those in more senior positions or to the media ------- but...
DILEMMA

WHISTLE-BLOWING

1. “IS A RISKY BUSINESS”
   - Discipline, dismissal, prosecution, ostracization, informants, snitches, rats, squabbles, sneak, stoolies, troublemaker or ‘maverick’

2. HELPFUL PRACTICE
   - prevent a great disaster or harm befalling on the general public,
   - instrument in support of good governance and a manifestation of a more open organizational culture
• STUDY OF WHISTLEBLOWERS IN THE US FOUND

• 100% of those who blew whistle were fired and most of them were unable to find new jobs.
• 17% lost their homes
• 54% were harassed by peers at workplaces
• 15% were subsequently divorced
• 80% suffered physical deterioration
• 90% reported emotional stress, depression and anxiety
• And sadly, 10% of them attempted suicide.
SO WHAT DID THE LAW SAY?

BLOWING WHISTLE BY EMPLOYEE INVOLVES BREACHING TWO DUTIES:

1. The shared implied duty of trust and confidence
2. Employee’s duty not to disclose employer’s confidential information

whistleblower can be dismissed, prosecuted except...
the disclosure is of wrong-doing, in the public interest and made to appropriate organization
WHISTLEBLOWING AROUND THE WORLD

- Internationally, there has been growing support for whistle blowing:
  - Particularly in the areas of good governance, public accountability and fight against corruption
    - Example:
      - Under Article 33 of the UNCAC signatory countries are encouraged to take domestic measures to incorporate in their legislations and other provisions protecting whistleblower witnesses and their families from any unwarranted treatment.
      - In Europe, Article 22 of the European Council’s Criminal Law Convention on Corruption called upon the signatory countries to provide for effective protection for whistleblowers and those who disclose/report criminal activities.
      - In the Americas, section 8 of article iii of the Inter-American Convention Against Corruption emphasizes the importance of whistleblower protection as one of anti-corruption instruments/tools
IN SOME COUNTRIES?

• A number of countries in Europe, the Americas, Asia have since enacted whistleblower protection legislations

• In Africa?
  • Only in South Africa that comprehensive whistleblower protection legislation can be found
WHISTLEBLOWERS?

"Coal miners used to carry caged canaries into the mines with them. When the canaries stopped singing, they knew they were in trouble and they had better get out fast. Whistleblowers in government and other large organizations are, in a way, our canaries. When they are free to `sing,' those institutions are healthy. When they are silenced, we are in trouble."

- Reed Irvine
THE POSITION IN NIGERIA

• As at the time of this presentation there is no provision, either in an Act of National Assembly or a law of any state expressly protecting whistleblowers, either in the public or private sectors in Nigeria
• However, there are two bills before the National Assembly seeking to protect disclosures made in public interest and whistleblowers ---- www.nassng.org
• “WHISTLEBLOWER PROTECTION BILL, 2008” (H.B. 117) sponsored by Senator Ganiyu Olanrewaju Solomon.

• SAFEGUARDED DISCLOSURE (WHISTLEBLOWERS, SPECIAL PROVISIONS, ETC.) BILL, 2009 (H.B. 167) sponsored by Honorable John Halims Agoda

Progression?

No WB reward mechanism, no agency responsible for enforcement, etc

• There have also been some elements of whistleblower ENCOURAGEMENT AND ASSURANCE IN SOME LEGISLATIONS, CODES OF PRACTICE AND POLICY DIRECTIVES
27. (1) Notwithstanding anything contained in the Criminal Code, Penal Code, the Official of Secrets Act, or any other enactment, no civil or criminal proceedings shall lie against an officer of any public institution, or against any person acting on behalf of a public institution, and no proceedings shall lie against such persons thereof, for the disclosure in good faith of any information, or any part thereof pursuant to this Act, for any consequences that flow from that disclosure, or for the failure to give any notice required under this Act, if care is taken to give the required notice.

(2) Nothing contained in the Criminal Code or Official Secrets Act shall prejudicially affect any public officer who, without authorization, discloses to any person, an information which he reasonably believes to show –

(a) a violation of any law, rule or regulation;

(b) mismanagement, gross waste of funds, fraud, and abuse of authority; or

(c) a substantial and specific danger to public health or safety notwithstanding that such information was not disclosed pursuant to the provision of this Act.

(3) No civil or criminal proceedings shall lie against any person receiving the information or further disclosing it.
CLAUSE 6.1.12 OF THE CODE PROVIDES:

“Banks should also establish ‘whistle blowing’ procedures that encourage (including by Assurance of confidentiality) all stakeholders (staff, customers, suppliers, applicants etc) to Report any unethical activity/breach of the corporate governance code using, among others, A special email or hotline to both the bank and the CBN”
IN OTHER JURISDICTIONS

- **IN THE US**
  - Pioneered in the United States as early as 1863 with the enactment by congress of the **FALSE CLAIMS ACT**
  - **IN 1989 THE WHISTLEBLOWER PROTECTION ACT** was passed --- Seeks to protect federal workers disclosing on violation of law, rule or regulation or any information disclosing abuse of authority, gross waste of funds ==== protects anonymous whistleblowers also
  - Excludes staff CIA, FBI, defense, judiciary and congress
  - Disclosures can be made internally, externally or to the press
  - The united states Office of Special Counsel (OSC) was established in 1979 ---- confidential disclosure channel for
  - Whistleblowers in the federal employment
  - **WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2007**
  - **NOV 2012, WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2012**
    - informants in the private sector who expose violations of securities law can receive between 10% and 30% of a penalty
**IN THE UK**

- **1999, THE PUBLIC INTEREST DISCLOSURE ACT (PIDA) WAS PASSED.** PIDA protects both public and private sector employees who make ‘Qualifying Disclosure’
  - Disclosure of crime, breach of regulation, health and safety hazards, etc
- unfair to dismiss an employee because he made a protected disclosure, regardless of it been in the public interest. and now as opposed to the past
- compensation under the Act for unfair dismissal is unlimited
DENMARK

- No, Denmark has no specific whistleblower protection laws in place
- However, the Danish Act on Processing of Personal Data establishes Danish Data Protection Agency – issues out guidelines and procedures on whistleblowing

www.datatilsynet.dk/english/whistleblowersystems/whistleblowerguidelines/

- reports on serious matters affecting peoples’ life, on fraud, corruption, bribery, health and safety can be made to the agency
- March 1, 1978 – Nigeria Airways F28-1000 crashes in Kano killing 16
- June 24, 1995 – Harka Air Services Tupolev 34 crashes on landing in Lagos killing 16
- November 13, 1995 – Nigeria Airways Boeing 737-2f9 crashes on landing in Kaduna killing 9
- November 7, 1996 – a Nigerian ADC (Aviation Development Corporation) Airline Boeing 727-231 flying from Port Harcourt to Lagos with 142 passengers and 9 crew members crashed on landing, plunging into a lagoon with all on board killed.
- May 4, 2002 – Nigerian EAS Airlines’ BAC 1-11-500 with 105 people on board crashed and burst into flames in a poor, densely populated suburb of Kano. 76 on board killed, including 72 on the ground bringing it to a total 148 dead.
October 22, 2005 – a Nigerian Bellview Airlines Boeing 737 airliner with 117 people on board crashed and disintegrated in flames shortly after taking-off from Lagos. All on board killed.

December 10, 2005 – a Nigerian Sosoliso Airlines DC-9 crashed in Port Harcourt, killing all 103 on board. Most on board were school children going home for Christmas.

September 17, 2006 – a Nigerian 18-seater Dornier 228 Air Force transport plane, carrying 15 senior army officers and three crew members crashed leaving only three survivors that sustained serious injuries.

June 3, 2012 - a Dana airlines flight 9J 992 carrying 153 passengers on board crashed at a residential area of Iju-ishaga, Lagos. No one survived the crash.
SO DO WE NEED WHISTLEBLOWER PROTECTION LAW IN NIGERIA
THANK YOU
RESOURCES

• www.theworldlawgroup.com
• http://works.bepress.com/ibrahim_sule/
SCENARIO

Chioma, who graduated in 1999 but got a job in 2012, has just discovered that her new employer (a pharmaceutical company licensed by NAFDAC to produce certain drugs in Nigeria) is producing fake drugs for sale in the Nigerian market. She is deeply troubled - on one hand she worries that the fake drugs may hurt unsuspecting Nigerians, if she does not speak out. On the other hand she is worried that she may lose her job, if she speaks out. So, she called you asking:

“what should I do?”