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CLIENT-ATTORNEY PRIVILEGE IN NIGERIA.

IN-HOUSE COUNSEL: "BEWARE". CORPORATIONS: "TAKE HEED"

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 ABSTRACT

This article seeks to provide a debate on privilege, particularly on client-attorney privilege, particularly in its application to in-house counsel under Nigerian law. Although the policy guiding privilege is normative and widely acknowledged across boundary lines and different legal concepts across diverse boundaries, the application of client-attorney privilege to in-house counsel in Nigeria is quite novel, same having never been discussed or adjudicated upon before Nigerian courts. As such, the author's opinion in this article is guided by decisions of foreign courts and opinions of foreign authors, which strongly support the statutory provisions under Nigerian evidence law guiding client-attorney privilege.

The author argues that client-attorney privilege applies to in-house counsel as much as it applies to external counsel and at best such in-house counsel ought to take caution in their activities by not intermeddling legal duties with business/executive functions so as not to lose the protection provided by client-attorney privilege.

Key Words: in-house counsel, external counsel, client-attorney privilege, legal practitioners, Nigeria.

INTRODUCTION

Owing to economic development, Nigeria has seen a massive increase in investment, which has in turn translated into a large number of new businesses/companies and a growth of existing businesses/companies. Such growth has occasioned increase in staff, including legal practitioners. As such, there is a larger amount of lawyers working in-house than ever before. Thus, the need for this article cannot be overemphasized. Can employers rely on the provisions of Nigerian law to prevent communications to and from in-house legal practitioners from being disclosed in court? This is a burning issue in present day Nigeria, especially in the corporate world.

In this article, the author will contend that under Nigerian law, particularly the provisions of the Evidence Act,[1] in-house counsel are covered by client-attorney privilege (the "**Privilege**"), similar to attorneys in private practice ("**External Counsel**"). Furthermore, this article will discuss steps to be taken by in-house counsel and their employers to ensure communications made in the course of their employment remain privileged. This article will also employ American and Indian cases to fill in the void created by a dearth of Nigerian superior court decisions on this area, especially where such foreign cases apply provisions which are similar to the provisions of the Nigerian Evidence Act.

CLIENT-ATTORNEY PRIVILEGE, OR NOT?

Client-attorney privilege has long been thought of as one of the oldest and most sacrosanct privileges in the law of evidence. The privilege was created to prevent the attorney from having to testify, under oath, against his client, because such testimony would violate the attorney's honor as a gentleman.[2] At its most basic, privilege ensures "that one who seeks advice or aid from a lawyer should be completely free of any fear that his secrets will be uncovered"[3]. The aim of this privilege is to ensure that the client is more willing to communicate to counsel things that might otherwise be suppressed. In theory, such candor and honesty will assist the attorney in providing more accurate, well-reasoned professional advice, and the client can be secured in the knowledge that his statements to his lawyer will not be taken as an adverse admission or used against his interest.[4] As such, the privilege seeks to further encourage the relationship between a lawyer and

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[1] [2011], Act Number 18.

[2] See Edna Selan Epstein, "The Attorney-Client Privilege and the Work-Product Doctrine"; Section of Litigation, American Bar Association at 2 (3d ed. 1997).

[3] *United States v. Grand Jury Investigation*, 401 F. Supp. 361, 369 (Western District of Pennsylvania, United States District Court. 1975).

[4] Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion About Attorney Communications*, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated, 48 AM. U. L. REV. 967, 969-70 (1999).

his client, in order that such lawyer may effectively discharge the duty imposed on him by such client.

On the other hand, there is the argument that having regard to the complex nature of modern day corporations, their large corporate structures and their activities, it is often the case that the best and only evidence about the conduct of many corporations can be obtained from their own communications, including communications made with its lawyers and admissions made therein. Therefore, it is not unlikely that since a lot of money is usually involved in large scale investigations into the activities of such corporations, especially multinationals and a lot of corporate goodwill stands to be lost if the corporations are found wanting in their activities, such corporations would go to any length to conceal evidence of wrongdoing and frustrate investigations into their activities. As such, if corporations are further allowed to use the advantage conferred by the privilege, the public interest in detecting and punishing corporate crime will inevitably be defeated.

ANALYSIS OF NIGERIAN LAW PROVISION

Under Nigerian law, privilege is provided for in Section 192 of the Evidence Act. It states:

> *No **Legal Practitioner** shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him **in the course and for the purpose of his employment as such legal practitioner** by or on behalf of his **client**, or to state the contents or conditions of any document with which he has become acquainted in the course and for the purpose of his **professional employment** or to disclose any advice given by him to his client in the course and for the purpose of such employment.*

From a judicial point of view, this provision of the Evidence Act was given judicial assent in Abubakar v. Chuks, although in this case the Supreme Court of Nigeria held that the privilege would not apply, since the relevant information was already in the public domain.[5] Nevertheless, there is still a dearth of judicial authorities in Nigeria that thoroughly examine section 192 of the Evidence Act in its application to attorney-client privilege for in-house counsel.

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[5] (2007) 18 NWLR (Pt.1066) 386, Per Niki Tobi, JSC. See also Dawaki General Enterprises Ltd & Anor v Amaco Enterprises Ltd & Ors (1999) 3 NWLR (Pt. 594) 224, 227 – 228 (Court of Appeal). These cases however did not extend to the application of Section 192 of the Evidence Act to in-house counsel.

LEGAL PRACTITIONER: IN-HOUSE OR EXTERNAL?

The author opines that "Legal Practitioner" as used in section 192 above refers to both in-house counsel and external counsel. It should be noted that section 192 does not distinguish the categories of legal practitioners that enjoy the privilege it provides for. As such, the application of the provision is general to all Legal Practitioners. The Interpretation Act[6] in its definition of Legal Practitioner states that ""Legal practitioner" has the meaning assigned to it by the Legal Practitioners Act".[7]

The Legal Practitioners Act[8] (LPA) consequently defines Legal Practitioner to mean:

> A person entitled in accordance with the provisions of this Act to practice as a barrister or as a barrister and solicitor, either generally or for the purposes of any particular office or proceedings.[9]

It should be noted that the definition as well as the provision of the Legal Practitioners Act dealing with entitlement to practice[10] does not create a distinction between in-house (who may be regarded as solicitors for the purpose of the LPA) and external counsel and as such no such distinction is contemplated in section 192 of the Evidence Act in the application of the privilege. In fact, the Rules of Professional Conduct for Legal Practitioners (RPC)[11] contemplates legal practitioners working as in-house counsel without losing their rights and privileges, save for those it specifically lists out.[12]

The question of the applicability of privilege to in-house counsel has always been a burning issue in American courts. In line with the author's position, it has consistently been held by the American courts that there is no distinction between in-house or external counsel for the purpose of the privilege.[13] The only problem exists in practice, since the benefit of privilege is not obtained merely by speaking to a lawyer.[14]

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[6] CAP. I23, LFN 2004. (The Interpretation Act in its application section (Section 1) states that it applies to the provisions of any enactment (including the Evidence Act) except in so far as the contrary intention appears in this Act or the enactment in question).
[7] Section 18 (1).
[8] CAP L11, Laws of the Federation of Nigeria, 2004.
[9] Section 24.
[10] Section 2 Legal Practitioners Act.
[11] Made pursuant to the Legal Practitioners Act.
[12] Rule 8 RPC
[13] United States v. United Shoe Machine Corp., 89 F. Supp. 357, 360 (United States District Court - District of Massachusetts, 1950)
[14] See Rossi v. Blue Cross & Blue Shield, 73 N.Y.2d 588, 593 (1989), where the New York Court of Appeal stated that in the case of corporate staff counsel, the need to apply attorney-client privilege narrowly is more heightened.

As a way of buttressing the author's position, is important to examine this topic from the Indian viewpoint, since the Nigerian Evidence Act largely traces its origins from the provisions of the Indian Evidence Act.[15] Their similarities can be seen in the resemblance between the provisions of section 192 of the Nigerian Evidence Act stated above and section 126 of the Indian Evidence Act 1872. The wording of section 126 of the Indian Evidence Act applies to "barristers or attorneys", similar to the Nigerian Evidence Act's position, which applies to Legal Practitioners, i.e. persons entitled to practice as barristers or barristers and solicitors. However, the Bar Council of India Rules[16] provides that once an advocate[17] accepts a job as a full-time salaried employee, such advocate shall cease to practice as an advocate,[18] and in effect cease to be called a barrister or attorney. It follows therefore, that such person will cease to enjoy the benefits an advocate would have in practice, including privilege. However, the current judicial attitude in India suggests otherwise, as the High Court of Bombay[19] after taking into consideration the provisions of the Bar Council of India Rules went ahead to hold that salaried employees who advise their employers on legal matters should get the same protection as barristers or attorneys under the Indian Evidence Act, provided that the communication between them is not made in furtherance of an illegal purpose. Even though some authors[20] and indeed foreign courts[21] have disregarded the weight of this decision, at the very least, it suggests a leaning towards this author's position in this article.

An alternative argument as to the interpretation to be given to section 192 in its application to in-house counsel can be seen if the surrounding provisions are examined, i.e. section 193 of the Evidence Act. Section 193 provides that "The provisions of section 192 shall apply to interpreters and the clerks of legal practitioners".

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[15] See the similarities between section 192 of the Nigerian Evidence Act and section 126 of the Indian Evidence Act. See also Z. Adangor, "What Is Innovative in the Evidence Act, 2011?" Journal of Law, Policy and Globalization, Vol.43, 2015; Hon. Justice Abiodun Akinyemi, "The Evidence Act 2011 – An Appraisal", being a paper presented at the Ogun State Bar And Bench Forum, on Thursday, 11th July, 2013 at the June 12 Cultural Centre, Abeokuta, Ogun State, Nigeria.
[16] Part VI, Chapter II, Section VII, Rule 49.
[17] The term "Advocates as used in India refers to both Barristers and Solicitors, as the practice of law in India is fused. Persons who have obtained a degree in law may be admitted as advocates in India. (See section 24 Advocates Act 1961 of India), as such there is no distinction between solicitors and barristers in India.
[18] See Satish Kumar Sharma v. Bar Council of Himachal Pradesh (AIR 2001 SC 509), Indian Supreme Court.
[19] Municipal Corporation of Greater Bombay v. Vijay Metal Works (AIR 1982 Bom 6)
[20] L. J. Savitt and F. L. Nowels, "Attorney-Client Privilege For In-House Counsel Is Not Absolute In Foreign Jurisdictions", The Metropolitan Corporate Counsel, October 2007, Page 18; S. Chan, "An in-house lawyer's right to legal privilege", Asia Law, May 2008, Page 29.
[21] In Shire Development Inc. v. Cadila Healthcare Ltd., C.A. No. 10-581-KAJ (D. Del. Oct 19, 2012), a Delaware District Court found that the in-house counsel of an Indian company is not entitled to protections of confidentiality and legal privilege given the prevailing law in India. The Court was persuaded by the opinion of Justice B.N. Srikrishna (former Justice of the Supreme Court of India), who was appointed as a neutral expert.

As such, it may be argued that section 193 suggests that the class of legal practitioners referred to in section 192 are those legal practitioners known to use clerks and interpreters in the course of their service to clients, i.e. external counsel.

Nevertheless, this view does not do justice to the intention of the drafters of the Evidence Act. Reading section 192 and 193 together, it is clear that the provisions of section 193 are supplemental to the provisions of section 192, i.e. it applies to legal practitioners and their interpreters and clerks, if any. It was the intention of the drafters of the Evidence Act that section 193 should prevent an absurd situation where a legal practitioner benefits from privilege, but their employees through whom communication is made with clients are not protected. As such, section 193 should not be interpreted to restrict the interpretation of section 192, but rather to expand it where the circumstances permit.

CLIENT AND LEGAL/PROFESSIONAL EMPLOYMENT

Since, the duty of privilege under the above provision is owed to a "client", it is important to understand who a client is for the purpose of section 192. This is important in order to determine whether a corporation can be a client of its own employee. It is also important since from the wording of section 192 above, privilege can only exist where there is a client.

Black's Law Dictionary defines client as "a person or entity that employs a professional for advice or help in that professional's line of work; especially one in whose interest a lawyer acts, as by giving advice, appearing in court, or handling a matter".

From the definition in Black's law dictionary, a corporation is a client if the legal practitioner employed is so employed for the purpose of rendering services connected with his profession as a legal practitioner. Thus, a corporation that employs legal practitioners for the purpose of providing legal services (in-house counsel) is a client of such legal practitioner so far as the services provided by the legal practitioner are legal in nature. For clarity, "legal" is defined in the same Black's law dictionary as "of, relating to, or involving law generally; falling within the province of law".

Consequently, the employment contemplated by section 192 of the Evidence Act is employment of a legal nature to perform services connected with the practice of law. Thus, a legal practitioner employed to provide human resource services (excluding any legal services) would not necessarily enjoy the privilege provided for in section 192.

Furthermore, from the provisions of section 192, the communication must be in the course and for the purpose of the legal practitioner's employment as such legal practitioner. There are thus two conjunctive tests to determine which communication is privileged under the provisions of section

192. Firstly, the communication must be made in the course of the legal practitioners employment and secondly, the communication must be made to further the purpose of the legal practitioners employment.

As regards information being in the course of the legal practitioner's employment, it is important for such legal practitioner to have a portfolio that denotes a legal capacity and for communications made to and from him to contain legal issues. This point was elucidated in an appeal before the Court of Appeal of the State of California[22], where the appellate Court held that in respect of communications made in an insurance claims investigation, to the extent that the insurance claims adjusters (who were in fact licensed attorneys) employed by an Insurance company were performing claims investigations, any information obtained therein constituting factual matters concerning the investigation would not be covered by privilege.

It is submitted that if the "Claims Adjusters" in this case were designated as "Legal Counsels", and their investigations and communications flowing therefrom also revealed legal matters, the decision of the Court of Appeal may have been different.

As regards the communication being made to further the purpose of the legal practitioner's employment, even though a legal practitioner (in-house or external) has been instructed to provide advice on a certain legal issue, where the materials, documents or information provided to him are in connection with some other pressing issues which are not legal in nature (e.g. to provide financial advice based on the company's recent profit and loss account, especially where such legal practitioner is also a qualified accountant), such materials, documents or information will not be covered by privilege. Thus in Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp,[23] the Plaintiff asked the New York court to compel an attorney who was an in-house environmental counsel for the defendants and who was also a negotiator of the contract in issue, to answer certain deposition questions that involved the contract. The Court found that the attorney had been acting as a business advisor and not as an attorney. As such, the attorney could not rely on privilege.

In conclusion, subject to certain restrictions in its application (such as that they act in a legal rather than an executive capacity) in-house lawyers are included within the ambit of legal advice privilege. This position is justified on the ground that, although the communications between the corporation and its in-house counsel are internal, nevertheless such in-house counsel performs the

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[22] See ,202 Ranch LLC v. Superior Court, 113 Cal. App. 4th 1377, 1390 (2003) (American case, which noted this exact same point)

[23] No. 93 Civ. 5125, 1996 U.S. Dist. LEXIS 671 (U.S. District Court, Southern District of New York Jan. 25, 1996).

same function as any other external counsel. As Lord Denning put it, "(In-house counsel) are regarded by the law as in every respect in the same position as those who practice on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their clients and to the court. They must respect the same confidences. They and their clients have the same privileges. I have myself in my early days settled scores of affidavits of documents for the employers of such legal advisers. I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege; and I have never questioned it".[24]

As such, the author posits that Nigerian courts will take this approach, same having been adopted in other jurisdictions, including in England. Although this provides only persuasive authority, nevertheless, the strength of the arguments provided above give little reason for any derogation.

In summary, for practical purposes, a couple of points can be deduced from the above analysis of the Nigerian law provision in respect of privilege which in-house counsel and corporations alike can take in order to reduce their exposure to investigative eyes prying into their communications and seeking to use such communications in court.

To ensure that the communications appear as being made to in-house counsel in the course of and for the purpose of providing legal services as a legal practitioner, the following practices may be considered:

- Attachment titles, names, headers and all pages of documents, emails and other communications made to such in-house counsel, should be captioned: **"Privileged and Confidential/Attorney-Client Communication."**

- While sending such communication to in-house counsel, the practice of using the abbreviation **"FYI"** (For your information), which is very widely used in the corporate world in Nigeria should be refrained from. Using this can raise the notion that legal services were not sought from the in-house counsel as such communication was only to keep him informed. Instead, using terms that will indicate that legal services are required as per the communication: e.g. **"See below/attached the requested information as regards the pending legal matter/issue".**

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[24] Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners (No 2) [1972] 2 All ER 353, at 376, Paragraphs G – J, (Court of Appeal.

- The designation of the in-house counsel's job portfolio should carry a legal connotation. For example, it is easier to prove that communications made to a legal practitioner employed as a **"General Counsel"** is made in the course of and for the purpose of providing legal services in his capacity as a legal practitioner than for a corporation to prove same if such communications were made to a legal practitioner employed as a "Human Resources Manager" or "Claims Adjuster".

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