



Communication Between Legal Practitioner and Client in Nigeria- Critical Analysis of Extent of Privilege and Notable Exceptions

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ABSTRACT

Original Research Article

This paper critically analysed the extent of privilege enjoyed in “communication between a legal practitioner and client under the Nigerian legal system”. Owing to incidences of impostors, the paper carefully explained the meaning of “legal practitioner and the procedure for becoming a lawyer as well as “remaining in good standing in the legal profession in Nigeria”. From statutory and judicial decisions, the paper established that the communication between legal practitioner and client was privileged but this is however subject to notable exceptions. It was recommended that clients should, while taking the services of any lawyer, ensure that such lawyer is “in good standing” while legal practitioner acting for a client must ensure that communication between them do not offend the exceptions as to be used as a shield to protect or cover the commission of crime.

Keywords: Communication, Client, Crime, Practitioner, Privilege.

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1.0 Introduction

This aim of this paper is to provide clarity on the extent of “privilege enjoyed in the communication between a lawyer and his client under the Nigerian legal system”. This serves to illuminate the ill-thinking that “every communication between a legal practitioner and client is privileged and subject to non-disclosure restrictions”. It also explains who is eligible to “practice as a legal practitioner in Nigeria” so that potential clients will be warned against the dangers of engaging quacks or impostors. Although, client- lawyer privilege has long been thought of as one of the oldest and most sacrosanct privileges in the law of evidence, it is not without recognised exceptions under Nigerian statutes. It is correct to assert that 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 honour as a gentleman”.ⁱ 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”.ⁱⁱ Privilege is said to “ensure that the client is more willing to communicate to counsel things that might otherwise be suppressed. In theory, such candour 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. As such, the privilege seeks to further encourage the relationship between a lawyer and his client, in order that such lawyer may effectively discharge the duty imposed on him by such client”.

Against this backdrop, the paper will further discuss the topic under the following headings namely-“Who is a legal practitioner or lawyer in Nigeria?”, “Rules of Professional Conduct for Legal Practitioners”; “Relation between legal practitioner towards client”; “Status of communication between legal practitioner and client”; “Exceptions to non-disclosure principle of communication between a legal practitioner and a client in the course of employment”; “Conclusion and recommendations”.

2.0 Who is a legal practitioner or lawyer in Nigeria?

In this paper, the nomenclatures “legal practitioner” and “lawyer” are used interchangeably as unarguably, they mean the same thing in the Nigerian legal system. The Interpretation Act,ⁱⁱⁱ states unequivocally that ““Legal practitioner has the meaning assigned to it by the Legal Practitioners Act”. The Legal Practitioners Act^{iv} interpreted “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.” In the first instance, “membership of the Legal Profession in Nigeria is regulated by law”. *Section 2(1)* of the “Legal Practitioners Act provides three classes of persons entitled to practice law in Nigeria” namely:

1. Those entitled to practice generally in Nigeria.
2. Those entitled to practice for the purpose of any particular office such as the Attorney General and Law Officers in public or civil service.
3. Those entitled to practice by warrant for the purpose of any particular proceeding under *section 2(2) and (3)* of the Legal Practitioners Act.

These are the persons called lawyers especially those entitled to practice generally in Nigeria. This means those “whose names are on the Roll of Legal Practitioners kept by the Registrar of the Supreme Court”. Consequently, “a person shall be entitled to be called to the Nigerian Bar and have his name on the Roll of Legal Practitioners kept by the Registrar of the Supreme Court” if-

- a) He is a citizen of Nigeria, or non-citizen of Nigeria;
- b) He produces a qualifying Certificate to the Body of Benchers; and (c) He satisfies the Benchers that he is of good character. He must be a fit and proper person.
- c) He has been called to the Bar by the Body of Benchers; and
- d) He produces a Certificate of his Call to the Bar to the Registrar of the Supreme Court.

Under this subgroup, the person must firstly have earned a good First Degree in Law from a recognised University, either in Nigeria or overseas, after having been found to be “worthy in character and learning. Only persons “duly called to the Nigerian Bar” by “the Body of Benchers” and are up-to-date

with their Annual Practicing Fees and of good standing at the Bar have right of audience in Courts “as members of the legal profession”. Other details are found in the “Legal Practitioners Act which is a crucial legislation governing the legal profession in Nigeria” providing “a framework for the regulation of legal practitioners, ensuring standards of professional conduct and protecting the public interest”.

It may not be out of place to add here that all lawyers in Nigeria must pay their practicing fees in the obligatory manner stipulated in Rule 9 of the RPC, 2023. Specifically, it is enacted therein that

- (1) A lawyer shall pay his annual practicing fees not later than 31st March in every year, provided that a lawyer enrolled during the year shall pay his practicing fee within one month of enrolment.
- (2) A lawyer shall not claim in any court or before any judicial tribunal that he has paid his annual practicing fees where he is in default.
- (3) A lawyer shall not sign documents, including pleadings, affidavits, depositions, applications, instruments, agreements, letters, deeds, memoranda, reports, legal opinions and process or file any such documents as a legal practitioner, legal officer or adviser of any governmental department or Ministry or any corporation where he is still in default of payment of his Annual Practicing Fees.

Regarding Seal and Stamp, it is provided in “Rule 10 of RPC, 2023” that “(1) A lawyer, acting in his capacity as a legal practitioner, legal officer or adviser of any government department or Ministry or any corporation, shall not sign or file a legal document unless there is affixed on any such document a seal and stamp approved by the Nigerian Bar Association. (2) For the purpose of this rule, legal documents include pleadings, affidavits, depositions, applications, instruments, agreements, deeds, letters, memoranda, reports, legal opinions, or any similar documents. (3) Where a lawyer signs or files any legal document as defined under paragraph (2) of this rule, and in any of the capacities mentioned in paragraph (1) of this rule, the document so signed or filed shall be deemed not to have been duly or properly signed or filed.”

It must be emphasised compliance with “the Rule on Seal and Stamp” is mandatory although “failure to affix the approved seal and stamp of the NBA on a process does not render the process null and void”. It has been variously held to be an irregularity that can be cured.^v In *UBA Plc & Anor v View & Trust Ventures Ltd & Anor*,^{vi} the decision was reached that “The purpose of affixing the Nigerian Bar Association stamp and seal is to ensure that the legal practitioner who filed the process in Court have his name on the roll of legal practitioners in Nigeria and that imposters and quacks do not infiltrate the legal profession. In *Audu v FRN*,^{vii} it was held that the seal and stamp is designed to root out non-lawyers who parade themselves as Legal Practitioners.

3.0 Rules of Professional Conduct for Legal Practitioners

All lawyers in Nigeria are bound by the extant “Rules of Professional Conduct”^{viii} for Legal Practitioners, 2023” which is “made pursuant to *section 12(4)* of the Legal Practitioners Act, 1975”.^{ix} Hence, it is mandated that “1. A Lawyer shall uphold and observe the rule of law, promote and foster the cause of justice, maintain a high standard of professional conduct, and shall not engage in any conduct which is unbecoming of a legal practitioner” and “2. A lawyer shall not knowingly do any act or make any omission or Engage in any conduct designed to lead to the admission into the legal Profession of a person who is unsuitable for admission by reason of his moral Character or insufficient qualification or for any other reason.”^x The lawyer is a “Minister in the temple of justice”. As decreed, “the primary duty of a lawyer towards a client is the duty to devote his attention, energy and expertise to the service of his client and, subject to any rule of law, to act in a manner consistent with the best interest of his client”.

4.0 Relation Between Legal Practitioner Towards Client

Rule 14 of the “RPC 2023” provides for the relation between a lawyer and a client thus-

- “1 (1) A lawyer shall devote his attention, energy and expertise to the service of his client and, subject to any rule of law, act in a manner consistent with the best interest of his client.
- (2) Without prejudice to the generality of paragraph (1) of this rule, lawyer shall-
- (a) consult with his client in all questions of doubt which do not fall within his discretion;
 - (b) keep the client informed of the progress and any important development in the cause or matter as may be reasonably necessary;
 - (c) warn his client against any particular risk which is likely to occur in the course of the matter;
 - (d) respond as promptly as reasonably possible to request for information by the client; and
 - (e) where he considers the client's claim or defence to be hopeless, inform him accordingly.
- (3) When representing a client, a lawyer may, where permissible, exercise his independent professional judgment to waive or fail to assert a right or position of his client.
- (4) A lawyer employed in respect of a court case shall be personally present or be properly represented throughout the proceedings in court.
- (5) Any negligence by a lawyer in handling a client's affairs may amount to professional misconduct.”

5.0 Status of Communication Between Legal Practitioner and Client

It is settled law that “communication between a legal practitioner and a client in the course of their professional relationship which contains statements disparaging a third party is privileged”. This covers “communication between a legal practitioner and a witness in the course of judicial proceedings”. Under *section 192* of the Evidence Act, 2011 as amended, is provided that

- (1) 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 condition 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.
- (2) Provided that nothing in this section shall protect from disclosure-
 - a) any such communication made in furtherance of any illegal purpose.
 - b) any fact observed by any legal practitioner in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.
- (3) It is immaterial whether the attention of such legal practitioner was or was not directed to such fact by or on behalf of his client.
- (4) The obligation stated in this section continues after the employment has ceased.

The above section “bars a legal practitioner from disclosing any communication made to him by his client in the course of employment or to disclose the contents of a document of which he became acquainted with in the course of his employment or to disclose any advice he gave his client in the course of his employment”. However, this “principle of non-disclosure does not extend to communication made in furtherance of any illegal act or purpose or any fact showing that a crime or fraud has been committed since the commencement of his employment”. Further to the foregoing, the above provisions “shall apply to interpreters and the clerks of legal practitioners”.^{xi} This is absolute privilege. However, for a statement to be privileged, the communication must be “professional” and any other utterances which are not sufficiently established for professional advice are not protected. In *More v Weaver*,^{xii} the defendants made certain uncomplimentary statements about the business capacity and financial position of the plaintiff while writing to her solicitor. Based on this, the plaintiff sued, claiming damages. Scrutton L J held that:

Suppose a client who has queried with the builder who was building a house for him, goes to his solicitor, discusses the position with him statements regarding the builder which are untrue, those statements will be privileged. But suppose that in the middle of the conversation, the client being of gossiping disposition says 'Have you heard that Jones has run off with Mrs. Brown?', that would not be relevant to the discussion and therefore not privileged.

In *Munster v Lamb*,^{xiii} "both parties were barristers at law. A married couple were charged with administering drugs to the members of the plaintiff's house at which they were guests on an evening to facilitate its burglary. The husband was convicted but the wife was acquitted on the ground that she acted under the influence of her husband. The defendant Barrister Lamb, in the course of defending the couple, at the trial, suggested that the plaintiff might have been keeping drugs in his house for immoral or criminal purposes. There was no evidence that the plaintiff kept drugs in his house for such purposes. The plaintiff then sued the defendant's counsel for defamation". Judgment of the lower Court was affirmed and it was decided that the statement of claim disclosed no reasonable cause of action, and it would be struck out based on the principle of law that no action will lie against an advocate for defamatory words spoken in the course of an inquiry before a judicial tribunal, although they were uttered maliciously and not with the object of supporting the case of his client, and are uttered without any justification, and from personal ill-will anger towards the person defamed or are irrelevant to every issue of fact which is contested before the tribunal.

The privilege of counsel is similar to that of a judge and a witness, and it is based on the same principle, that it is dispensable in the interest of suitors, that those who take part in a trial should be free and independent in the discharge of their duty, and to that end, their conduct should not be subject to be called to question in a subsequent proceeding, otherwise, there would be no end to judicial proceedings. Delivering judgement in this case, Brett MR explained the law thus:

About counsel, the questions of malice, bona fides, and relevancy cannot be raised. The only question is whether what is complained of has been said in the course of the administration of law. If that be so, the case against a counsel must be stopped at once. No action of any kind, no criminal prosecution can be maintained against a defendant, when it is established that the words complained of were uttered by him as counsel in the course of a judicial inquiry, that is, an inquiry before any court of justice into any matter concerning the administration of law. It may be said that the privilege of counsel is absolute because he speaks in the presence of a judge who can check him if what he says is improper.^{xiv}

Thus, "a barrister may be committed for contempt of court or called to order for the unbecoming language used in the discharge of his functions as an advocate". Lord Mansfield explained and summarised the position of the law hundreds of years ago in *R v Skinner*^{xv} when he held that "Neither party, witness, counsel, jury, or judge can be put to answer civilly or criminally for words spoken in office. If the words spoken are opprobrious or irrelevant to the case, the court may take notice of them as contempt and examine on information. If anything, *mala men* are found upon such inquiry, it will be punished suitably."^{xvi}

6.0 Exceptions to Non-Disclosure Principle of Communication Between A Legal Practitioner and A Client in the Course of Employment

Circumstances abound when "communication between legal and client" will not be regarded as "secret as to make it inadmissible". These are - "(a) any such communication made in furtherance of any illegal purpose; or (b) any fact observed by any legal practitioner in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment".^{xvii} This provision came for direct interpretation in *Obiri v Obiri*.^{xviii} In that case, the appellant contended that the trial Court was wrong in admitting the evidence of a named Legal Practitioner who acted as counsel to the appellant in express contravention of *section 192 (1), (2) and (3)* of the Evidence Act 2011. The Court resolved the matter as follows

"The appellant's grouse is the testimony of A. A. Ahmed Esq. a legal practitioner. From his evidence as can be seen from PP 122-126 of the records of proceedings, A. A. Ahmed, Esq. as CWA testified that a lady by name Worgu called him on phone on 15/10/2017 and requested him to secure the bail of her friend who lives in Port Harcourt and another at the Force Headquarters Abuja. At the police station he was shown a petition written against the suspects Ext 001 and upon perusal of the said petition he requested that the police should allow the matter to be settled. They were released on bail and both the application for bail and the bail bond were admitted in evidence and marked as exhibits 003 and 004 respectively. He also stated that he was the surety to the two suspects and they were released on bail on 18/10/2017. He finally stated that K. O. Ogbonna was never at the police force Headquarters. Now the conflict sought to be resolved by the above evidence is the Appellant's deposition that up to the time of filing the motion for amendment of the statement of defence the Defendant/Applicant was still in police custody at Abuja, hence, he could not sign his further witness deposition and also bring his additional witness deposition. Furthermore, his counsel K. O. Ogbonna, Esq. also

travelled to Abuja so as to effect the release of the Defendant/Applicant on bail, whereof he was out of town within the period of time to file the amended statement defence. On the strength of the evidence adduced to resolve the conflict in the affidavit evidence of parties, the trial Court held at P142 of the record thus:

‘On 3rd January 2018, 1st witness A. A. Ahmed, Esq. called by the claimant/Respondent testified. During cross examination, it was clear to this Honourable Court that he was the one that secured the bail of the Defendant. His name and signature are boldly crested on the bail bond, furthermore, just to be able to exhibit this fact before this Honourable Court, CWA also wrote a letter to the Deputy Inspector General of Police and the Commissioner of Police Homicide section, Criminal Intel & Invest. Dept. (FCID) Abuja to obtain a CTC of the bail bond evidencing same.

Now, relying on the testimony of A. A. Ahmed Esq. as CWA to refuse the second application for amendment of the statement of defence, can the evidence of A. A. Ahmed, Esq. be said to infringe the provisions of *section 192 (1),(2) and (3) of the Evidence Act 2011*? The operative words in the section are disclosure of communication made with the client. In *Abubakar v Chuks* (2007) LPELR 52 @ 15-16; Tobi, JSC (of blessed Memory) gave a meaning of the word "disclose" in this way: "The operative and functional word in the section is "disclose" the word means to make known, especially something that has been kept secret, publicly. Disclosure, the noun variant of the word "disclose" means the act of disclosing secret facts. A person can only disclose a fact which is not known to public. In other words, a person can only disclose facts which are hidden from the public. And public here does act necessarily convey its general unguarded parlance of people in general or for use of many persons. It could mean for the use of any person. It conveys the opposite meaning of "not' private."

"From the above dicta, the issue is whether the communication in controversy can be regarded as a secret communication between a counsel and his client, or where documents are involved, where the contents there of are regarded as secret as between a counsel and a client. In such situation, a counsel cannot divulge the information or contents of the documents without the express consent of the client. CWA in this case who is a legal practitioner acting for the Appellant disclosed what he did to the Appellant when he was detained by the police. The act performed by CWA was to apply for bail of the Appellant and that was evinced by Exhibits 003 and the bail bond as in Exhibit 004. He also testified that K. O. Ogbonna Esq. was never at the police Headquarters at the time he alleged to have been there. Are these facts secret communications to warrant invoking the provisions of *section 192 (1), (2) and (3) of the Evidence Act 2011*?

I think not. This is so because the fact that CWA (A. A. Ahmed, Esq.) was not the only person aware that he acted for and applied for a bail of the Appellant. This being the case then, Exhibits 003 and 004 can also not be regarded as secret documents that CWA cannot disclose in Court. The fact relating to matters CWA testified are not only known to him and the Appellant but to many people. Those facts cannot be said to be secret communication between a counsel and his client. See *Iyeke v Abu* (2015) LPELR 25735 and *Mainstreet Bank Registrars Ltd v Ahaiwe* (2019) LPELR 40757."

Conclusively, a careful reading of *section 192(1), (2) and (3) of the Evidence Act, 2011 as amended* would reveal that "what was envisaged is the disclosure of communication to a third party who is not a party to the purported transaction". The law is settled that "where the evidence or statement of the legal practitioner are on matters already known to the parties, the evidence or statements cannot be said to enjoy any privilege". This was the decision in *Dawaki Gen. Ent. Ltd. v. Amafco Ent. Ltd*^{xix} and reiterated in *FADAC Enterprises Ltd & Anor v Chizea & Anor*.^{xx}

7.0 Conclusion and recommendations

The Nigerian legal system offers robust protection for communication between legal practitioner and client. Obligation of non-disclosure of such communication persists even after the employment has ceased. However, as disclosed in this paper, the obligation of non-disclosure does not extend to instances where commission of crime is involved or to matters that are already in the public domain. In order to enjoy the full benefits of this non-disclosure privilege, it is recommended that potential clients should only retain the services of qualified legal practitioners that in good professional standing which information either the "Chief Registrar of Supreme Court of Nigeria" or the "Nigerian Bar Association" can avail anyone interested within and outside Nigeria. On the part of legal practitioner, the RPC, 2023 forbids "a legal practitioner from injuring the interest of his client" and disobedience of the Rules "amounts to professional misconduct with dire consequences". It is thus recommended that every "legal practitioner" must ensure that "communication with a client" does not offend the notable exceptions on non-disclosure as to be used as a shield to protect or cover the commission of crime.

8.0 References

1. Epstein, E. S., "The Attorney-Client Privilege and the Work-Product Doctrine"; *Section of Litigation, American Bar Association* at 2 (3d ed. 1997).
2. *United States v. Grand Jury Investigation*, 401 F. Supp. 361, 369 (Western District of Pennsylvania, United States District Court. 1975).
3. CAP. I23, LFN 2004.
4. *Section 24 of the Legal Practitioners Act.*

5. This was also the ratio decidendi in *Yaki v Bagudu* (2015) 18 NWLR (Pt. 1491) 288, *Wayo v Nduul* (2019) 4 NWLR (Pt. 1661) 60 and *Boko v Nungwa* (2019)1 NWLR (Pt. 1654) 395.
6. (2022) LPELR-57923(CA).
7. (2024) LPELR-62977(SC) (Pp. 20-21 paras. A-A).
8. Hereinafter abbreviated and called “RPC”.
9. Cap. L11 LFN, 2004.
10. Rules 1 and 2 of the RPC, 2023.
11. *Section 193* of the Evidence Act, 2011 as amended.
12. (1928) 2 KB 520.
13. (1833) 11 QBD 588.
14. *Slabbert v Brett* (1133/2006) (2007) ZAECHC 152.
15. (1990) 1 SCR 1235.
16. 98 ER 529 at 530.
17. *Section 192* of the Evidence Act, 2011 as amended.
18. (2019) LPELR-48670(CA) (Pp. 11-17 paras. A-A) per Lamido, JCA.
19. [1999] 3 NWLR (Pt. 594) 224, 236
20. (2023) LPELR-60624(SC) (Pp. 24-25 paras. C).