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**LEGAL PRIVILEGE OF IN-HOUSE COUNSEL –
THE POSITION UNDER NIGERIAN LAW**



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INTRODUCTION

During legal representations, a lot of sensitive matters are usually disclosed to a counsel and it would be unfair to the client if these matters can be divulged without any restrictions.

More so, unrestricted disclosure of information would discourage clients from providing information that is important for the determination of a matter.

The attorney-client privilege is therefore important as it encourages full and frank disclosure in discussions between legal advisers and their clients without the fear that disclosure of such communications may prejudice the interests of the client in the future.

LEGAL PRIVILEGE OF A COUNSEL/LEGAL PRACTITIONER UNDER NIGERIAN LAW

There are provisions governing the attorney-client privilege under Nigerian law. The Evidence Act 2011 (Evidence Act) mandates a legal practitioner not to disclose any communication made to

him in the course and for the purpose of his employment, or 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 disclose any advice given by him to his client in the course and for the purpose of such employment. [1]

However, there are exceptions to this provision. Exceptions include the fact that a legal practitioner shall not by virtue of this provision be prevented from disclosure when such information is made in furtherance of any illegal purpose.

A legal practitioner is also not prevented from disclosing any fact observed by such legal practitioner in the course of his employment, showing that any crime or fraud has been committed since the commencement of his employment.[2]

Again, the Rules of Professional Conduct for Legal Practitioners 2007 (RPC), prohibit a lawyer from revealing communications between him and his client for the advantage of the legal practitioner or a third party without the consent of the client.[3]

[1] Evidence Act 2011 (Evidence Act), Section 92 (1).

[2] Ibid. Section 92 (1) (a)-(b).

[3] The Rules of Professional Conduct 2007 (RPC), Rule 19(1).



However, a legal practitioner is not precluded from revealing such communications where the communications evince an intention to commit crime,[4] the communications are required by law or a court order,[5] or the communications are needed by the legal practitioner to establish and collect his fees or to defend himself or his associates in an allegation of wrongful conduct.[6]

LEGAL PRIVILEGE OF AN IN-HOUSE COUNSEL

While it is not in dispute that legal privilege applies to an external counsel, what has been constantly asked is if legal privilege also extends to an in-house counsel.

Since it has been established that the privilege covers all legal practitioners, the question to be answered is if an in-house counsel is to be regarded as a legal practitioner under the scope of the provisions above.

A. WHO IS A COUNSEL?

Although the Evidence Act does not define who a legal practitioner is for the applicability of the rule of legal privilege, the Interpretation Act states that a 'Legal Practitioner' is interpreted to mean legal practitioner as defined by the Legal Practitioners Act (LPA).[7]

Similarly, the RPC defines a lawyer to mean the definition given to a legal practitioner under the LPA.

The LPA defines a legal practitioner as a person who is entitled to practise as a barrister or as a barrister and solicitor, either generally or for the purposes of any particular office or proceedings. Such Legal Practitioner's name must also be on the Roll.[8]

From this definition, it is clear that the definition of a legal practitioner does not distinguish between an in-house counsel and an external counsel. Once a legal practitioner's name is on the Roll, he is regarded as a legal practitioner and is bound by the rule of legal privilege provided for in the Evidence Act and RPC.

B. WHO IS A CLIENT?

For the rule of legal privilege to apply, there is the need to establish the existence of an attorney/client relationship between the counsel and the client. Instructively, the 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." [9]

[4] Ibid. Rule 19(3).

[5] Ibid. Rule 19(3).

[6] Ibid. Rule 19(3).

[7] Interpretation Act CAP. 123, LFN 2004, Section 18 (definition of legal practitioner).

[8] The Legal Practitioners Act CAP. L11, LFN 2004 (LPA), Sections 2 and 24. The 'Roll' is a list, kept by the Registrar of the Supreme Court, of persons entitled to practice as such in Nigeria.

[9] Black's Law Dictionary (10th edn, 2014) Pg. 309.



By the definition of ‘client’ above, it is clear that an entity that employs an in-house counsel for the purposes of providing legal advice can be regarded as a client of such in-house counsel.

Although there is no case law interpreting the rule of legal privilege to specifically apply to in-house counsel, however, based on the definition of a ‘legal practitioner’ and ‘client’ above, it can be inferred that an in-house counsel employed by a private employer to give legal advice has legal privilege if such in-house counsel’s name is on the Roll.

In addition, it should be noted that the LPA expressly states that a person is entitled to practice as a barrister or solicitor if and only if, his name is on the Roll.[10]

This means that there are no other requirements to be met (other than being registered at a Bar) such as periodic payment of practising fees, to continue the legal privilege.

Furthermore, even when an in-house counsel performs the work in a foreign country based on his qualification to practise as a Legal Practitioner in Nigeria, such in-house counsel retains his legal privilege.

Whether such legal privilege can be enforced in a foreign country will however be dependent on the laws of that foreign country.

LEGAL PRIVILEGE OF A FOREIGN IN-HOUSE COUNSEL

The legal privilege in the Evidence Act and the RPC is only applicable to a legal practitioner called to the Nigerian Bar; whose name is on the Roll.[11]

If Nigerian courts do not respect the privilege asserted by a foreign in-house counsel before Nigerian courts, this would promote a situation where information disclosed to/discussed with Nigerian counsel would be privileged, but not privileged if discussed with/disclosed to foreign counsel in Nigeria.

As the privilege is that of the client and not that of the lawyer, it is the client that would suffer from this dichotomy. Nigerian courts are permitted to apply foreign laws if the contracts before them contain foreign law clauses.

Therefore, if the Nigerian court is directed to the foreign law which grants privilege to the foreign in-house counsel, it is likely that the court will grant the same level of legal privilege available to such foreign counsel under that foreign law.

[10] LPA, Section 2.

[11] LPA, Sections 2 and 7. RPC, Rules 19 and 56 (definition of lawyer).



SCOPE OF THE LEGAL PRIVILEGE

A legal practitioner is mandated not to disclose oral and written communications of its client.[12]

This obligation of the legal practitioner (in-house counsel or external counsel) extends to oral or written communications made by any employee of the in-house counsel's employer while seeking legal advice in the normal course of such employee's employment.

Furthermore, to the extent that the advice was given by the in-house counsel in his capacity as a legal practitioner, it is immaterial that such in-house counsel is a member of a business team. Besides, the role of a legal practitioner in a business team is for the team to rely on his legal expertise.

In addition, the legal privilege of an in-house counsel under Nigerian law includes communication with external counsel on preparing, discussing and/or drafting litigation work products and on (the termination of) litigation (assuming litigation exists or is contemplated).

This is because the Nigerian legal system does not distinguish between in-house counsel and external counsel.

Again, the Evidence Act and RPC rules on legal privilege cover any form of communication made to the legal practitioner in the course and for

the purpose of his employment. An in-house counsel is usually employed to manage the legal portfolio of the company which includes litigation.

Even though such in-house counsel cannot practice as a barrister in the course of his employment as an in-house counsel,[13] discussing litigation work product with external counsel is still part of the in-house counsel's job description as a legal practitioner.

Consequently, such in-house counsel still enjoys the legal privilege provided for in the Evidence Act and the RPC.

Furthermore, if the communication between any other employee of the employer and the external counsel was made within the employee's ordinary course of employment, such employee is deemed to be an agent of the company and a client of the external counsel for the purpose of section 192 of the Evidence Act and rule 19 of the RPC.

As such, by the rule of legal privilege, the external counsel is prohibited from disclosing such communications, without the consent of the client.

In addition, the legal privilege extends to communication between the other employee and the in-house counsel when the in-house counsel advises on legal matters to the extent that the other employee is seeking such legal advice in the ordinary course of his employment

[12] Evidence Act, Section 192 (1).

[13] RPC, Rule 8(1) & (2).

Such employee is deemed to be an agent of the company and a client of the in-house counsel for the purpose of section 192 of the Evidence Act and rule 19 of the RPC.

As such, by the rule of legal privilege, the in-house counsel is prohibited from disclosing such communications.

COMMUNICATING UNDER THE INSTRUCTION OF AN EXTERNAL COUNSEL WHILE CONDUCTING AN INTERNAL INVESTIGATION

There is no duty on a company's employee working and communicating under the instruction of an external counsel conducting an internal investigation, which prevents such employee from disclosing such communications to a third party.

This is because, that sort of communication is not anticipated by the Evidence Act. The Evidence Act prohibits a legal practitioner from disclosing any advice given by him to his client in the course and for the purpose of such employment but does not prohibit any other person from disclosing such advice.[14]

However, where the above scenario relates to an in-house counsel, the communication can only be regarded as privileged if the work or communication was made to him in his course of employment as a legal practitioner in the company.

INDEPENDENCE OF THE IN-HOUSE COUNSEL

Rules 14 to 25 of the RPC govern the relationship between a counsel and his client. Although no rule specifically requires that counsel be independent from the client, some rules highlight independent aspects of the relationship.

These rules[15] apply to the independence of counsel in respect of his/her relationship with the client. For example, 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.[16]

CONCLUSION

It is our position that the only parameter for determining that a person is a legal practitioner in Nigeria, is whether such legal practitioner has his name on the Roll.

Once this is established, the legal privilege provided for in the Evidence Act as well as the RPC would apply to an in-house counsel. There is therefore no difference between an external counsel and in-house counsel when it comes to the issue of legal privilege as the privilege depends on the existence of an attorney/client relationship between counsel and the client.

The breach of this legal privilege will therefore attract sanctions and offer the different remedies available to the employer/client of the counsel.

[14] Section 192 of the Evidence Act, 2011.

[15] Ibid. Rules 14(3) & 15(1), (2)(a)(b).

[16] Ibid. Rule 14 (3).

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