PUBLIC INTEREST AND PRIVILEGE IN THE RELATIONSHIP BETWEEN LAWYERS AND CLIENTS

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1.0 INTRODUCTION

The adversarial nature of the administration of justice has of necessity engrafted the lawyer as an important participant in it. The lawyer is like a sphinx-a mysterious phenomenon with a woman's head and a lion's body. As "an officer of the Court", the lawyer is expected to present the client's case before a Judge in the innocence, elegance and forthrightness of a woman. He is to assist the court in ensuring that justice is done by not withholding any admissible evidence or applicable enactment or precedent. In presenting the facts and law, he must deliberately promote all methods and secure all compliances that would accelerate the hearing and determination of the case before the court.[2]

However, the lawyer in addition to this public duty also owes a "private duty" to his client '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 the client'.[3] In the performance of this duty, the lawyer is like the lion, ferociously sifting through the oral and documentary evidence availed him by his client in order to eliminate potentially harmful, though useful evidence and endeavoring to ensure that any enactment against the interest of his client is set aside and any binding precedent overruled. At this point, it matters not that the evidence may be useful to the opposing party. The lawyer's task is to secure victory for his client and in the process jettison any superfluous though useful evidence.

The natural response to this dual role sitting in the same person is to perceive him as a repository of conflicting correlatives. In truth, that is the mystery called the lawyer-promoting the end of justice by the very means that appear to undermine it. In that essential area of admissibility of evidence, the vital tool by which a lawyer conflates these conflicts is the principle of privilege. The classic definition of this type of privilege is that propounded by John Henry Wigmore (Wigmore) one of the great early American writers on the law of evidence:

> "Where legal advice of any kind is sought from a professional legal adviser, in his capacity as such, the communications

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[2] See generally Rules 30, 31 and 32 of the Rules of Professional Conduct for Legal Practitioners (RPC) 2007.
[3] Rule 14 of the RPC 2007

> relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the privilege be waived".[4]

The Concept of Privilege

Privilege is generally in law understood to mean "a legal advantage, allowance or permission" such as a benefit or exemption. This benefit or exemption is conferred by law on a class of persons as a result of which such class of persons, are exempted from a duty or burden or liability to which others are subject[5]. Such class of persons may also by the privilege enjoy benefits that others are denied. Privilege allows a legislator to say on the floor of the House what may be defamatory if spoken elsewhere or by some other person. It is for such situations that legislative privileges whether absolute or qualified are created by statute. A lawyer may also by virtue of rank enjoy privileges.[6] Privilege permits some persons in a bankruptcy action to recoup their debts before other non-privileged creditors.

Hohfeld, in his highly insightful and analytical paper[7] distinguished between a right and a privilege thus,:

> "As indicated in the above scheme of jural relations, a *privilege* is the opposite of a duty, and the correlative of a "no right". In the example last put, whereas X has a *right* or *claim* that Y, the other man, should stay off the land, he himself has the privilege of entering on the land; or in the equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off"[8]

One of the most useful lessons in the distinction made by **Hohfeld** between a right and a privilege is to help us note that when we say "X is a privilege and not a right" we do not mean that just because X is a privilege, it cannot be enforced as a right against other persons. X can be so enforced for as long as the conditions for enforcing the privilege are met. It is in the enjoyment of X that we call it a privilege since X is enjoyed as a benefit or

[4] Wigmore on Evidence Volume 8 Section 2292

[5]" New Brunswick Broadcasting Company Vs. Nova Scotia (1993) 1 SCR 319 (Canada)

[6] It is for this reason that the right to sit in the inner Bar, mention cases before other lawyers (some of whom may be seniors at the Bar) and wear silk gowns in court appearances which are permitted by law to Senior Advocates of Nigeria are called "privileges"

[7] Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as applied in Judicial reasoning. 23 Yale Law Journal 16

[8] Ibid page 32

exemption conferred by law, which others have a duty to respect. Hohfeld shows this distinction in his use of what he calls jural opposites and jural correlatives;

> "……If further evidence be needed as to the fundamental and important difference between a right (or claim) and a privilege, surely it is found in the fact that the correlative of the latter relation is a "no-right," there being no single term available to express the latter conception. Thus, the correlative of X's right that Y shall not enter on the land is Y's duty not to enter; but the correlative of X's privilege of entering himself is manifestly Y's "no-right" that X shall not enter"[9]

Privilege in the Solicitor-Client Relationship

One of the essential principles of the adversarial system of justice- whether litigation, arbitration, mediation or conciliation is that relevance determines admissibility of evidence. It is therefore the prerogative of the Judge to receive all relevant evidence without let or hindrance. Conversely, the client must also be encouraged to disclose every fact related to or connected with the brief he has given to his lawyer to assist the lawyer in proffering sound legal advice and preparing for any contingent litigation that may arise. It is believed that if the client knows that he is safe to divulge to his lawyer all that he knows without any apprehension that some of that communication or information given in evidence would be used against him, the aim of justice would be fostered. This is the foundation of the solicitor-client privilege.

The solicitor-client privilege, variously described as "lawyer-client privilege", "attorney-client privilege" or "legal professional privilege" is one of the oldest and the most venerated doctrines under common law. Notwithstanding its antiquity, its importance lies in the pivotal role it plays in the lawyer's professional functions since it involves an intersection of the mechanism of adjudication with the law of privacy. It operates not only as a rule of evidence but also as a rule of ethics in view of its being grounded in confidentiality.

The doctrine of privilege appears to have had its roots in Roman law. Although reported decisions on it began to come up more than 400 years ago, the widely accepted genesis of what represents the common law position on this doctrine is attributed to Lord Brougham[10] in the case of Greenough v Gaskell[11]:

[9] Ibid page 33
[10] Some controversy surrounds this eminent jurist as stated in note 25.

> "The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources, deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counselor half his case"[12]

It is paradoxical that the privilege is founded on public interest; the public interest of ensuring that a party is put in a position where he can make "a clean breast of his troubles to his advisers" and that "there shall be complete and unqualified confidence in the mind of the client when he goes to his solicitor or when he goes to his barrister that that which he divulges to him will never be disclosed to anybody else."[13]

Types of Solicitor-Client Privilege

It may be useful before giving a historical sketch of the doctrine of Solicitor-Client privilege to describe the types of such privileges that presently exist in modern law. The term Solicitor-Client privilege is not in use anymore in England. What exists in England is the "Legal professional privilege" which consists of two branches:

i. Legal advice privilege and
ii. Litigation privilege

Legal advice privilege is the privilege attached to communication between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to his client. Litigation privilege encompasses communications

[11] The brief historical survey outlined later in this paper casts some doubt on the reliability of this case as correctly stating the position at common law before 1833.
[12] See note 26
[13] Hobbs v Hobbs and Cousens (1959) 3 All ER 827

between the client's professional legal advisers and third parties if made for the purpose of pending or contemplated litigation. Litigation privilege also covers communications between the client or his agent and third parties if made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the purpose of obtaining advise upon pending or contemplated litigation.[14] [15]

In Canada, the term "Solicitor-Client privilege" has been retained[16] to correspond to legal advice privilege. In Australia, legal advice privilege and litigation privilege have now been codified[17]. Section 118 of the Evidence Act provides:

> "Evidence is not be adduced if, on objection by a client the court finds that adducing the evidence will result in disclosure of:
>
> a. A confidential communication made between a client and a lawyer or
> b. A confidential communication made between two or more lawyers acting for the client or
> c. The contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person for the dominant purpose of the lawyer or one or more of the lawyers providing legal advice to the client "

Another interesting innovation in Australia is the codification of two other Solicitor-Client privileges which are the joint-client privilege and the common-interest privilege.
Joint-Client privilege covers where the solicitor is retained by clients who pursue the same objectives in relation to the subject matter of the advice e.g. the insurer and the assured
Common-Interest privilege applies wherever different parties share a common goal to the subject matter of the legal advice or litigation, even though their interest may otherwise diverge.[18]
It is doubtful whether common-interest privilege still exists in England[19].

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[14] Three Rivers District Council & Ors. Vs. Governor and Company of the Bank of England (No. 6) 2004 UK AL 48
[15] This term has been criticized in Waugh Vs. British Railways Board (1979) 2 ALL E.R. 1169 as inaccurate because the privilege is that of the client and not the lawyer.
[16] Blank v Canada (Minister of Justice) 2006 CC 39
[17] Evidence Act 1995 adopted by the Provinces: See Evidence Act (New South Wales) and Evidence Act 2001 (Tasmania)
[18] Svenka Handelsbanken Vs. Sun Alliance (1995) 2 Lloyd's report 84. See also Section 118(b) of the Evidence Act 1995 (Australia)
[19] City of Gotha Vs. Sotheby (1995) 1 WLR 114

In the United States of America, legal advice privilege and litigation privilege are also recognized. However, the variant of litigation privilege is that which is called work product doctrine[20]. The US concept may be appropriately described as "a doctrine" rather than a privilege since some material it protects can be made subject to discovery, if the facts thereby concealed cannot be ascertained from other sources. However, in the case of litigation privilege it operates as a true privilege. If it applies, then there is immunity from discovery in legal proceedings to the same extent where legal advice privilege applies.[21]

In this paper, "Solicitor-Client privilege" would be used broadly to cover all the four types of privilege described above. Before the solicitor-client privilege as it relates to Nigeria is examined, there is a need to briefly sketch the historical development of the concept of privilege not only because Nigeria, as a former British colony has English common law roots but also because of the illumination that the historical sketch gives on how the principles were framed.

A historical sketch of the doctrine of the solicitor-client privilege

The case law on privilege began in 1654 during which time the important distinction between a barrister and solicitor at common law seemed to have shaped how the doctrine was applied then. According to Hazard:

> *"Conceptually, the distinction may explain why at one time the privilege was thought to belong to the lawyer rather than the client. A barrister was considered not merely an "officer" of the court but a member of it, who could no more properly be asked to reveal a client's confidences than a modern judge could be asked to disclose matters heard in camera"*[22]

The case of *Spark Vs. Middleton*[23] appeared to have delimited the scope of the doctrine even then (almost 400 years ago). The privilege applied to matters communicated to counsel when he acted as such, or not before or after he ceased to act and certainly not to matters such counsel observed as distinct from what his client communicated to him. However, where a witness had acted previously as a solicitor such a witness was compelled to give evidence of his client's communication to him in relation to the legal advice he gave.[24]

[20] Hickman Vs. Taylor 329 US 495 (1947)
[21] See Waugh Vs. British Railways Board (Supra)
[22] See a well-written article by Geoffrey C. Hazard: An Historical Perspective on the lawyer-client privilege.1-1-1978 faculty scholarship services paper 2406 . http://digitalcommons.law.yale.edu/fss_papers/2406
[23] 83 E.R. 1079 (1664)
[24] Radcliffe Vs. Fursman 1 E.R. 1101 (1730)

English common law in 1743 further delimited the scope by denying privilege to communication that was not necessary to the matter in which the lawyer who retained and if the communication related to a highly criminal act.[25]

It must be said that during this period down to 1833, the case law was replete with conflicting decisions, some affirming privilege in some circumstances and others denying it in identical circumstances.[26]

In 1833, the foundation of the modern law of privilege, at least in England was laid in Bolton Vs. Corporation of Liverpool[27] and Greenough Vs. Gaskell[28]. It is best to repeat Hazard's analysis of the judgments in the two cases (coincidentally by the same Judge, Lord Brougham):

> "Together, *Bolton* and *Greenough* encompass a broad range of communications: from client to lawyer, and from lawyer to client; legal advice in a strict technical sense and business-financial assistance of the sort rendered by an office lawyer, communications between barrister and client and between solicitor and client; exchanges in contemplation of litigation and ones not occasioned by the specific prospect of imminent litigation; and communications as such and the transmission of tangible items, such as pre-existing documents, from client to lawyer.
>
> Brougham held *all* those matters immune from disclosure. To reach that result he had to narrow the scope of some cases, to construe others squitingly, and simply to ignore many more. In particular, he handled *Anneseley v Anglesea* in about the only way possible, that is by not citing it at all. As a demonstration of manipulating precedent Brougham's performance is unsurpassed"[29]

Although ***Greenough*** was not fully accepted as an authoritative statement of the law in subsequent cases, it is now referred to as the "fons et origo" of the modern law of privilege.[30] One good thing that ***Greenough*** achieved was to bring into sharp focus the two

[25] Annesley Vs. Anglesen 17 HOJ St. Trials 1139 (1743)
[26] Such conflicting decisions include Robson Vs. Kemp 170 E.R. 499 (1780) Garmsford Vs. Grammar 107 E.R. 516 (1807) Preston Vs. Carr 148 EQ 874 (1826)
[27] 39 E.R. 614 (1833)
[28] 39 E.R. 618 (1833)
[29] Page 1084
[30] See Three Rivers Case. Note 14

conflicting principles raised by the doctrine of privilege which still lingers till today: the principle to promote and compel the disclosure of the whole truth relevant to the matters in question and the need to assure a client that it is not every fact or documents that he has given his lawyer that the defendant can have access to in the assertion of his defence.

This historical sketch seems to have revealed one thing: the conflict between the lawyer's duty to assist the Court in the search for truth and the lawyer's duty of confidentiality is rooted in antiquity. Secondly, ***Greenough*** only papered over the cracks in Lord Brougham's yeoman's effort at imposing a near absolute privilege on solicitor-client communication.[31]

The doctrine of privilege involves and has been demonstrated as a battle of public interests: the public interest in preserving confidence in order to promote full and frank disclosure against the public interest that seeks the discovery of that truth already disclosed in order to ensure that justice is done. The dilemma of privilege is that it endeavours to restrict the discovery of truth only to the boundaries of the duty of confidentiality.

The tension generated in the process of such restriction has engendered the difficulty encountered in understanding this branch of evidence. One of the most troubling is the distinction between confidentiality and privilege. The sources of privilege in many commonwealth jurisdictions are common law[32] and statutes. However, there are some other jurisdictions which have in addition to statutory privilege also have rules of professional conduct for their lawyers[33] imposing a duty of confidentiality in respect of communications with their clients. Where the duty of confidentiality is more restrictive than the rule of privilege, the lawyer is free from anxiety.

However, where the duty of confidentiality imposes a burden of secrecy in circumstances where the duty of privilege imposes a duty to disclose then the lawyer is in a quandary. On this issue it is necessary to understand what the law in Nigeria provides. In other words, the question should be asked, which is the overriding public interest: the search for truth or the need to preserve confidences? What is our societal and cultural attitude to privileges in the first place, not least the lawyer client privilege? These and other related questions as they relate to Nigerian law will be discussed in this paper.

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[31] It is worthwhile to refer to Hazard's comment on Brougham (See page 1083 of the article, Note 98)
"Brougham, it may be recalled, had already made a considerable the contribution to the legal definition of the lawyer's role. While at the bar he had represented Queen Caroline in her disputation with George IV over their marital difference and obligations. To counter an effort by the King to divorce Caroline on the ground of adultery, Brougham as her counsel announced readiness to assert a defense, that of recrimination, which would raise questions of the legitimacy of royal succession. And in doing so he stated what remains the basic credo of loyalty to client: "separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion".

[32] England, Canada, Australia, New Zealand, India, Singapore and Nigeria are obvious examples.

[33] The USA, Canada, India and Nigeria have such provisions.

It cannot be denied that there is always some anxiety about all privileges, including the lawyer-client privilege. The campaign for the abolition of the rank of the Senior Advocate of Nigeria has been vociferous and relentless, though it appears dormant at this time. The battle on the principle of favouring "educationally disadvantaged States in Nigeria" went all through to the Supreme Court.[34]

With regard to the lawyer-client privilege the following issues will arise. What has been or would be our response as a nation? Are we likely to see the exercise of the privilege as a desire of a person wishing to avoid even the most admirable actions to be known by everyone or seeking to conceal some legally dubious or dirty business? In other words, is the lawyer-client privilege a principle of privacy or a device for cover ups? This perplexity with regard to the doctrine of privilege in the lawyer-client relationship is ancient and global. It is important to understand how it would be approached under Nigerian law.

The Solicitor-Client Privilege under Nigerian Law

Strictly speaking, the solicitor-client privilege under Nigerian law is codified and found in Sections 192-195 of the Evidence Act, 2011. Sections 192 and 195 which create the privilege provide thus:

> "***Section 192(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: 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.

[34] Badejo Vs. Federal Minister of Education (1996) 8 NWLR Pt. 464 15

(2) 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.

(3) The obligation stated in this section continues after the employment has ceased."

"Section 195- No one shall be compelled to disclose to the court any confidential communication which has taken place between him and a legal practitioner consulted by him, unless he offers himself as a witness in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known, in order to explain any evidence which he has given, but no others."

The important difference between Sections 192 and 195 is that Section 192 makes any "communication made by a client to his lawyer "in the course and for the purpose of his employment as such legal practitioner" privileged whilst Section 195 only attaches privilege to "any confidential communication which has taken place between him and a legal practitioner consulted by him". It appears therefore that whilst a lawyer is barred from disclosing any communication between him and his client, the client may be questioned on any communication which is not confidential, if he opts not to testify but on any communication whether confidential or not, which is necessary to clarify any evidence volunteered by him as a witness. It appears however that he cannot be compelled to testify. It also does not appear as if Nigerian law recognizes any other privilege other than legal advice privilege. There is no judicial decision on this point. Indeed, there are only five (5) Nigerian decisions on the doctrine of privilege that I could lay my hands on in the course of researching for this paper. I am not alone since standard texts on evidence and ethics in Nigeria have discovered only these cases.[35]

These cases, with the exception of **Eguabor,** deserve in my respectful opinion no more than a footnote reference. The *ratio decidendi* in ***Horn Vs. Rickard*** was actually on the propriety of a legal practitioner deposing to an affidavit. This practice was deprecated as it offers an opportunity for a breach of lawyer-client confidentiality. In the ***Awoniyi*** case, it was the dissenting opinion of Kutigi JCA (as he then was) that mentioned in passing that a plaintiff cannot in attempting to establish publication rely on communication of the purported libelous document from a defendant to his counsel. In the ***Oshunrinde*** case, the point to be decided in a motion filed before the High Court to set aside a judgment was whether the

[35] These cases are Queen Vs. Eguabor (1962) 1 All NR 287; Horn Vs. Rickard (1963) 2 All NR 40; Awoniyi Vs. Registered Trustees of AMORC (1990) 6 NWLR Pt. 154 42; Oshunrinde Vs. Akande (1996) 6 NWLR Pt. 455 383 and Akintoye Vs. Omole (Unreported) Suit No: HAD/10/75 delivered on 6th June, 1978

content in a counsel's file jacket could be relied upon by the judge. The Supreme Court held that the content of such document was not privileged since it does not come up within Section 170(1) (now 192(1) of the Evidence Act.

In the ***Akintoye*** case, the defendant in a case came to instruct X, a legal practitioner in respect of a suit without knowing that X was already acting for the Plaintiff. The defendant on getting to X's chambers saw the managing clerk to whom he made some disclosures before the clerk took him to X, who refused the brief. Ogundare J. (as he then was, of blessed memory) held as follows;

> "I am of the view that the confidential relationship commences the moment the client enters the chambers and starts talking to the managing clerk or any employee about the purpose of his coming to the chambers (i.e. to instruct counsel). Even if I am wrong in this view, I will still hold that there are circumstances other than the relationship of solicitor-client in its stricter sense that will impose a duty on a solicitor to maintain confidence and one of such circumstances is the case here, where a would be client had in the belief that he was instructing a solicitor passed some information regarding his case to the managing clerk of the solicitor"[36]

The most interesting of these cases is ***Eguabor***. In that case, the accused in his effort to resist the admissibility of a statement he made to the police denied its content stating that what he told the police was that he was sick and could not get up, which was different from what was recorded. At this point the counsel to the accused said "I do not object to the statement being admitted, my original instructions were that the accused went to tap palm wine on the day in question". The Court admitted the statement and the accused was convicted. At the Supreme Court Brett FJ, delivering the leading judgment said inter alia:

> "If counsel finds that his client's conduct is such that he cannot, consistently with his duty to the court continue to represent him, he may ask the court to release him. But whether he takes this extreme course or not, he is at all times under an obligation not to disclose the instructions he has received, except with the express or implied consent of his client or former client."[37]

[36] See Orojo: Professional Conduct of Legal Practitioners in Nigeria, 3rd Edition 211
[37] See Orojo Ibid page 209-210

In my view as stated earlier, these cases are too few and too terse to be helpful in construing the provisions of the enactments on privilege and confidentiality in Nigeria. It is therefore advisable to proceed on the footing that Nigerian case law on privilege and confidentiality is indeed almost non-existent.

In summary, given a liberal interpretation, the law of privilege in Nigeria can be stated thus;

a. A lawyer cannot be permitted (but may be compelled) without his client's express consent to disclose any of the following matters made known to him in the course of and for the purpose of his employment as such legal practitioner;
   i. Any communication (whether confidential or not)
   ii. The content or condition of any document with which he became acquainted (whether or not given to him by the client)
   iii. Any advice given by him to his client.

b. A client cannot be compelled (but may be permitted) to testify on any confidential communication which has taken place between him and a legal practitioner consulted (even though not employed) by him.

c. If the client testifies, he may be compelled or permitted to disclose any confidential communication as directed by the court in order to explain any evidence he has already given and no more.

The anachronism of the Evidence Act, 2011

It must be noted that though the Evidence Act was passed in 2011, it remains a codification of common law as at 1872, which was first introduced in India before being imported into Nigeria in 1945[38]. In 1871, an English lawyer and judge, Sir Fitzjames Stephen published a digest of the English law of evidence by which he attempted to codify the English common law of evidence as at that date. The Evidence Act that was passed in Nigeria in 1945 reflected 1871 English common law. The provisions of the Evidence Act in relation to the lawyer-client privilege, has remained unchanged from 1945 till date. In truth therefore, Nigerian law of lawyer-client privilege though pretending to be only five years old, is indeed over 140 years old. This is the reason why modern developments in the law which have witnessed the evolution of other lawyer-client privileges apart from the legal advice privilege such as joint-client privilege, common-interest privilege and litigation privilege do not still form part of our law.

[38] See Aguda: The Law of Evidence, 4th Edition, 4

Litigation privilege, as stated earlier, affords protection from disclosure of certain documents created and communications made by third parties – persons other than the lawyer, his client and their respective agents. Litigation privilege applies to all documents created and communications made by any person when litigation was pending, in reasonable contemplation and for the dominant purpose of obtaining legal advice as to the litigation or evidence for use in the same.[39]

It may be worthwhile also at this stage to observe a very fundamental omission in the Evidence Act, 2011 which has shut the door against other means apart from the Evidence Act that could have helped in the development of the law of lawyer-client privilege in Nigeria. In the repealed Evidence Act, Section 5(a) of the Act provides thus;

> "Nothing in this Act shall;
>
> a. Prejudice the admissibility of any evidence which would apart from the provisions of this Act be admissible:

This provision has been accepted as making it possible for Nigerian Courts to admit evidence made admissible under common law but which has not been expressly made inadmissible by the Evidence Act.[40] Under the present Act, Section 5(a) has now been replaced with a more restrictive Section 3 which provides thus;

> "Nothing in this Act, shall prejudice the admissibility of any evidence that is made admissible by any other legislation validly in force in Nigeria"

The sad spectacle under our law of evidence as it presently stands is that rules of common law can no longer be relied on to admit any piece of evidence which has not been expressly prohibited under the Evidence Act. Secondly, the only "legislation" that Section 3 of the Evidence Act can take advantage of must be a Federal legislation since evidence is now under the exclusive legislative list and States cannot legislate on evidence as such legislation would be unconstitutional.[41] Notwithstanding this, neither Section 5(a) of the old law or Section 3 of the new law can be of help in importing into Nigeria other forms of lawyer-client privilege since the doctrine of privilege seeks to exclude rather than admit evidence.

[39] Alfred Compton (NO 2.) Amusement Macho Limited Vs. Customs and Excise Commissioners (No 2) 1974 A.C. 405
[40] See R Vs. Itule (1961) 1 All NR 462
[41] See Item 23 on the Exclusive legislative list of the Second Schedule to the 1999 Constitution (as amended)

Ethical Duty of Confidentiality and the Lawyer-Client Privilege

Apart from all these problems that have been created by the weaknesses in the Evidence Act as already pointed out and the paucity of case law in Nigeria on the lawyer-client privilege, there is also the additional complication presented by the Rules of Professional Conduct for legal practitioners governing the ethical duty of confidentiality by a Nigerian lawyer. Rule 19 of the RPC 2007 provides thus;

> (1) Except as provided under sub-rule (3) of this rule, all oral or written communications made by a client to his lawyer in the normal course of professional employment are privileged.
>
> (2) Except as provided in sub-rule (3) of this rule, a lawyer shall not knowingly-
> a. Reveal a confidence or secret of his client;
> b. Use a confidence or secret of his client to the disadvantage of the client or
> c. Use a confidence or secret of his client to the advantage of himself or of a third person unless the client consents after full disclosure.
>
> (3) A lawyer may reveal-
> a. Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them;
> b. Confidences or secrets when permitted under these rules or required law or a Court order;
> c. The intention of his client to commit a crime and the information necessary to prevent the crime;
> d. Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

First, it is debatable whether a rule of ethics can be enforced as a rule of privilege. The rules of professional conduct for legal practitioners are not made to regulate procedure or evidence but to direct the ethical conduct of a lawyer in the practice of his profession.[42]

Secondly, only the National Assembly can legislate on Evidence by virtue of the provisions of the Constitution of the Federal Republic of Nigeria 1999 (as amended).[43] It is therefore submitted that the word "privilege" as used in Rule 19(1) of the RPC should mean no more than "confidential" or "secret" and not that the rule bars the court from compelling the

[42] The power to make the RPC derives from Section 12(4) of the Legal Practitioners Act, which vests the exercise of the power in the General Council of the Bar.
[43] See Note 41

disclosure. This difficulty arose in the American Bar Association Code of Professional Responsibility initially adopted in 1969 but amended in 1974. In the code as amended Disciplinary Rule DR7-101(B)(I) which contained the words "privileged communication" were taken to mean "confidential" or "secret" communication.[44]

Furthermore, Rule 19(3) clearly shows that communications referred to in Rule 19(1) cannot be "privileged" in the strict sense of that word since a lawyer may reveal confidences and secrets when permitted under these rules or required by law or a court order.

Rule 19(3) is a puzzling provision to say the least. It is truly baffling that a "privileged communication" can also be subject to disclosure when the law requires it or when the court so orders. Where then is the privilege? The order of court or the enactment that can compel disclosure of confidential communication is subject to no limitations or restrictions. Rule 19(3) is so wide and encompassing that almost all the other exceptions are rendered superfluous.

It must be stated at this point that whichever way Section 192(1) of the Evidence Act or Rule 19(1) of the RPC 2007 are construed, it has been held that these provisions constitute a bar to any disclosure by a legal practitioner of any cash transaction between a legal practitioner and his client as provided by Section 5 of the Money Laundering (Prohibition) Act. In the case of ***Registered Trustees of the Nigerian Bar Association Vs. Attorney General of the Federation & Anor***[45]*.* Kolawole J. held that Sections 20 and 21 of the Legal Practitioners Act already made elaborate provisions to regulate money transactions between a legal practitioner and a client. Accordingly, Section 5 of the Money Laundering (Prohibition) Act is a usurpation of the powers of the General Council of the Bar in relation to such money transactions.

He further held thus;

> "By these analysis, the Legal Practitioners Act which predated the **Money Laundering (Prohibition) Act**, supra, and if it were the intention of the National Assembly to make the **Money Laundering (Prohibition) Act**, supra to supersede the **Legal Practitioners Act**, it would have in its latter legislation, specifically so stated, and would have also, subordinated the provision of Section 192 of the **Evidence Act** to it when it included lawyers in Section 25 of **Money Laundering (Prohibition) Act**, supra. In the absence of any such specific

[44] See American Bar Association Commentary on Ethics and Professional Responsibility, opinions No. 341 (1975)
[45] FHC/ABJ/CS/173/2013 delivered on 17th December, 2014 (Federal High Court decision (unreported)

provision, my view is that the National Assembly, perhaps oblivious of the obligations which both the Legal Practitioners Act and **Evidence Acts**, two (2) previous legislations had created, enacted the **Money Laundering (Prohibition) Act**, supra. without adverting the likelihood of the Acts undermining each other. They are in my view, not harmonious legislations, and because, the **Legal Practitioners Act** and Section 192 of the **Evidence Act** are specifically made to address the practice of law by the Plaintiff, their provisions should be referred and read as over-riding the provisions of the **Money Laundering (Prohibition) Act**, supra."

Statutory impediments in the way of lawyer-client privilege

It may be necessary at this stage to examine some statutory provisions having regard to Rule 19(3) of the RPC 2007. Section 3 (1) of the Money Laundering (Prohibition) Act, 2011 provides as follows;

> "A financial institution and a designated non-financial institution shall;
>
> a. Verify its customers identity and update all relevant information on the customer;
> i. Before opening an account for, issuing a passbook to, entering into fiduciary transaction with, renting a safe deposit box to or establishing any other business relationship with the customer and
> ii. During the course of the relationship with the customer
>
> b. Scrutinize all ongoing transactions, undertaken throughout the duration of the relationship in order to ensure that the customer's transaction is consistent with the business and risk profile.

Section 5(1) also provides that;

> "A designated non-financial institution whose business involves cash transaction shall;
>
> a. In the case of:
> i. A new business, before commencement of the business;

ii. Existing business, within three months from the commencement of this Act, submit to the Ministry submit a declaration of its activities

b. Prior to any transaction involving a sum exceeding One thousand US Dollars or its equivalent identify the customer by requiring him to fill a standard data form and present his international passport, driving license, national identity card or such other documents carrying his photograph as may be prescribed by the Ministry:

c. Record all transactions under this Section in chronological order, indicating each customers surname, forename and address in a register numbered and forwarded to the Ministry."

These sections are similar to other provisions in many countries which have been enacted for the purpose of fighting money laundering, terrorism, human trafficking, drug trafficking and other international crimes. They represent what is generally known as the "Gatekeeper initiative" by which a financial institution or a service provider such as a lawyer or an accountant may assist the State in monitoring anyone who may be involved in such crimes. It appears that in Nigeria at least for now, a lawyer cannot act as a "gatekeeper" going by ***the Registered Trustees of the NBA*** case. A detailed critique of this judgment is outside the scope of this paper, since in my opinion the case deals more with whether a lawyer should, construing the provisions of the Money Laundering (Prohibition) Act, 2011 against the provisions of the Legal Practitioners Act be a "designated non-financial institution" since a lawyer has no customers but only clients. In my opinion, it does not represent an authority for properly construing Sections 192-195 of the Evidence Act or even Rule 19 of the RPC 2007.

Section 38 of the Economic and Financial Crimes Commission Act, 2004 provides thus:

" A person who

a. Willfully obstructs the Commission or any authorized officer of the Commission I the exercise of any of the powers conferred on the commission by this Act, or
b. Fails to comply with any lawful enquiry or requirements made by any authorized officer in accordance with the provisions of this Act, commits an offence under this Act and is liable on conviction to imprisonment for a term not exceeding five years or to a fine of twenty thousand naira or to both such imprisonment and fine."

The question is what constitutes "a lawful enquiry or lawful requirements made by any authorised officer in accordance with the provisions of this Act"? If for instance, X is arrested by EFCC on suspicion of having committed a criminal offence and is questioned with regard to a document which he claims to be in the custody of his lawyer. Can the EFCC under this provision invite that lawyer to disclose the content of the document to the Commission? If EFCC can, would any question asked constitute a lawful enquiry having regard to Section 192(1) of the Evidence Act. Another scenario may be the invasion of the house of a person suspected to have committed a criminal offence and the discovery of some documents, which was entered on the strength of a valid search warrant,, containing communications between the suspected person and his lawyer but which were written in cryptic language understandable only to the two of them. Can the suspect or his lawyer be questioned by the EFCC on the meaning of such cryptic language and would that constitute a lawful enquiry or requirements as provided under Section 38?

Sadly Nigerian case law does not provide much guide in this regard. Many unfortunate situations are now arising in which the EFCC relying on section 38 invites a panic stricken lawyer, who upon the threat of arrest and detention and on the strength of Section 38 divulges communication between him and his client to the EFCC. In my opinion, I think the time has come for courageous lawyers to seek guidance from the Courts with regard to the interpretation of Section 38 vis-à-vis Section 192 of the Evidence Act and Rule 19 of the RPC 2007. The NBA ought to take this bold step as was done in respect of the gatekeeper initiative in order to settle the matter once and for all.

Sections 317 and 319 of the Companies and Allied Matters Act also offer another insight with respect to the investigation of a company by the Corporate Affairs Commission. Section 317 (2) provides thus;

> "If the inspector considers that a person other than an officer or agent of the company or other body corporate is in possession of information concerning its affairs, he may require that person to provide to him any books, documents in its possession relating to the company or other body corporate, to attend before him and otherwise to give him all assistance in connection with the investigation, which he is reasonably able to give and it is that person's duty to comply with the requirement"

Sub-section 3 further provides that;

> "An inspector may examine on oath the officers and agents of the company or other body corporate, and any such person as is mentioned in subsection 2 of this section in

> relation to the affairs of the company or other body and administer an oath accordingly"

It is necessary to also seek the Court's guidance on whether a lawyer who may fall within Section 317(2) as aforesaid could rely on Section 192(1) of the Evidence Act and Rule 19 of the RPC 2007 as making it unreasonable for him to answer questions before the inspector bordering on lawyer-client privilege or confidentiality. It is amazing to discover that in the over twenty-five years of the existence of CAMA this point has not arisen for determination before the Court.

Another enactment worthy of consideration is Section 13(2) of the Advanced Free Fraud and other Fraudulent Act, 2006 which provides as follows;

> "Any person whose normal course of business involves the provision of non-fixed line or Global System of Mobile Communications (GSM) or is in the management of any such services, shall submit on demand to the Commission such data and information as are necessary or expedient for giving full effect to the performance of the function of the Commission under this Act"

Where a lawyer and his client make communications by mobile telephones, and such communication is stored by a GSM provider would the disclosure of such communication by the GSM provider to the EFCC violate the lawyer-client privilege? In my opinion, such disclosure particularly on the strength of section 13(2) may not violate the lawyer client privilege. However, since the communication was obtained by reason of the position of the GSM provider as the depository of confidential communication rather than confidential communication voluntarily divulged to it, such communication notwithstanding Section 13(2) would still be improperly obtained evidence. The use of such evidence in Court must still pass the test of Sections 14 and 15 of the Evidence Act.

Section 14 provides that;

> "Evidence obtained:
>
> a. Improperly or in contravention of a law or
> b. In consequence of an impropriety or of a contravention of a law, shall be admissible unless the court is of the opinion that the desirability of admitting the evidence is out-weighed by the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained.

Section 15 provides further that;

> "For the purposes of section 14, the matters that the court shall take into account include:
>
> a. The probative value of the evidence,
> b. The importance of the evidence in the proceeding,
> c. The nature of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding
> d. The gravity of the impropriety or contravention;
> e. Whether the impropriety or contravention was deliberate or reckless;
> f. Whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
> g. The difficulty, if any, of obtaining the evidence without impropriety or contravention of the law."

It may be argued that a GSM service provider who divulges confidential communication between a lawyer and his client may not have acted improperly. In my view, this may just represent a part of the argument. The other part is that the GSM service provider would not have been in a position to divulge the confidential communication if it had not been a depository of such communication. Any such communication divulged without seeking guidance from the court can be taken to have been improperly given, even though not in contravention of the law. This point appears debatable and probably needs the Court's clarification.

Confusion in the Nigerian case law in respect of RPC 2007

Is the RPC 2007 still valid law in Nigeria? This question is in need of an urgent answer in view of decision of the Supreme Court in ***Aladejobi Vs. NBA***[46]***.*** In that case, the issue that arose for determination was whether the appellant can appeal to the Supreme Court from the direction of the Legal Practitioners Disciplinary Committee or must appeal to the Appeal Committee of the Body of Benchers. By the Legal Practitioners Amendment Decree No. 21 of 1994, the Legal Practitioners Act 1975 (as amended) was further amended by deleting some sections of the 1975 Act and inserting fresh sections.

Section 1(1) of the Act was amended to delete some words by reason of which the General Council of the Bar was deprived of the powers of "the general management of the affairs of

[46] (2013) 15 NWLR Pt. 1376 66

the Nigerian Bar Association". In its place, a new Section 12(4) was enacted which provides thus:

> "It shall be the duty of the Bar Council to make rules from time to time on professional conduct in the legal profession and cause such rules to be published in the Gazette and distributed to all the branches of the association"

There were some other amendments contained in the said decree which though important, do not presently concern us, but which were raised in ***Aladejobi***. In its judgment the Supreme Court held that though decree No. 21 of 1994 has not been repealed but it was no longer valid since it has been omitted by the National Assembly in the revision of the Laws of the Federation of Nigeria which came into effect in 2004. Accordingly, the amendment contained in the said decree No. 21 of 1994 which vests a right of appeal from the direction of the Legal Practitioners Disciplinary Committee to the Supreme Court cannot be applied as it was omitted from the Legal Practitioners Act as revised in 2004. ***Aladejobi*** also dealt a fatal blow to the RPC 2007 since the power of the General Council of the Bar to make RPC 2007 was derived from Section 12(4) of the Legal Practitioners Amendment Decree No. 21 of 1994, which has also been omitted from the revised edition. It is necessary to reproduce the opinion of I.T. Muhammad JSC on this point:

> "Now, the correct position of the law and practice, my lords, as I understand them, is that once a decision (including a Direction from the LPDC) is delivered and it is appealable, it is the prevailing law and practice governing appeals that must guide the filing of the appeals. When appeals ceased to be channeled directly from High Court to Supreme Court, it was the new law, practice and policy on appeals that were in vogue. It cannot have retrospective effect. It is thus, my view, that the appellant's appeal is caught-up by this law and practice. The appellant, certainly, could not have appealed to this court within the period 1992-2004 as there was no direction to appeal against. The direction came in 2011. Appellants' appeal was filed in 2011. The law in operation, controlling all appeals from the direction of the LPDC is the Constitution 1999 (as amended) and the re-enacted Legal Practitioners Act as contained in Cap L11 of the 2004 LFN. This Act mandates an aspiring appellant to go through the Appeal Committee of the Body of Benchers first before approaching the Supreme Court"

It is remarkable that another decision of the Supreme Court which decided that an enactment which is omitted from the revised laws but which has not been repealed is still

valid[47] was not considered by the Supreme Court let alone applied. In that case, the issue to be determined was whether Carriage by Air (Colonies, Protectorate and Trust Colonies) Order 1953, which made the Warsaw convention applicable to Nigeria, was no longer valid because it was omitted from the revised edition of the Laws of the Federation of Nigeria 1990. The Supreme Court held that the 1953 Order having not been repealed but merely omitted from the revised laws is still valid in Nigeria and therefore made the Warsaw convention still applicable to Nigeria. Ogundare JSC (of blessed memory) held thus;

> "… it has not been shown by the plaintiff that the 1953 Order was at any time repealed before the coming into force of the 1979 Constitution. The Order, therefore forms part of the existing laws as defined in Section 274(1) of that Constitution.
>
> Mr. Agbakoba also argues that as the 1953 Order was omitted from the 1990 Revised Edition of the Laws of the Federation on the ground that it is "no longer relevant to Nigeria" it has ceased to have effect in Nigeria. With respect to learned counsel I have no hesitation in rejecting this submission[48]"

As precedent stands in Nigeria today, ***Ibidapo*** and ***Aladejobi*** are in violent conflict. There is therefore the need for the Supreme Court to urgently clarify its position with regard to the applicability of the Legal Practitioners Amendment Decree No. 21 of 1994. Until that is done it is doubtful whether the RPC 2007 is still valid. This portends very dangerous consequences for legal practitioners in Nigeria particularly the ability of the lawyer to rely on Rule 19 thereof. This Rule was applied by the Federal High Court in ***The Registered Trustees of NBA*** case without adverting its mind to ***Aladejobi***. It is no exaggeration therefore to say that ***Aladejobi*** has not only further confused the state of the law with regard to the lawyer-client privilege but has also set us back in our reliance on the doctrine of *stare decisis* in Nigeria.

It is now time to set out in summary the position of the law with regard to public interest and privilege in the lawyer-client relationship in Nigeria.

- It appears the only type of privilege applicable in Nigeria is the legal advice privilege as provided in Sections 192-195 of the Evidence Act, 2011.

- The RPC 2007 particularly Rule 19 creates only an ethical duty of confidentiality rather than an evidentiary rule of privilege.

[47] Ibidapo Vs. Lufthansa Airlines (1997) 4 NWLR Pt. 498 124
[48] See page 160

- It is highly doubtful having regard to ***Aladejobi*** whether the RPC 2007 including Rule 19 is still valid law in Nigeria. The decisions of the Supreme Court[49] that have held that the RPC is a subsidiary instrument having been made pursuant to Section 12(4) of the Legal Practitioners Act (which enactment is now cast in serious controversy) would have to be treated with caution in the light of ***Aladejobi.***

- The Nigerian lawyer cannot be a "Gatekeeper" pursuant to the Money Laundering (Prohibition) Act 2011.

- Some enactments in Nigeria which appear to have the capability of eroding the lawyer-client privilege are still being left to roam free whilst they are covertly doing great damage to the lawyer's duty of confidentiality and privilege. It is still difficult to authoritatively comment on the validity of those laws since case law on the lawyer-client privilege in Nigeria is virtually non-existent.

- With regard to evidence that may be obtained from third parties but which have the potential of infringing on the lawyer client privilege (for example Section 13(2) of the Advanced Fee Fraud and Other Related Offences Act 2006) it may be necessary to examine the provisions of the Evidence Act 2011 to see whether such evidence may be excluded as violating the lawyer-client privilege or be treated under Section 14 of the Evidence Act as being improperly obtained evidence.

The future of the lawyer-client privilege in Nigeria

The paucity of case law on the lawyer client privilege in Nigeria may appear to have sent a strong message.[50] That message is that the Nigerian legal system operates in a manner that makes it unnecessary to invoke this doctrine. For instance, in the administration of criminal justice in Nigeria particularly in homicide and robbery cases, an accused or defendant only briefs a lawyer after he has been arrested and detained and has made statements to the Police. At the time the solicitor is involved there is little if any communication that can be protected by the lawyer client privilege in view of the confessional statement that would either have been made or extracted from the suspect. It is therefore most unlikely that the invocation of the lawyer-client privilege may arise in such matters.

Another point to note is that the Nigerian economy is still poor and cannot afford any form of retainer for many of its citizens. It is usually in retainerships that the lawyer and his client make confidential communication. What is more common in Nigeria is the retention

[49] IBWA Vs. Imano Nigeria Ltd (1988) 3 NWLR Pt. 85 633; Fawehinmi Vs. NBA (No. 2) (1989) 2 NWLR Pt. 105 558

[50] I have been in active legal practice for over thirty years now and I have not handled any matter in which the issue of lawyer-client privilege has arisen.

of a lawyer when litigation has commenced or the probability of its commencing is very high indeed. In such circumstances, the client even to his lawyer is very reticent since no strong relationship had previously existed to encourage any disclosure of confidential communication. Apart from this, the average Nigerian is very skeptical of the lawyer almost to the point of cynicism. The lawyer is perceived as dangerous and exploitative seeking only to milk his client rather than defend him in the most professional way. The lawyer also conceives the client not as a partner but as someone who may not be fully trusted. As a result, the lawyer client privilege is seen more as a cloak of cover up rather than a principle of privacy. It is fair to say that having regard to the present unfortunate events involving the arrest and detention of judges and the invitation of lawyers by the EFCC any attempt to invoke the lawyer client privilege will be visited with great public outcry.

The point being made is that socially, politically, and culturally the lawyer client privilege does not seem to sit well with us as a nation. In other nations where there has been a culture of respect for human dignity, promotion of individual and national integrity, regard for human rights, encouragement of reliance on the professional skills of the lawyer, it is not difficult to see why the lawyer client privilege and the ethical duty of confidentiality are zealously and jealously protected. There must therefore be an attitudinal change involving all concerned to restore the lost glory of the judicial system and instill once more public confidence in it. This is the practical obstacle that stands in the way of the lawyer client privilege in Nigeria.

There appears to be a lack of understanding of what actually constitutes public interest. Section 45 of the 1999 Constitution (as amended) has created the same problem for the enforcement of fundamental human rights in Nigeria particularly the Right to Privacy. Professor Deji Adekunle in his very comprehensive treatment of this subject[51] stated thus;

> "The immediate consequence of this gap in Nigeria law is the absence of an institutional framework and weak remedial structure. The 21st century- the digital age- has moved beyond skeletal constitutional provisions to protect citizens from abuse of technology. Without a strong perspective framework, what hope does the citizen have against the coercive apparatus of the State? What protective measures can the Nigerian State deploy when law enforcement agencies intrude on privacy of citizens beyond the Fundamental Human Right (FHR) enforcement action? What measures are deployed to ensure that when courts act on evidence

[51] Right to Privacy and Law Enforcement: Paper presented at the Ogun State Judges Conference 2016 delivered on 27th September, 2016.

> thus procured, impunity is not being promoted? Is the criminal justice system improved by condoning such invasions?

What has the misfortune that has befallen the lawyer client privilege and that which has almost sounded the death knell for the right of privacy seem to have the same roots which is the apathy and cynicism of the average member of the Nigerian public for privileges generally and particularly those which are asserted by means of Court action.

Conclusion

The doctrine of the lawyer client privilege has been earlier explained is rooted in public interest, which is the need to ensure that every participant in the legal process is given adequate facilities for telling the whole truth and nothing but the truth. However, that public interest can only find acceptance in a society where the lawyer and the Judge are regarded as men and women of honour and integrity; where they are expected to be the custodians of legal and social justice and are above board like Caesar's wife. It is my opinion that the lawyer and the Judge in order to convince the public that the duty of confidentiality and privilege are for the good of all must themselves be viewed as public spirited. I do not think that recent events have helped our course. Events are still unfolding however, and it is my hope that when the dust finally settles the administration of justice would be the better for it. We must find a way to secure a public buy-in into the lawyer client privilege. It is one thing to effect a change in legislation, it is another to get public support for that change.

I may therefore sum up by stating that the future of the lawyer client privilege in Nigeria does not appear too bright but with our collective effort, we may be able to effect a turnaround.