

## **Discussion paper on “The Future of Legal Practice Specialisation and the Barrister-Solicitor Divide” (by Fidelis Oditah QC SAN)**

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### **Introduction**

I am honoured to be invited to discuss the excellent paper just delivered by my learned brother Prof. Fidelis Oditah (QC, SAN) on the vexing topic of specialisation in the legal profession in Nigeria.

I wish to pay tribute to my good friend, Dr. Tunde Ajibade (SAN), for initiating these lectures and for sustaining them, complete with lunch, during these times of global meltdown which is beginning to bite our noble profession.

I observe that they have over the years chosen topics around the legal profession; this year has not been an exception. If I may speak for many lawyers, we deeply appreciate the opportunity you have given us for public discourse on the issues surrounding our profession. I make bold to say your focus on the profession and style clearly distinguishes your lecture and your firm from the rest.

### **The Lecture**

At the risk of repeating what has been so ably put across to us in the lead paper, I should say that our lead discussant traced the history of specialisation in the UK and Nigeria. But perhaps the most relevant part of the paper is Part III which sought to explain the relationship between a split profession and increasing specialisation in legal practice. A significant conclusion of the lead discussant that would form the fulcrum of my own contribution is as follows: *How narrowly a Barrister or Solicitor can specialize is very often a function of the size and depth of the particular legal market.*

### **The Nigerian Legal Market**

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<sup>1</sup> Being paper discussion presented at SPA Ajibade 2012 Annual Lecture La Scala Restaurant MUSON Centre Onikan Lagos 22<sup>nd</sup> November 2012

I agree completely with the statement that the size and depth of a particular legal market determines the level of specialisation it can accommodate. However, it would seem that even when the market was shallow it was possible to have a fair level of specialisation, if the market structure for the practice of the profession is designed to encourage specialisation and discourage quackery by which I mean untrained and unregistered persons practicing the profession.

First from my experience, the legal market has been deepening and widening. I recall my cutting my teeth in the Barristers' practice of Mr. H. A. Lardner (SAN). Well, I soon realized that whilst we became quickly familiar with practice and procedure, we were essentially doing mainly land cases.

Second, the needs of the Nigerian legal market changes from time to time. Soon most of the land in Lagos was litigated. Commerce continued to improve requiring different skills. I left to join the Solicitors' firm of R.I. Kuku & Associates as a Partner. That was the first time I saw a joint venture agreement and other commercial agreements. Since then I have, at an average of every five years, added new areas of practice to my reservoir. They include inter alia, Capital Market, Arbitration, Insolvency and recently Construction Law. These are in addition to my active Barrister's practice in Commercial Litigation.

The question is how do we cross over in Nigeria? Can we rely on our University and Law School training alone to, for instance, take up a brief as a Receiver-Manager? Is there regulation that encourages specialisation in Nigeria?

## **Best Practices in Specialisation<sup>2</sup>**

In the United States each State Supreme Court sets forth its criteria for admission to practice before the courts in that State. So, traditionally an Attorney is licensed to practice in a state or group of states<sup>3</sup>. If you have to practice outside

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<sup>2</sup> See generally "*Thoughts on the Compatibility of Recent UK and Australian Reforms with U.S Traditions in Regulating Law Practice*" by Ted Schneyer being paper presented at symposium for Conference of Chief Justices of the States in Chicago on May 26-27, 2009

<sup>3</sup> So for example, in the State of New Jersey the State Supreme Court regulates who may be admitted to practice before it and the courts in New Jersey. See generally, New Jersey Court Rules 1:21-1

your licensed area, a licensed local attorney will have to appear with you or you get a special dispensation<sup>4</sup>. According to Professor Ted Schneyer<sup>5</sup> prior to the 1970s law practice in the United States was primarily regulated by the state supreme courts working in tandem with the ABA and state and local bar associations in a regime of lawyers called "professional self regulation". Since the 1970s, there has been increasing Federal regulation of aspects of legal practice<sup>6</sup>.

Even after licensing you need to be admitted into specialized areas of practice before practicing in those areas. For instance to be involved with serious bankruptcy practice you need to be admitted to a Bankruptcy Inns of Court or registered as a Debt Relief Agency DRA<sup>7</sup>. To be a member of the Inn you must have successfully completed a course of training under pupillage of the masters and barristers of the Inn<sup>8</sup>. Also in order to be patent Attorney in the United States you must be licensed to practice before the United States Patent and Trade Office (USPTO). Amongst the requirements for you to be licensed as a patent Attorney by the USPTO you must possess the requisite legal, scientific, and technical qualifications and pass an examination<sup>9</sup>. The complex American specialty Bar system is very much different from the UK Inns of Court but it is effective as fidelity bonding and reference associations<sup>10</sup>. There are admission conditions to be met, such as examinations and practical exercises. In addition

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<sup>4</sup> An attorney who is admitted in another jurisdiction within the United States may only appear *Pro Hac Vice* in a specific case in the courts of New Jersey with an attorney who is admitted to practice before the courts in the State of New Jersey. See New Jersey Court Rules 1:21-2. The only exception to the Pro Hac Vice rule are attorneys who are employees of and are representing the United States of America or a sister state. See New Jersey Court Rules 1:21-2 (a).

<sup>5</sup> Supra

<sup>6</sup> See for instance Financial Institutions Reform Recovery and Enforcement Act 1989 which classified institution-affiliated parties IAPs as including lawyers, and also s.307 of Sarbanes-Oxley Act 2002 which SEC implemented by setting standard for lawyers appearing before the SEC

<sup>7</sup> See US Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

<sup>8</sup> Andrew R Turner Bankruptcy American Inn of Court [www.innofcourt.org](http://www.innofcourt.org)

<sup>9</sup> See 37 Code of Federal Regulations § 11.7.

<sup>10</sup> Other specialty Bars in the US include Association of Corporate Counsel, etc

in the US, there are age restrictions before admission to practice before some courts, like Court of Appeal and Supreme Court. Till now you just can't practice at the Court of Appeal and many specialized Tribunals in the US simply because you have been called to the Bar. By way of example, for you to be admitted to Bar of the United States Supreme Court you must have been admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for a period of at least three years immediately before the application<sup>11</sup>. . An applicant is required to obtain a certificate of good standing from the jurisdiction in which he or she practices and must have two sponsors who must be attorneys already admitted to practice before the United States Supreme Court.

In addition in the United States there are a number of statutorily created specialized courts pursuant to Article 1 Section 8 Clause 9 of the Constitution of the United States of America which gives Congress the power to constitute tribunals inferior to the Supreme Court of United States of America. These specialized courts regulate who may practice before them and set their own admission requirements. Just to name a few of these specialized courts---you have United States Bankruptcy Court<sup>12</sup> which deals with matters of insolvency; the United States Tax Court<sup>13</sup> the United States Court of Federal Claims (the general jurisdiction of the court is described in 28 U.S.C. §1491) which hears monetary claims against the United States government court adjudicates disputes involving federal income tax and finally the United States Court of International Trade<sup>14</sup> formerly the United States Customs Court which adjudicates disputes involving international trade and customs matters. Each of these courts has their own admission requirement that is usually embodied in their court rules.

The courts set ethics standards and the Bar enforces it. Recently though some piecemeal statutory regulation of the profession in the US has began<sup>15</sup>. The move away from self regulation to regulation is gaining momentum. Regulation

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<sup>11</sup> See United States Supreme Court Rule 5 which can be found at <http://www.supremecourt.gov>

<sup>12</sup> See 11 USC § 101 et. seq

<sup>13</sup> See Tax Reform Act of 1969 Pub. L. 91-172

<sup>14</sup>see Customs Court Act of 1980

<sup>15</sup> See Sarnanes-Oxley Act and other Federal laws regulating lawyers

of law practice is changing everywhere in the world from the US to Australia. In Australia what they did was to adopt a Model Law which the various states then enact for regulation of the profession<sup>16</sup>.

Our lead discussant has ably outlined developments in regulation of legal practice in the UK. I will only add that in the UK a regime of licensing for insolvency practitioners is obtainable under Ss. 389 & 390 of the Insolvency Act, 1986 as amended and various regulations. As an expert in UK Insolvency Law I will leave him to say more on how the profession is organized there.

### **Which Model of Specialisation For Nigeria?**

The lead paper has put a lot of emphasis on the dichotomy between Barristers and Solicitors as the basis for Specialisation, though it went on to assert that within each of those specialized areas there is now further specialisation. From my view, this dichotomy is not feasible in Nigeria. This is because the profession, as pointed out by the lead presenter, is already fused. However the imperative for specialisation remains the same.

The question in Nigeria is how do we create effective specialisation? And how do we create depth and width in each specialized area of practice to drive the maintenance of specialized law practice?

1. First, the regulatory framework needs to be enhanced to encourage commercial use of specialist skill. For now there is nothing to encourage the use of Nigerian law as choice of law. Without certainty in outcome in our court system and law reform to upgrade our commercial laws to international best practices we cannot be a destination for dispute resolution and choice of law. It is a chicken and egg dilemma.
2. Second is the absence of specialized skill within the profession, which renders use of Nigeria as destination for dispute resolution further unattractive.
3. Third, growth of the economy may enable lawyers follow the growth pattern but there is risk that we can have economic growth but the big legal work would continue to be shipped abroad with no trickling effect on local lawyers.

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<sup>16</sup> See Professor Ted Schneyer *supra*

4. Fourth, The Protocol for Free Movement of Legal Services and other non trade multilateral agreements entered into by Nigeria such as the Financial Action Task Force on Money Laundering (FATF) remain both a challenge and an opportunity for growth and specialisation in Nigeria<sup>17</sup>.
5. Lastly resistance to change by the lawyers themselves and absence of critical mass to drive change such as consumer groups or competition regulators constitute impediment to innovation and renewal of the profession which may have resulted in greater segmentation and specialization for economies of scale and risk management.

## **Specific Initiatives Recommended**

### **a) New Regulatory Framework**

There is need for the creation of a new institution to regulate lawyers and the practice of law in Nigeria. In many ways the practice of law in Nigeria is virtually unregulated. There is a positive correlation between the regulation of law and the use of lawyers for transactions. Better regulation increases confidence in the profession, and invariably, increased usage of the services of lawyers and at lower cost to the consumers. Ideally, lawyers should drive transactions not other professionals like Bankers, Estate Surveyors, etc.

### **b) Encourage Specialized Bodies of Knowledge**

Clearly for there to be effective specialisation there must be a body of specialized knowledge and a system of retention and transmission of that knowledge. The existence of organizations such as Capital Market Solicitors Association (CMSA), of which Dr. Tunde Ajibade is the current Chairman, is to be encouraged and not deprecated. They are now working on a system of transmitting knowledge accumulated into a well-developed curriculum. In the UK under the Legal Services Act 2007 various specialized associations are

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<sup>17</sup> Pursuant to FATF CBN has now set a deadline of 31<sup>st</sup> January 2013 for law firms amongst others to registered for money laundering monitoring under FATF.

recognized and are in fact approved as regulators for their special areas by Legal Services Board LSB. Again at the INSOL African Round Table held in Abuja by BRIPAN in collaboration with INSOL and the World Bank/IFC in February 2010 a senior UK judge, Justice Norris discussed extensively the UK insolvency system. He stated that the proper functioning and development of their judicial insolvency system was dependent upon the quality of the people who are in charge of running the court or practicing before the court and the training they have received. He said there was hardly any appeals from the decision of the High Court and that it is the decisions of the High Court that are cited as authority as the higher courts hardly intervene. He said everyone (lawyers and judges alike) knows what to expect so there are hardly surprises.

### **c) Regulatory Support for Specialisation**

In the end any body of knowledge which is cut off from the fountain of life will fizzle out and wither. There has to be a way by which regulation rewards those who have sought specialized knowledge and encourages those who have not to follow that narrow path. I am not talking about award of SANs. It is too easy to get in and out of any area of practice in Nigeria without any investment either in physical and risk management infrastructure or in knowledge<sup>18</sup>. The result is that it is difficult to build critical mass for regional or world class law firms to thrive in Nigeria. In summary, we are suffering from over-competition in Nigeria whereas in other climes regulation is driven by need to encourage competition and protect the consumers of legal services. There are ideas on how these issues can be dealt with but perhaps the set up of a new regulator can enable the regulator focus on building critical mass within the profession.

Once again, I thank the lead presenter Prof. Oditah (QC, SAN) for this excellent paper and Dr. Tunde Ajibade (SAN) for inviting me. I hope my few words would further stimulate thoughts on this vexing topic.

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<sup>18</sup> See Securities and Exchange Commission v Prof A B Kasunmu SAN [2009] 10 NWLR (pt 1150)509