

Your WhatsApp Messages May Become Exhibits



Discovery in U.S. and Nigerian Litigation

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You are a director of a Lagos company that has just received a demand letter from a law firm in New York or Miami. The letter warns that the company must preserve evidence and mentions a process called discovery. No one has sued the company yet, but the letter may start the clock. You may need to preserve emails, WhatsApp threads, and data on the directors' phones, including the joke someone sent in 2021. You have not been served with a complaint, but your duty to preserve evidence may already have begun. **What, exactly, is discovery? How far can it reach, and what should you do next?**

THE RISK

If relevant messages disappear, the case may stop being about the contract. It may become about you and why the evidence no longer exists.

This article grew out of conversations on the sidelines of the recent Nigerian Bar Association Conference in Port Harcourt. It explains how quickly American discovery can reach a Nigerian company, what may happen if the company fails to comply, and what an American company should expect when its dispute lands in a Nigerian court.

What Nigerian Companies Should Know

The court changes the clock

Federal, Florida, and New York courts use different discovery triggers, disclosures, and stay rules.

Start by identifying the court and its clock.

FEDERAL

Parties ordinarily begin discovery after the Rule 26(f) conference. Filing a motion to dismiss does not automatically pause discovery.

FLORIDA

Most parties must serve initial disclosures within 60 days and before seeking discovery. Filing a motion to dismiss does not automatically pause discovery.

NEW YORK

A motion under CPLR 3211, 3212, or 3213 ordinarily stays disclosure under CPLR 3214(b). In the Commercial Division, Rule 11(g) requires the court, upon counsel's application, to decide whether disclosure will proceed.

Your WhatsApp messages may become exhibits

When American lawyers ask for documents in discovery, they do not mean only contracts, invoices, and letters. They also mean electronically stored information, including emails, texts, WhatsApp messages, spreadsheets, recordings, databases, and cloud files.

If a director negotiated price in a group chat, used a personal Gmail account, or discussed the dispute on a private phone, the company may have to collect and produce every responsive communication within its possession, custody, or control.

Keeping the company's data server in Apapa does not, by itself, place its records beyond discovery. A Nigerian company properly before a U.S. court may have to produce responsive records it controls, even if it stores them in Nigeria. Foreign law, privacy restrictions, and proportionality may narrow the request. Geography alone will not defeat it.

Preservation may begin before the lawsuit

Once a company reasonably anticipates litigation, it should identify potentially relevant information and tell employees to preserve it. A serious demand letter, a failed transaction followed by a threat to sue, or other concrete notice may require the company to stop routine deletion.

Federal Rule 37(e) and Florida Rule 1.380(f) govern electronically stored information that a party had a duty to preserve but lost after failing to take reasonable steps. A court may order measures to cure any prejudice. In federal and Florida state court, the most severe sanctions, including an adverse inference, dismissal, or default, generally require the court to find that the party intended to deprive its opponent of the information. New York takes a different approach. Under CPLR 3126 and New York's spoliation doctrine, even negligent destruction may support an adverse inference if the missing evidence is relevant and the sanction fits the harm. A New York court will generally strike a pleading or dismiss a case only for willful or contumacious conduct, or when the loss causes prejudice so severe that a lesser sanction will not suffice.

Your directors may have to testify

U.S. discovery may reach both the company and its people. In federal court, an opponent may use Rule 30(b)(1) to notice a named director, officer, or managing agent. It may separately use Rule 30(b)(6) to notice the company on specified topics and require the company to prepare a designee. The other side may use both. Producing a corporate representative does not take the finance director off the calendar. A company that wants to protect a senior executive must seek a discretionary protective order. Federal practice has no twin of Florida's apex rule

New York also allows the notice to name a particular officer, director, member, or employee. CPLR 3106(d) gives the company a narrow way out: it may substitute someone else if it gives notice at least ten days before the deposition. Miss that date and the named officer remains the witness. An opponent may separately notice the entity under 22 NYCRR 202.20-d and Commercial Division Rule 11-f. Florida also allows both tracks, but Rule 1.280(i) gives a high-level officer who lacks unique personal knowledge a formal apex procedure. An executive who negotiated the contract or took part in the WhatsApp discussions should expect to testify.

Depositions often take several hours. Federal courts and New York Supreme and County Courts generally limit each deposition to seven hours unless the parties agree or the court orders otherwise. Florida has no comparable statewide seven-hour limit. No witness statement drafted in chambers will keep an involved principal out of the chair.

Silence can establish the facts

Suppose you receive a request for admission asking you to "admit that your managing director authorized the transfer." In federal or Florida state court, the rules generally treat the matter as admitted unless you serve a written answer or objection within 30 days. The admission then establishes the fact conclusively unless the court allows you to withdraw or amend it. The opposing party may no longer have to prove the point at trial.

New York gives you less time. CPLR 3123 generally gives a party 20 days to respond to a notice to admit. New York limits the device to matters about which there should be no substantial dispute, but the rule still deems an unanswered matter admitted. Do not route these requests through the company as ordinary correspondence

The evidence you need in Nigeria may be in America

You are suing in Lagos to recover money that you paid under a failed transaction. The defendant denies receiving the money. A New York bank holds the account records that may show where the funds went. The employee who arranged the payment now lives in Florida and has emails confirming the payment instructions and the defendant's receipt of the funds. A Nigerian court may not be able to compel that bank or witness. That does not necessarily put the evidence beyond your reach.

Under 28 U.S.C. § 1782(a), you may ask the federal district court where the bank or witness resides or is found to order testimony or document production for use in the Nigerian proceeding. The bank or witness does not have to be a party in Nigeria. The court has discretion whether to grant the application, and privileged material will still remain protected. If the court grants the application, section 1782 can turn evidence in the United States into proof you can use in a Nigerian case.

What U.S. Companies Should Know

NIGERIAN LITIGATION | FRONT-LOADING | FOCUSED DISCOVERY

Build the case before filing it

An American company litigating in Nigeria should begin with the opposite assumption: discovery will not necessarily supply the evidence missing when it files the case.

Nigerian civil procedure permits interrogatories, discovery, production, and inspection of documents. But front-loading shapes the case from the beginning. Under rules such as the Federal High Court (Civil Procedure) Rules 2019 and the High Court of Lagos State (Civil Procedure) Rules 2019, a claimant generally files its

originating process together with its statement of claim, witness list, witness statements on oath, and copies of the documents on which it intends to rely. A defendant usually files the corresponding materials with its defence.

Do not ask only whether the company knows enough to plead a claim. Ask whether it can identify the witnesses and documents needed to prove that claim. Investigate first. Secure the documents. Confirm what each witness can establish. Do not file on the assumption that broad discovery will later reveal the rest of the case.

Discovery follows the pleaded issues

Nigerian discovery ordinarily follows the case disclosed by the pleadings. Parties use interrogatories to seek admissions or information about facts material to the issues. They use document discovery to obtain material bearing on those issues. The Supreme Court of Nigeria has treated interrogatories as a means of obtaining information relevant to matters in dispute. See *Famuyide v. R.C. Irving & Co. Ltd.* (1992) 7 NWLR (Pt. 256) 639; *Abubakar v. Yar'Adua* (2008) 4 NWLR (Pt. 1078) 465.

An American litigant may expect more. A demand for every communication involving an opponent's executives, made in the hope that something useful will turn up, may draw a relevance objection. The requesting party must explain how the information bears on the issues the parties have pleaded.

The rules also vary by court. The Federal High Court and the state High Courts do not follow identical procedures. Local Nigerian counsel should identify the governing rules before the action begins. In any court, the requesting party should expect the judge to connect discovery to the pleaded issues rather than grant unrestricted access to an opponent's records.

Electronic evidence still matters

Narrower discovery does not make electronic communications irrelevant. A party may use emails, WhatsApp messages, and other electronic records as evidence if it satisfies the requirements of the Evidence Act 2011, as amended. A party may also seek those records through a

proper request for
discovery or production.

Nigerian courts do not generally use the same elaborate framework of litigation holds, custodians, search terms, ESI protocols, and sanctions aimed specifically at lost electronic information. An American company should not import that machinery wholesale. It should still preserve the communications that prove its case and comply with a proper Nigerian discovery order.

Depositions often take several hours. Federal courts and New York Supreme and County Courts generally limit each deposition to seven hours unless the parties agree or the court orders otherwise. Florida has no comparable statewide seven-hour limit. No witness statement drafted in chambers will keep an involved principal out of the chair.

Narrower discovery is still enforceable

A party cannot refuse proper discovery merely because Nigerian practice is narrower. Nigerian courts may require answers to interrogatories, order further answers, compel production, and impose consequences for noncompliance. Narrower does not mean optional.

Plan for the evidence when drafting the contract

The difference between the systems matters before a dispute arises. A U.S. company that agrees to litigate in Nigeria should negotiate audit rights, access-to-records provisions, reporting duties, and record-retention obligations. The right to obtain records while the relationship still works may prove more useful than the hope that discovery will fill the gaps after it breaks down.

If important evidence sits in the United States, counsel should also consider section 1782. A forum clause determines more than who will decide the dispute. It also affects how the parties will find the evidence they need to prove it.

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THE PRACTICAL DIVIDE

In the United States, prepare to disclose what hurts. In Nigeria, prepare to prove the case you file.