



## *Intra Legem*

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## *Attorney - Client Privilege*

### **Background**

Ever wondered if it is safe to share any communication with your legal advisors or legal counsel or once shared whether there are any safeguards and recourses available to the affected party? While dealing with any legal conflict, issue or matter, be it from the litigation or corporate perspective, it is pertinent to know whether the document, information, or any communication shared by a client is in safe hands and held in confidence by its legal advisors.

For the purpose of effective representation to the clients and encouraging them to make full and frank disclosure to the attorneys, the concept of 'privileged communication' got evolved.

So what is privileged communication?

Privileged communication or professional communication is the confidential interactions or conversations between the two individuals in a legally recognised relationship, which communication cannot be disclosed or compelled to be disclosed to any third party.



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### Privileged Communication and its Importance

The importance attached to the privileged communication from the perspective of the client was stressed in *R. v. Derby Magistrates Court ex p. B* (1995) 4 ALL ER 526, in which it was noted "*A man must be able to consult his lawyer in confidence, since otherwise, he might hold back half the truth*".

Likewise, if the proceedings are initiated against the lawyer for acts and omissions by their clients, no lawyer would be able to discharge his role effectively and do justice to the case or matter handled by him (*K. Ponnammal v. A. Loganathan*, (2009) 6 MLJ 792 (MAD)).

While the article focuses on the privileged communication between client and attorney, the doctrine of privileged communication is not confined to them alone but also extends to other relationships such as doctor and patient, husband and wife, State communication (from unpublished official records to affairs of State), official communication (made to a public officer in 'official confidence'), priest-penitent privilege or reporters privilege.

The doctrine of privileged communication is not confined to attorney-client alone but also extends to other relationships such as doctor and patient, husband and wife, state communication (from unpublished official records to affairs of State), official communication (made to a public officer in 'official confidence'), priest-penitent privilege or reporters privilege.



As such, in India, the (Indian) Evidence Act particularly recognizes privileged communications between attorney-client, husband-wife, State and official communications.

### **Applicable Statutes and Nature of Communication**

*The law relating to privileged communication in India is more than a century-old law.*

The trio of the (Indian) Evidence Act, the (Indian) Advocates Act, and the Bar Council of India Rules provides a statutory right and imbues a sense of relief to the clients to come forward and disclose information without any apprehension or fear of divulgence of such confidential communication to any third party.

In addition to the above-mentioned statutes and rules, one will also have to consider the provisions of the (Indian) Companies Act, (Indian) Code of Criminal

Procedure, and the (Indian) Contract Act to understand the rule of privileged communication.

In light of these statutory provisions, any individual who seeks advice from an attorney would lead to establish an attorney-client privilege and the disclosure of information will be protected under the applicable laws and rules.

In order for the communication to be termed as a privileged communication, it should be of a private or confidential nature, which is otherwise not available in the public domain. Importantly, such communication should have been made with a view to obtaining professional advice, implying that not any communication made by a client to an attorney is privileged from disclosure (*Framji Bhikaji v. Mohan*, (1893) 18 Bom 263). Whether the communication was intended to be confidential shall depend on the facts of each case.

Also, it is pertinent to note that privilege extends to all communications, oral or written.



## Establishment of Attorney-Client Relationship

The important point under consideration is the time period from when the attorney-client relationship gets established.

Any communication made during the subsistence of the relation of an attorney and the client will be construed as privileged communication. For the purpose of establishing legal relations, no formal engagement or payment of fee is mandated. The determining factor will be whether the communication was made with the attorney in his capacity as a professional advisor and not as a friend (*Smith v. Duniell*, 44 LJ Ch 189) or otherwise. This would again mean that no privilege is attached to the communication with an attorney when only consulted as a friend or for informal advice.

## Period of Privilege

The privilege of non-disclosure of communication is required to be maintained by the attorney not only till the time of their engagement but even after the engagement is terminated. The Indian Evidence Act specifically provides that the legal advisors shall not be permitted 'at any time' to disclose professional communications.

An attorney cannot disclose any information or content of the confidential document that has been disclosed to him during his engagement with the client and post its termination.

Again, in *K. Ponnammal v. A. Loganathan*, it was held that the Counsel is obligated to protect the interests of the client during the subsistence of professional engagement and even thereafter.



## Applicability of the Provisions

The (Indian) Evidence Act provides the category of people to whom the confidential provisions are applicable. Within its ambit are included the barristers, attorneys, pleaders, and vakils. Further, it also covers interpreters and clerks assisting the attorneys in any legal matter, making them bound by similar restrictions under the (Indian) Evidence Act, as those applicable to the legal advisors.

The rule of privileged communication is confined to legal advisors and not to the third party.

Whether or not an in-house counsel will be bound by the provisions dealing with the privileged communication has been a matter of debate. In order to understand the applicability of the provisions to in-house lawyers, the provisions of the Advocate Act and BCI Rules will have to be taken into consideration.

The term "Advocate" under the Advocates Act includes an advocate entered into the roll which is prepared and maintained as per the Advocates Act and who appears before the courts and who practices the profession of law outside court by giving legal advice or drafting legal documents. BCI Rules state that an advocate cannot be a full-time salaried employed with a firm, government, or a company. In view of these provisions, an in-house lawyer, who draws a salary as an employee of a company, cannot practice as an advocate until such time that he or she is in full-time employment. Relying on these provisions, it can be argued that any kind of communication between the in-house lawyer and his or her employee will not be protected as privileged communication.

The Supreme Court of India in *Satish Kumar Sharma v Bar Council of Himachal Pradesh* (2001) 2 SCC 365, held that it's not whether a person is engaged on terms of salary or by payment of remuneration, but whether he is engaged to



act or plead on its behalf in a court of law as an advocate. If the terms of engagement are such that he does not have to act or plead, but does other kinds of work, then he becomes a mere employee. Essentially, implying that in-house lawyers will not be bound by the provisions dealing with the privileged communication.

A contrast view is if the in-house lawyer has been appointed as an advocate, then the confidential communication between such an in-house lawyer and the company will be protected as privileged communication.

### **Waiver and Exceptions**

The law is clear on the point that the privilege under the (Indian) Evidence Act is for the benefit and the protection of the client and not the legal advisors. Hence, the privilege can be waived only by the client or his representative.

Such privilege may be expressly or impliedly waived under Sections 126 or 128. An express waiver would mean where the client has specifically permitted the client to disclose some or all of the confidential information, on such understanding and conditions, as indicated by the client at the time of giving such waiver. In case of an implied waiver, the legal advisor may be called as a witness and for questioning on matters in order to explain or support any evidence being examined by the court. In such cases, the attorney shall be required to disclose professional communication.

As far as exceptions are concerned, in the event, during the course of an engagement, the attorney observes that any crime or fraud has been committed by the client, then, the communication made concerning such matter by the client shall not be accorded protection under the (Indian) Evidence Act. Also, communications made in furtherance of an illegal purpose or any fact coming to the knowledge of the legal adviser after commencement of his or her engagement showing that any crime or fraud has been committed



will not be protected (*Gurunanak Provision Stores v. Dulhonumal Savanmal*, A 1994 Guj 31, 36).

Also, in terms of the provisions of the Code of Criminal Procedure, a court can compel the disclosure and production of any document from an attorney for its admissibility, if the document is necessary for the purpose of any investigation or proceeding.

### **Remedial Measures**

So what if an attorney, even though barred to testify or disclose the communications, discloses these communications or testifies in court without the consent of his clients? What if the attorney is not disclosing but the client is compelled to make the disclosures? What if the attorney is put in a situation to divulge the privileged communication? What happens to the usual deal list publications and announcements made after the deal closures?

While the (Indian) Evidence Act safeguards the communications between a client and its attorney, there are no direct remedial provisions provided thereunder for a breach committed by the attorney. Turning to the BCI Rules, it lists down the duties of the attorney toward its clients and the consequences of non-adherence.

Amongst various duties, an attorney is required to adhere to the provisions of the (Indian) Evidence Act and not take advantage of the confidence and trust reposed in him by his clients. In the event, there is a professional or any other misconduct, the Advocates Act sets out that the relevant bar council shall refer such matter to a disciplinary committee for remedial or disciplinary actions like dismissing of the complaint or suspension or removal of the advocate from the roll of the advocates.

While the punishment is as severe as losing the license to practice, there are instances where the client may still choose to enter into a non-disclosure



agreement with their legal advisor. Entering into such agreements will give the attorney and clients alike added layer of protection under various apparent and unforeseen scenarios. Consider a situation where the attorney may be put in a situation to divulge information, then, having an agreement between the parties makes it easier as well as a quick and strong defense to protect the privilege. Separately, when the entire understanding is put down in a written agreement, it gives comfort to the client, especially in highly sensitive and big-ticket matters. Along with the comfort factor, the clients can also have an additional remedies including under the (Indian) Contract Act for any possible breach of the terms and conditions of an agreement.

Some other remedial measures could be in the form of approaching the Court for seeking interim and final reliefs, including specific performance, injunction, and stay orders for non-disclosure of information and documents.

Any disclosures against the contravention of law or commercial understanding cannot be admitted in a court of law as evidence.

## Concluding Thoughts

While the legal advisors are always under a moral obligation to respect the confidence reposed in them by the clients, the (Indian) Evidence Act makes specific provisions wherein the protection from disclosure of communication is not only extended to the client but also to the legal advisors.

The law on privileged communication is also well settled on the point that communication once privileged always remains privileged. Having said that, the rule of privilege is not absolute in nature. There are certain exceptions where the disclosures are permitted or can be made permitted. Moreover, if the disclosures are made in contravention of legal or commercial provisions, there are consequences of such breaches.

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