

INDIA

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1. DEFINITION - PRESENTATION

1.1 DEFINITION

There is no statutory definition of client-lawyer or legal professional privilege in India. From the wording of sections 126 and 129 of the Indian Evidence Act, 1872, which set out the main rules against disclosure, it can be broadly defined as:

1. the protection against disclosure by an Advocate¹ that is accorded to:
 - a) all communications made by or on behalf of a client to his² Advocate and any advice given by the Advocate to his client in the course of and for the purpose of that Advocate's engagement³ and
 - b) the contents or condition of any document which an Advocate has become acquainted with in the course of and for the purpose of his engagement⁴,and
2. the protection that is accorded to every person against being compelled to disclose any confidential communication with his legal professional adviser, save where that person voluntarily gives evidence as a witness and where the disclosure of confidential evidence is necessary to explain the evidence already given by him.⁵

2. SOURCES

The law of India has for the most part its origin in English judgments and Indian Acts of Parliament that were enacted at a time when India was still a colony of Britain. The law

¹ Only lawyers who are enrolled as Advocates may practise law in India: Section 29 of the Advocates Act, 1961. There are no rules specifically for law firms or indeed express recognition of them under the rules produced by the Bar Council of India, the all-India regulatory body of the profession responsible for setting standards of professional conduct and exercising a supervisory role over the Bar Councils in the individual states of India. Where a law firm is involved, it is the individual advocates in a law firm rather than the law firm itself that may provide legal services in India. Advocates derive their authority to represent their clients in court-related matters under a power of attorney granted in their name.

² References to the masculine include references to the feminine wherever the context admits.

³ The current practice is to refer to Advocates as being "engaged" or "retained" to act in a particular matter. Section 126 of the Evidence Act refers to "employment" rather than "engagement". However, rules framed by the Bar Council of India under the Advocates Act, 1961, (the Bar Council of India Rules) forbid Advocates from entering into any full-time employment and continuing to practise as Advocates at the same time (Part VI, Chapter II, Section VII, Paragraph 49). The wording of the rule is wide enough to cover employment by a law firm. A practice has developed of law firms taking on Advocates as full-time, salaried "consultants" to circumvent the rule. It is a matter of debate whether information in the hands of an Advocate other than the Advocate in fact instructed in the same law firm remains privileged where a relationship of agency cannot be established between the two. A blanket instruction to the law firm would arguably cover partners and employees, but not necessarily full-time, salaried/non-partner Advocates.

⁴ Section 126 of the Evidence Act, 1872.

⁵ Section 129 of the Evidence Act, 1872.

relating to legal professional privilege is found mainly in Sections 126 – 129 of the Indian Evidence Act, enacted in 1872 (i.e. more than half a century before India gained her independence). It is based on a draft prepared by Sir James Fitz-James that sought to reduce the then prevailing English law of evidence into a code suitably modified to cater to circumstances in India. After Independence in 1947, English judgments remain of considerable persuasive authority and it is settled law that the courts in India may look to English decisions in matters concerning the interpretation of the Evidence Act⁶. The law in India relating to legal professional privilege will therefore seem instantaneously familiar in many respects to English and common law lawyers, but the similarities with English law are in fact more illusory than real.

The relevant provisions of the Evidence Act are:

Section 126: No barrister, attorney, pleader, or vakil⁷ 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 barrister, pleader, attorney, or vakil, 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:

- (1) any such communication made in furtherance of any illegal purpose;
- (2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, pleader, attorney, or vakil was or was not directed to such fact by or on behalf of his client.

Explanation: The obligation stated in this section continues after the employment has ceased.

Section 127: The provisions of section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys, and vakils.

Section 128: If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and, if any party to a suit or proceeding calls any such barrister, pleader, attorney, or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney, or vakil on matters which, but for such question, he would not be at liberty to disclose.

⁶ *State of Punjab v. S. S. Singh*, A.I.R. 1961 S.C. 493.

⁷ These different categories of lawyers are of historic significance now; only those enrolled as Advocates are now entitled to practise law in India (see footnote 1 above).

Section 129: No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communication as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no other.

The code of conduct applicable to Advocates is found in the Bar Council of India Rules, Part VI, Chapter II, Section II. At first sight, it appears surprisingly silent on any duty of confidentiality owed by Advocates to their clients. However, Paragraph 16 of this Section provides:

An Advocate shall not, directly or indirectly, commit a breach of the obligations imposed by section 126 of the Indian Evidence Act.

The Evidence Act applies to judicial proceedings in India but not to affidavits or arbitrations.⁸ It may therefore be thought from a literal reading of Paragraph 16 that disciplinary proceedings under the code of conduct would be attracted only where an Advocate breaches section 126 of the Evidence Act i.e. where the Evidence Act applies in the first place. However, from an Advocate's point of view, it would be safer to read Paragraph 16 as effectively reproducing the obligations in section 126 of the Evidence Act, so that the duty of confidentiality exists even when the Evidence Act does not strictly apply.

3. SCOPE/LIMITS

3.1 General observations

In determining the scope of legal professional privilege in India, it is important to treat the Advocate's position as separate from that of the client: the same confidential information that may not be forced out of the client may in certain specified circumstances be disclosed by his or her Advocate, either voluntarily or compulsorily. The level of protection accorded to confidential information and material in India accordingly depends on whether that information or material is sought to be extracted from an Advocate or from his client.

Disclosure by an Advocate

The protection accorded by section 126 of the Evidence Act against disclosure by an Advocate extends only in respect of actions committed before the engagement of the Advocate. Accordingly, there is no such protection in respect of:

- (a) any communication made in furtherance of any illegal purpose or

⁸ Section 1, Evidence Act, 1872.

- (b) any fact observed by the Advocate in the course of his engagement showing that any crime or fraud has been committed since the commencement of that engagement.

Communications must be made confidentially in the context of a Client – Advocate relationship and with a view to obtaining legal advice in order to obtain protection. A record of a client's appointment and time of attendance have been held not to be privileged. Communications made before the creation of a Client – Advocate relationship, such as where "friendly" advice is sought but no Client – Advocate relationship eventually results, similarly runs the risk of having to be disclosed.

The rule is: "Once privileged, always privileged." The privilege therefore extends after the lawyer's engagement has come to an end, but not to communications made or advice received thereafter.

The provisions of Section 126 of the Indian Evidence Act apply to interpreters and agents of the Advocate, who are under the same prohibition and are entitled to the same immunity as the Advocate engaged in the matter.⁹ The agents of the Advocate are effectively treated as one with the Advocate. Accordingly, privileged information coming into the hands of an Advocate's clerk does not amount to publication for the purpose of a suit in defamation.¹⁰

Privileged communications and information in the hands of the Advocate may be disclosed with the consent of the client. The consent has to be expressly given to the Advocate. Failure to claim privilege does not amount to an express consent to its waiver.¹¹ A client who gives evidence as a witness is not thereby to be taken as having waived the protection against disclosure of confidential information by the Advocate under Section 126 of the Evidence Act. Even where a client calls his or her Advocate as a witness, privilege shall not be deemed to have been waived save in respect to those matters which the client questions that Advocate on.¹²

Disclosure by the Client

However, where a client voluntarily gives evidence as a witness, he or she may be compelled to disclose any confidential communication with the Advocate which in the Court's opinion is necessary to explain the evidence that the client has already given but for no other purpose.¹³ The immunity against forced disclosure afforded to a client under section 129 is wider than that afforded to Advocates under Section 126, covering any type of confidential communication and applying irrespective of whether or not that communication was in the course of or for the purpose of the professional legal adviser's engagement or was in furtherance of an illegal purpose.

⁹ Section 127 of the Evidence Act.

¹⁰ *P.R. Ramakrishnan v. Subramma* AIR 1988 Ker. 18.

¹¹ *Mandesan v. State of Kerala* 1995 Cr. L.J. 61

¹² Section 128 of the Evidence Act, 1872

¹³ Section 129 of the Evidence Act, 1872

3.2 Between lawyers

Communications between lawyers are generally admissible and in practice are relied upon as evidence. An admission however is irrelevant if it was made either upon an express condition that evidence of it was not to be given or in circumstances that the court can infer that the parties agreed that evidence of it must not be given.¹⁴ This, however, goes to relevance and not admissibility and there is no reason why an admission made in these circumstances should not operate as an estoppel. Section 23 provides:

In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

Explanation-Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under Section 126.

In explaining the “without prejudice” rule in India, parallels are sometimes drawn with the position in England, often with the assistance of recently reported cases, but there are in fact some fundamental differences. Communications written between parties containing proposals to settle are in practice occasionally brought to the attention of the Courts to seek further time or to demonstrate the overall reasonableness of a party’s approach without retribution, and the wording of Section 23 does not in itself render inadmissible “without prejudice” correspondence, whether containing an admission or not. What is required is an agreement from the party receiving the “without prejudice” communication to respect the privilege sought in order for the communication to be inadmissible.¹⁵

3.3 Third parties

Legal professional privilege in India is limited to communications, documents, and advice passing between client and Advocates (and their agents). Unlike the position in England, no privilege is available for communications made by parties or their Advocates and third parties for the specific purpose of pending or contemplated litigation.

4. IN-HOUSE LAWYERS

In-house lawyers may not practise as Advocates during the period of their employment.¹⁶ They would seem to clearly fall outside the ambit of Section 126, with its emphasis on a Client-Advocate relationship and the existence of communications, documents and advice made and given in the course of an Advocate’s engagement and

¹⁴ Section 23 of the Indian Evidence Act, 1872

¹⁵ *The Lucknow Improvement Trust v. P.L. Jaitley & Co* (1929) 5 Luck 465.

¹⁶ See footnote 4 above.

for the purpose of that engagement. It has, however, been said that official communications made by an employer to his employee and *vice versa* for the purpose of seeking legal advice should be protected under sections 126 and 129¹⁷ of the Evidence Act, but it is not easy to understand the basis of that view given the wording of these sections. Section 126 of the Evidence Act refers only to (former) categories of professional, and not employed, lawyers and envisions protection from disclosure only in the context of a Client-Advocate relationship.

5. PROSPECTIVE

The rules relating to privilege in India are more than a century old and are clearly inadequate to provide the levels of protection that may ordinarily be expected in modern relationships with lawyers. The categories of lawyers expressly referred to in the Evidence Act are no longer relevant. The wording would clearly need to be changed if in-house lawyers were to properly fall within its ambit. The absence of any protection for communications with third parties and the impact that this has on the ability of clients and their Advocates to freely communicate with potential witnesses and experts in the preparation of a case is obvious.

The treatment of privilege by the provision of different rules for the protection against disclosure by an Advocate and by his client has resulted in Advocates on occasion being compelled to disclose information and documents confidentially provided to them by their clients in circumstances where no such steps would have been permitted against those clients themselves. It is sufficient in an application for disclosure against an Advocate to show to the Court that a confidential communication between a client and his Advocate was in furtherance of an illegal act, such as a misrepresentation. It is not necessary to show that a criminal offence was involved, or that the Advocate was aware of what his client was up to. Advocates instructed or formerly instructed by clients against whom such illegality is alleged may find that they have to contest an application for disclosure at their own time and cost in order to avoid disciplinary proceedings under the Bar Council Rules for a breach of Section 126 of the Evidence Act. Clients for their part would be well advised not to place too much reliance on the apparently wide sweeping protection against the disclosure of confidential information in section 129.

¹⁷ Bombay Municipality v. Vijay Metal Works AIR 1982 Bom. 6.