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CONFIDENTIALITY THROUGH LEGAL PROFESSIONAL PRIVILEGE: AN ANALYSIS OF CONFIDENTIALITY OBLIGATIONS IN THE ADVOCATE–CLIENT RELATIONSHIP

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Abstract

By recalling Shakespeare's famous line, "*The first thing we do, let's kill all the lawyers,*" the Supreme Court in *Summoning Advocates case*¹ has renewed attention on legal professional privilege. Against this backdrop, this paper examines the legal and ethical foundations of confidentiality in the advocate–client relationship under Indian law. It discusses the historical development of the privilege, the statutory framework contained in the Indian Evidence Act, 1872, the Bharatiya Sakshya Adhiniyam, 2023, the Advocates Act, 1961, the Bar Council of India Rules, the extent to which the such framework adequately protects confidential communications and the judicial principles governing the scope and exceptions to legal professional privilege including the unresolved position of in-house counsel. Moving beyond the account of the law, the paper explains that legal professional privilege is different from an advocate's broader ethical duty of confidentiality. The paper argues that the real challenge lies not in justifying the existence of legal professional privilege, but in defining its limits in a manner that safeguards lead to full disclosure to ensure an effective legal advice while preserving the effective administration of justice.

Introduction

Legal professional privilege protects information disclosed by a client to their advocate during professional engagement from compelled disclosure. It is of two types, legal advice privilege, which includes information disclosed for the reason of seeking advice related to legal, and litigation privilege, covering material created in contemplation of or preparation for litigation.²

¹ *Summoning Advocates Who Give Legal Opinion Or Represent Parties During Investigation of Cases & Related Issues*, In re, (2026) 2 SCC 233.

² Privilege—General Principles, LexisNexis Legal Guidance, <https://www.lexisnexis.co.uk/legal/guidance/privilege-general-principles> (last visited July 24, 2026).

The privilege attaches not only to conversations but to documents and other material exchanged while the advocate is acting in that professional capacity.³

The essence is that a client must be able to place the whole of a matter before an advocate, including facts that are embarrassing or damaging, in order to receive competent advice.⁴ This is also includes client to be free from compulsion by a court to disclose the substance of such a communication unless he consents to be a witness.⁵ However, the pre-condition to attach this privilege is that the advocate-client relationship should be formed, whether through a written engagement or an oral agreement.⁶

Main body

Historical development and the reason

The classical justification for the privilege was given by Lord Brougham L.C. in *Greenough v. Gaskell* that in a scenario where the communication is not saved from disclosure then no person will be courageous enough to talk to a legal professional for advice to save his rights and place his stance in front of the court, neither to seek redressal nor to seek defence.⁷ Indian courts have recognised the same that effective legal representation depends on a client being able to communicate openly and honestly with counsel. If such communications were not protected, clients might hesitate to disclose all the relevant facts, leaving their lawyers to advise or represent them on incomplete instructions.⁸

However, the doctrine did not always rest on this rationale focusing on the client. Attorney-client privilege traces to the sixteenth century, when the advocate was bound by personal honour and professional oath to keep the client's secrets, so the privilege protected the advocate's integrity rather than the client's interest.⁹ By the close of the eighteenth century this began focusing on client and justification on the client's need to consult an adviser without fear of exposure.¹⁰ Therefore, this explains the reason behind this being an entitlement of the client and only the client chose to not have this privilege.

³Indian Evidence Act, 1872, §126, No. 1, Acts of Parliament, 1872 (India).

⁴*Greenough v Gaskell* (1833) 39 ER 618.

⁵Indian Evidence Act, 1872, §129, No. 1, Acts of Parliament, 1872 (India).

⁶*Kalikumar Pal v. Rajkumar Pal*, 1931 SCC OnLine Cal 89, p.5.

⁷*Supra* note 4.

⁸*Munchershaw Bezonji v. New Dhurumsey Spinning & Weaving Co.*, ILR 4 Bom. 576, p. 582.

⁹Devadipta Das, *Attorney-Client Privilege and the Constitutional State: Liberty's Last Refuge in the Age of Surveillance*, SCC Times (Dec. 24, 2025), <https://www.scconline.com/blog/post/2025/12/24/attorney-client-privilege-constitutional-state-surveillance-india/>

¹⁰ John William Gergacz, *Attorney-Corporate Client Privilege*, 37 JSTOR 461, 473 (1982).

Statutory Framework in India

India has no standalone confidentiality statute governing the advocate-client relationship. The privilege instead rests on several statutes read together including the Indian Evidence Act, 1872, Sections 126 to 129, now substantially re-enacted as Sections 132 to 134 of the “*Bharatiya Sakshya Adhiniyam, 2023*” (“BSA”); the “*Advocates Act, 1961*” (“AA”) and Bar Council of India Rules (“BCI Rules”), which supply the professional-conduct dimension and the “*Companies Act, 2013*” (“CA”).¹¹

Section 126 of the Evidence Act or 132 of BSA protects communications between a client and an advocate, and documents shared during the engagement, provided such exchange occurred during and for the objective of advocate's engagement.¹² Legal advice is protected, and so is material prepared in anticipation of litigation.¹³ Where the advice given has no real connection to law, the communication is not treated as privileged,¹⁴ and to fall within Section 126, a communication must also be confidential in character.¹⁵

Section 129 or 134 of BSA protects the client, rather than the advocate, from being compelled to disclose confidential communications with a legal adviser, except where the client chooses to be a witness, in which case the court may require disclosure of what is necessary to explain that evidence, and no more.¹⁶ However section 128 or 133 of BSA provides that a party does not waive legal professional privilege merely because agree to be a witness as simply stepping into the witness box does not mean that confidential communications between the client and their advocate no more fall under section 126.¹⁷ Section 227 of CA similarly protects privileged communications done to the legal adviser, other than the name and address of the client, from disclosure to an inspector, tribunal, CG, or a Registrar.¹⁸

Further, in addition to the pre-condition that the privilege attaches only once an advocate-client relationship exists; it does not protect communications made before that relationship was formed,¹⁹ the legal profeffession must be an advocate as per the definition given under the AA. The reason is that the BSA uses the term advocate under section 126 providing the said

¹¹I Indian Evidence Act, 1872, §126-129, No. 1, Acts of Parliament, 1872 (India); Bharatiya Sakshya Adhiniyam, 2023, § 132-134, No. 47, Acts of Parliament, 2023 (India); Advocates Act, 1961, No. 25, Acts of Parliament, 1961 (India); Companies Act, 2013, § 227, No. 18, Acts of Parliament, 2013 (India).

¹²*Supra* note 3.

¹³Larsen and Toubro Ltd. v. Prime Displays (P) Ltd., (2003) 114 Comp Cas 141.

¹⁴ Municipal Corporation of Greater Bombay v. Vijay Metal Works, 1981 SCC OnLine Bom 55.

¹⁵Memon Hajee Haroon Mahomed vs. Molvi Abdul Karim and Ors, MANU/MH/0069/1878.

¹⁶*Supra* note 6.

¹⁷ Id. at § 128.

¹⁸ Companies Act, 2013, § 227, No. 18, Acts of Parliament, 2013 (India).

¹⁹ *Supra* note 5.

privilege. Therefore, as per Section 29 reserves the practice of law to advocates,²⁰ and Section 2(a) defines advocates as any advocate entered in any roll under the provisions of this Act.²¹ It can be inferred that non-advocates such as accountants and business consultants cannot claim the privilege even where their advice resembles legal advice.

Privilege is an evidentiary rule governing what can be extracted from an advocate in a court or tribunal; the advocate's duty of confidentiality is a broader ethical obligation operating independently of any proceeding. The BCI Rules, Part VI, Chapter II, Section IV, Sub-section 24, provide that an advocate is prohibited from doing such thing by which he takes an advantage or abuses the trust placed on him by the concerned client, and 19 of the same Part provides that an advocate should only act on the instructions of his client or the agent authorised by the client but not on any other person's instructions.²² Read together, these provisions impose a standing statutory obligation of confidentiality on every advocate, independent of whether the information would separately qualify as privileged under Section 126.

This obligation is reinforced by the restatement of the advocate-client relationship as a fiduciary one.²³ Framing the relationship this way matters because it forms a basis outside the law of evidence altogether to hold an advocate to account for misuse of client confidences, including in professional misconduct proceedings where the strict evidentiary rules of privilege have no direct application. In *V.C. Rangadurai v. D. Gopalan*, the Court states that an advocate who perceives a conflict of interest in engaging with a different or new client ought to decline the engagement where it would work against a former client's interests, since to do otherwise breaches the fiduciary duty inherent in the relationship and amounts to professional misconduct.²⁴

Exceptions

The privilege is not absolute. The exceptions carved out by the Evidence Act, carried forward largely unchanged into the BSA, ensure that the privilege from becoming a shield for wrongdoing.

First, a communication is done for an illegal purpose then it is not privileged²⁵ as an illegal purpose defeats the entire purpose of providing the justice in the first place. Second, it is

²⁰ Advocates Act, 1961, § 29, No. 25, Acts of Parliament, 1961 (India).

²¹ Id. at § 2(a).

²² Bar Council of India Rules, Pt. VI, Ch. II, § IV, r. 19 & r. 24.

²³ *D.R. Dhingra v. Department of Personnel & Training (DoPT)*, 2010 SCC OnLine CIC 2096.

²⁴ *V.C. Rangadurai v. D. Gopalan*, (1979) 1 SCC 308.

²⁵ *Bharatiya Sakshya Adhiniyam*, 2023, § 132(1)(a), Acts of Parliament, 2023 (India).

excluded from this privilege if the advocate notices that a fraud or crime was committed from the commencement of the engagement, regardless of whether the client's attention was drawn to it.²⁶ Third, the client may expressly consent to disclosure, since the privilege belongs to the client and not the advocate.²⁷ Fourth, a client who gives evidence in a proceeding may be compelled to disclose confidential communications to the extent necessary to explain that evidence, however merely calling the advocate as a witness does not itself waive the privilege unless the client is questioned about confidential matters.²⁸

In-House Counsel as an exception

The framework described above assumes an advocate practising independently of the client. In-house counsel occupy a more uncertain position. An advocate who becomes a full-time salaried employee for any person, government, firm, or company is generally required to surrender the licence to practise.²⁹ In such scenario, the ordinary basis for the privilege that the person is an advocate as per the AA is absent and communications made to in-house counsel from company employees are not privileged in the same way as communications with an external advocate.

The Supreme Court' in *Satish Kumar case* held that a full-time employee who does not act as an advocate for the employer, but performs other functions, loses advocate status altogether and becomes a mere employee without any claim to privilege.³⁰ This unresolved position was addressed, but not corrected, by the 2025 judgment, which held that in-house counsel fall outside the definition of "Advocate" under the AA and are accordingly not covered by the privilege recognised for practising advocates.³¹

However, in-house counsel should be allowed to retain privilege for communications pertaining to legal advice or contemplated litigation, as distinct from administrative matters provided the counsel retains active enrolment. If privilege exists so that a client including a corporate client, can obtain candid legal advice without fear the communication will later be used against it then the same logic should apply equally whether the adviser is retained externally or employed internally provided the communication is genuinely for legal advice rather than a business decision. The rationale behind this is that in-house counsel perform

²⁶Id at § 132(1)(b).

²⁷Id at § 132.

²⁸Id at § 133 and 134.

²⁹ Bar Council of India Rules, Pt. VI, Ch. II, § VII, r. 49.

³⁰*Satish Kumar Sharma v. Bar Council of H.P.*, (2001) 2 SCC 365.

³¹*Supra* note 1.

substantively the same advisory function as external advocates and excluding them from privilege exposes them to compelled disclosure. On the other hand, companies usually manage by having confidentiality clauses into employment contracts, since such contractual protection does not depend on the uncertain application of the privilege.

Analysis and Suggestions

The existing legal framework provides a strong foundation for protecting confidential communications between advocates and their clients. However, some practical issues still remain unresolved. The framework does not clearly explain how courts should deal with disputes where one party claims privilege and the investigating authority disputes that claim. As a result, much depends on judicial interpretation, which can lead to inconsistent outcomes. Another area that requires greater clarity is the position of in-house counsel. The paper supports providing this privilege to the in-house counsels as well for the rationale stated above but at the same time, extending privilege without any limitations could allow companies to label ordinary business communications as legal advice. A more balanced approach would be to protect only those communications that are genuinely made for obtaining or giving legal advice.

The law also needs to keep pace with changes in the way legal services are delivered. Today, advocates frequently communicate with clients through emails, virtual meetings, cloud-based platforms and digital document systems. The increasing use of artificial intelligence in legal research and drafting also raises new questions regarding confidentiality and privilege. The present statutory framework was enacted long before these developments and provides very little guidance on how privilege should operate in such situations. Future judicial decisions or legislative amendments may therefore be necessary to address these issues.

Despite these concerns, the basic principle behind legal professional privilege continues to remain relevant. Clients can only receive proper legal advice when they are able to communicate openly with their advocates without fearing that their communications will later be disclosed. In my opinion, the focus of future reforms should not be on limiting the privilege but on providing clearer rules regarding its scope and application. This will strengthen both the administration of justice and public confidence in the legal profession.

Conclusion

Legal professional privilege in India rests on a client-centred rationale that has been broadly stable since the eighteenth century that a client must be free to speak candidly to an advocate, and a court will not compel disclosure of what passes between them, because the administration of justice depends on litigants receiving competent advice. The statutory scheme built provides a strong foundation as to what can be disclosed and what not as well as when the court can compel. However, there might be loose ends due to different interpretations as it is impossible to confine this principle a straightjacket formula. Therefore, the discussion is not about the need for legal professional privilege as that is well established but rather about defining its scope and identifying the authority responsible for determining its limits. The answers to these questions will continue to shape the relationship between effective legal representation and the administration of justice.

