PRIVILEGED COMMUNICATION BETWEEN A LAWYER AND CLIENT

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**ABSTRACT**

The most professional profession in today's world is Law. Every attorney is expected to pay utter respect to his client and the same is expected from the client as well. The attorney client privilege is one of the fundamental and important factors of the legal system. The existence of the Evidence Act,1872 has made it easy for both the client and the attorney to have a sorted relationship. If this rule would not have been there, half of the case would not have been disclosed by the client in front of the attorney. Also, no person would have been able to contact the skilled attorneys for the same.

Keywords:-*Attorney, Client, Privilege, Relationship.*

# Introduction

Law is supposed to be one of the most sober professions in the entire fraternity. This is a profession that involves the most amount of sophistication. A lawyer should always be well- versed with everything. Law is considered a noble profession, and this is reflected in the predominance of lawyers in all walks of public life in the past, be it the freedom movement, or early public service or political Section Also, a lawyer was regarded as a family friend.[[1]](#footnote-2)

While according to most people this perception of lawyers has changed in the eyes of the public,[[2]](#footnote-3) there is still a need to maintain some parts of that relationship.A lawyer is under a moral obligation to respect the confidence reposed in him and not to disclose communications which have been made to him in professional confidence i.e. in the course and for the purpose of his employment, by or on behalf of his client, or to State the contents or conditions of documents with which he has become acquainted in the course of his professional employment, without consent of his client.

If such communications were not protected, no man would dare to consult a professional adviser, with a view to his defense, or to the enforcement of his rights, and no man could safely come into a Court, either to obtain redress, or to defend himself.[[3]](#footnote-4)

# Origins and rationale of attorney client privilege

*“The situation created if there is no privilege given is one of every man being forced to defend himself instead of hiring a lawyer, or people telling their lawyers only half the story.”[[4]](#footnote-5)* This is the idea behind protecting this privilege, and is premised on the idea that legal business cannot be conducted without professional help, and that professional help can only be effectively provided with full information.[[5]](#footnote-6)

Lord Brougham LC in *Greenough* v. *Gaskell[[6]](#footnote-7)* stated that subject to recognised exceptions, communications seeking professional legal advice, whether or not in connection with pending court proceedings, are absolutely and permanently privileged from disclosure even though, in consequence, the communications will not be available in court proceedings in which they might be important evidence. It is clear from this discussion that the confidentiality of information between lawyer and client is both a right of the lawyer as well as the duty.[[7]](#footnote-8)

The position of law in India on privileged professional communications between clients and legal advisors are dealt under sections 126 to 129 of the Indian Evidence Act, 1872. Section 126 of the Act provides the scope of privilege attached to professional communications in a client attorney setting. It restricts attorneys from disclosing any communications exchanged with the client and stating the contents or conditions of documents in possession of the legal advisor in course of and for the purpose of the latter’s employment with the client.

The section also provides certain exceptional grounds on which such privilege shall stand denied, being furtherance of any illegal purpose or facts coming to the awareness of the attorney showing that either crime or fraud have been committed since the commencement of the attorney’s employment on the concerned matter.[[8]](#footnote-9)

# Evolution of this rule from the past

In India, the legal protection for this privilege is found in Section 126 to Section 129 of the Indian Evidence Act, 1872.[[9]](#footnote-10)

An explanation of the privilege provisions was provided by the Gujarat High Court in *Gurunanak Provisions Stores* v. *DulhonumalSavanmal and OrSection*[[10]](#footnote-11)the court stated that-

*“Neither a legal adviser nor his interpreter, clerk or even servant could be permitted to disclose any communications made to him in the course and for the purpose of professional employment of such legal adviser or to state the contents or condition of any documents with which any such person has become conversant in the course and for the purpose of such employment”.*

Sections 126 and 129 of the Evidence Act protect the communications between a lawyer and client made during the employment of the lawyer. In the opinion of the Bombay High Court, these provisions by necessary implication protect the documents prepared by the client in anticipation of litigation either for seeking legal advice or for using them in that litigation.[[11]](#footnote-12)

Further, Section 126 clearly requires that there be express consent of the client in order for privileged information to be divulged. It is not enough that the client fails to assert or claim that the communication is privileged.[[12]](#footnote-13)

The conditions under Section 129 are that the document must be in the nature of both internal legal advice and also opinions of counsel as well as in anticipation of litigation.[[13]](#footnote-14)

Further, Section 129 has been specifically left broad by the use of the term “any legal advisor” and not barrister, attorney, pleader or vakil, as other sections use. This implies that the coverage of this section is also broader.

The only statements that are protected are those made to an attorney in his capacity as an attorney.[[14]](#footnote-15) Therefore, when something is said to the attorney along with the opposite party,[[15]](#footnote-16) or when a lawyer testifies as to information that he has by virtue of being a witness,[[16]](#footnote-17) then attorney client privilege cannot be used to punish the lawyer for misconduct.

In *Superintendent and Remembrancer of Legal Affairs, West Bengal v. SECTION Bhowmick*,[[17]](#footnote-18) the Court held that-

*“Any communication that had instructions from the client was privileged, including, as was the case in the particular factual matrix, notes on the examination in chief of a witness for the other party. Communication from a third party to the lawyer, meant to be transmitted to the client, is also considered privileged if it was information connected to the general purpose of the legal advice”.[[18]](#footnote-19)*

The Supreme Court has recently held that there is no presumption that only because two lawyers are practicing from the same chamber, they would breach their confidentiality or commit some act which would amount to professional misconduct[[19]](#footnote-20)

The privileges mentioned in Sections 126 and 129 are designed to secure the clients confidence in the secrecy of his communication. Any breach of the confidence is a stigma not only on the individual concerned, but is also likely to have effect on credibility of the profession as a whole.[[20]](#footnote-21)

Based on this principle, it has been held that a salaried employee who gives his employer legal advice would be in the same position as someone who is an advocate whose services are hired for a particular legal matter.[[21]](#footnote-22)

Hence, these provisions have been extended to apply to in-house counsel as well. This seems to follow from the principle that the law is based on, as it is clear that the need for the privilege extends to anyone seeking to give meaningful legal advice.

# Rule of other jurisdiction

The rules governing attorney client privilege are an essential part of common law as discussed above. Hence, for the discussion below-

In its judgment in the case of*Southwark and Vauxhall Water Company*,[[22]](#footnote-23) (1978) 3 QBD 315 (CA), Lord Cockburn, C.J., observed:

*“The relation between the client and his professional legal adviser is a confidential relation of such a nature that to my mind the maintenance of the privilege with regard to it is essential to the interests of justice and the well-being of society.*”

In the United Kingdom, legal privilege is divided into legal advice privilege and litigation privilege. The second type is wider and covers documentation, etc. along with what is communicated between the two. However, it only applies when there is a litigation that has taken place.[[23]](#footnote-24)

However, as far as written documents are concerned, the privilege only applies to them if they are made for the purpose of and in the interest of the client’s right to defense, and that they emanate from lawyers not employed by the client.[[24]](#footnote-25)

In the USA and Canada, these rules are in the rules of evidence. These rules are based entirely on common law in both the United States and Canada.

Further there are two types of legal professional privilege

1. Legal advice privilege: It protects communication between a lawyer in his professional capacity and his client provided they are confidential and are for the purpose of seeking or giving legal advice.

2. Litigation privilege: the second type of legal professional privilege arises only after litigation or other adversarial proceeding are commenced or contemplated.,

• A lawyer and his nonprofessional agents,

• A lawyer and a third party.[[25]](#footnote-26)

# Exception to this rule of jurisdiction

It is clear that the privilege extends after the relationship between the attorney and the client has existed, there have been several complications dealing with this privilege extend till after the death of the client.

Since the purpose served by the privilege is to protect the interest of the client, it shouldnot extend after its death. So as far as civil suits are concerned, privilege has to extend after death as the estate of a deceased client can be sued. But as far as criminal cases are concerned, an argument has been made for allowing courts to require attorneys to testify providing privileged information if it helps exculpate someone wrongly accused of a crime, since the client is dead and cannot be charged for the crime anyway.

The Courts across the UK, USA and India have, however, held that this information is not to be made public even after the death of the client, and even if it could potentially save another person from being wrongfully convicted. In the United Kingdom, the House of Lords discussed this matter in*Bullivant and Others v. Attorney General of Victoria*.[[26]](#footnote-27)

In the United States, the US Supreme Court in *Swindler and Berlin*v. *U.SECTION*,[[27]](#footnote-28) the Court held similarly. Here it was stated that-

*“The presumption has always been that except in certain specified cases privilege would extend beyond death. The rationale used in this case was that in the event that such information was to be made public, the client may choose to not reveal it in the first place”.*

Another situation in which privilege may be sought to be waived is one where child care is concerned. While there have been no cases on this in India,[[28]](#footnote-29) the United Kingdom has seen the House of Lords take the position that privilege can be forcibly waived in cases concerning child welfare.[[29]](#footnote-30)

Therefore, the benefits that accrue from providing parties with the attorney-client privilege would not accrue here, as the parties were no adversarial and not competing with each other. However, while the justification for confidentiality is partly the adversarial nature of the system, but not only that. There is also the practical justification of this information being disclosed to the lawyer only because the client knows that it is not going to go to anyone except the lawyer. This problem will not go away in such case Section[[30]](#footnote-31)

After this, in the late 20th century, it was held that if there are documents in the possession or control of a solicitor which, on production, help to further the defense of an accused person, then no privilege is attracted. It was also laid down that the ‘balancing of conflicting interest’ exercise has to be done by the Court.[[31]](#footnote-32)

However, this was over-ruled in a House of Lords judgment in the 1990’Section[[32]](#footnote-33) The standard for the UK and some other parts of the commonwealth was laid down in *Prince JefriBolkiah* v *KPMG*,[[33]](#footnote-34) which has been distinguished on fact in later case Section The distinguishing on facts is usually a function of whether the Chinese walls set up for the purpose of ensuring that confidentiality isn’t breached are sufficient for the same.

# Conclusion

In conclusion, this research paper has analyzed that attorney client privilege is essentially an exception to the rule that all people can be required to divulge information if the court requires them to. However, a client literally needs to maintain due diligence which means he should all the protective measures up till a certain extent. Here, the word certain extent holds its meaning to limited liability.

The paper looks at the rationale behind the provisions and most proponents of attorney-client privilege base their belief in it on the practical implications of its removal. The entire legal fraternity is based on some of the basic structures of general public’s dependency on lawyers. It would become very difficult to run this business without faith of the public.

The paper then analyzes the rules governing this as they exist in various countries as well as the exceptions to the same across the same jurisdiction where every country focuses on building a trust worthy as well as fruitful relationship with its customers.

1. Soli J. Sorabjee, “Lawyers as Professionals”, AIR 2002 Jour 4. [↑](#footnote-ref-2)
2. the United States, for example, lawyers are easily the most hated and least trusted profession. When, in 1991, a national sample was asked to volunteer “what profession or type of worker do you trust the least,” lawyers were far and away the most frequent response. Almost as many (23%) spontaneously volunteered lawyers as the next two categories (car salesman, 13%; politicians, 11%) combined. Marc Galanter, “The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse”, 66 U. Cin. L. Rev. 805. [↑](#footnote-ref-3)
3. GauriKulkarni – “Privileged Communications”, available at http://www.legalserviceindia.com/articles/pc.htm accessed on 12th Jan, 2019. [↑](#footnote-ref-4)
4. Greenough v. Gaskell , (1824-34) All ER(Rep) 767. [↑](#footnote-ref-5)
5. Jones v. Great Central Ry, 1910 AC 4. [↑](#footnote-ref-6)
6. Greenough v. Gaskell , (1824-34) All ER(Rep) 767. [↑](#footnote-ref-7)
7. K. Gururaja Chari, Advocacy and Professional Ethics, (Allahbad: Wadhwa and Co. , 2000), at p. 143. [↑](#footnote-ref-8)
8. 8 Section 126, Indian Evidence Act No barrister, attorney, pleader or vakil, 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 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. [↑](#footnote-ref-9)
9. 126. Professional communications – No barrister, attorney, pleader or vakil 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 in 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 or this client.

   127. Section 126 to apply to interpreters etc. – The provision of Section 126 shall apply to interpreters and the clerks or servants of barristers, pleaders, attorneys and vakilSection

   129. Confidential communications with legal advisers –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 communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no other Section” [↑](#footnote-ref-10)
10. Gurunanak Provisions Stores v. DulhonumalSavanmal and Or Section, AIR 1994 Guj 31. [↑](#footnote-ref-11)
11. Larsen & Toubro Limited v Section Prime Displays (P) Ltd., [2003] 114 Comp Cas 141(Bom). [↑](#footnote-ref-12)
12. Mandesan v. State of Kerala, 1995 Cri LJ 61 (Ker). [↑](#footnote-ref-13)
13. Larsen & Toubro Limited vSection Prime Displays (P) Ltd., [2003] 114 Comp Cas 141(Bom). [↑](#footnote-ref-14)
14. M. C. Sarkar et al., Sarkar’s Law of Evidence, (15th edn., SECTIONSarkar and anr. edSection, Nagpur: Wadhwa and Company, 1999), at  p. 424-425 [↑](#footnote-ref-15)
15. Memon Hajee Haroon Mahomed v. Molvi Abdul Kuran & another, (1878) 3 Bom 91; Rebecca Mondal v.RamPratap, AIR 1989 AP 321. [↑](#footnote-ref-16)
16. V Ravi v. State of Kerala, 1994 Cri LJ 162 (Ker). [↑](#footnote-ref-17)
17. Superintendent and Remembrancer of Legal Affairs, West Bengal v. SECTIONBhowmick, AIR 1981 SC 917. [↑](#footnote-ref-18)
18. Balabel v. Air India, AIR 1993 SC 1246. [↑](#footnote-ref-19)
19. Sneh Gupta v. Devi Sarup and Or Section, (2009) 6 SCC 194. [↑](#footnote-ref-20)
20. Council of Institute of Chartered Accountants of India v. B Ram Goel, [2002] 111 Compass 355 (Delhi). [↑](#footnote-ref-21)
21. Municipal Corporation of Greater Bombay and Anr. v. Vijay Metal Works, AIR 1982 Bom 6. [↑](#footnote-ref-22)
22. Southwark and Vauxhall Water Company, (1978) 3 QBD 315 (CA). [↑](#footnote-ref-23)
23. GauriKulkarni, “Privileged Legal Communications”, Lawyers Collective, (2004) 19(3) 15. [↑](#footnote-ref-24)
24. K. Gururaja Chari, Advocacy and Professional Ethics, (Allahbad: Wadhwa and Co. , 2000), at p. 141 [↑](#footnote-ref-25)
25. Legal Advice Privilege available at http://www.freshfieldSectioncom/publications/pdfs/practices/legaladvice.pdf accessed on 11 Jan. 2019, 4:07 PM) [↑](#footnote-ref-26)
26. Bullivant and Others v. Attorney General of Victoria, (1901-03) All ER 812. [↑](#footnote-ref-27)
27. Swindler and Berlin v. U.SECTION 118 S Ct. 2081 (1998). [↑](#footnote-ref-28)
28. C.SECTION Raghu Raman, “Child Care Proceedings — Disclosure of Privileged Communications Between Client and his Attorney”, AIR 2007 Jour 56. [↑](#footnote-ref-29)
29. Re L (A Minor) Police Investigation— Privilege, (1996) 2 All ER 78 (HL). [↑](#footnote-ref-30)
30. Andrew Boon and Jennifer Levin, The Ethics and Conduct of Lawyers in England and Wales¸ Oxford: Hart Publishing, 1999 at p. 254. [↑](#footnote-ref-31)
31. R v. Barton, 1972 (2) All ER 1192; R v. Ataou, 1988(2) All ER 321. [↑](#footnote-ref-32)
32. R vSection Derbyshire Magistrates Court ex parte B, 1995(4) ALL ER 526. [↑](#footnote-ref-33)
33. Prince JefriBolkiah v KPMG, [1999] 2 A.C. 222. [↑](#footnote-ref-34)