

# PRIVILEGE COMMUNICATION BETWEEN ADVOCATE AND CLIENT

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## ABSTRACT

How can a client feel secure from the potential risk of having sensitive information fall into the wrong hands? The attorney-client relationship affords a distinct, invaluable right to have communications protected from compelled disclosure to any third party.

The attorney-client privilege is the oldest privilege recognized by Anglo-American jurisprudence. The privilege ensures “that one who seeks advice or aid from a lawyer should be completely free of any fear that his secrets will be uncovered. Before the privilege exists, there must be an attorney-client relationship. An express contract is not necessary to form an attorney-client relationship; the relationship may be implied from the conduct of the parties. But it is not always so clear when an attorney-client relationship exists.

There are certain exceptions to this privilege and it can also be waived off by the client not by the attorney. There are certain matters which are not protected by the attorney-client privilege.

In India, privilege communication between lawyer and client are dealt under section 126 to section 129 under Indian Evidence Act, 1872. The Bar Council of India Rules stipulates for all advocates certain standards of professional conduct and etiquette. Part VI, chapter II, section 2, Rule 17 of BCIR stipulates that “An Advocate shall not, directly or indirectly, commit a breach of the obligations imposed by section 126 of the Indian Evidence Act” thus reiterating the spirit of attorney-client privilege, breach of which will also lead to violation of the Bar Council Rules.

In this research paper we will also talk about the laws/rules which deal with privilege communication in different countries like UK, USA, and Canada etc.

## INTRODUCTION

The lawyer client privilege is the most established benefit perceived by Anglo-American statute. Actually, the standards of the tribute benefit might be followed right back to the Roman Republic, and its utilization was solidly settled in English law as ahead of schedule as the reign of Elizabeth I in the sixteenth century. Grounded in the idea of honor, the benefit attempted to bar any declaration by the lawyer against the customer.

As the benefit has advanced, incalculable strategy defenses have assumed a part in its turn of events. At its generally essential, the benefit guarantees "that one who looks for help from a legal counsellor ought to be totally liberated from any dread that his mysteries will be uncovered." Thus, the basic standard of the benefit is to accommodate "sound legitimate guidance [and] advocacy." With the security of the benefit, the customer may talk honestly and straightforwardly to lawful direction, unveiling all significant data to the lawyer and making a "zone of privacy" as it were, protected by the benefit, the customer might be all the more ready to convey to advise things that may somehow be smothered. In principle, such authenticity and trustworthiness will help the lawyer in giving more precise, very much contemplated proficient guidance, and the customer can be secure in the information that his announcements to his attorney won't be taken as an unfriendly affirmation or utilized against his interest. Indeed, furnished with full information, advisors at law are better prepared to fulfil the entirety of their expert obligations, maintain their obligations of sincere trust and steadfastness to the customer, and [contribute] to the productive organization of equity.<sup>1</sup>

## WHAT CONSTITUTES A LAWYER-CLIENT RELATIONSHIP?

We start our study of the privilege with the self-evident: before the benefit exists, there must be a lawyer customer relationship. As rudimentary as this idea appears, numerous customers expect the relationship exists and erroneously depend upon the assurance of the benefit, yet the benefit doesn't exist until the relationship is immovably settled. As a rule, the lawyer customer benefit doesn't grab hold until the gatherings have conceded to the portrayal of the customer.

In most of cases, the assurance that the lawyer customer relationship exists is anything but an arduous endeavour, for usually, the lawyer has explicitly recognized portrayal of the customer. Such an express affirmation might be exhibited by a commitment letter, a charge contract, or even an oral arrangement with respect to the extent of the portrayal. A lawyer customer relationship may likewise be explicitly recognized by the "appearance" of the lawyer for the customer, remembering recording pleadings for court for the customer, drafting reports for the customer, or showing up in court as the lawyer of a client.

An express agreement isn't important to shape a lawyer customer relationship; the relationship might be inferred from the direct of the gatherings. Notwithstanding, the relationship can't exist singularly in the brain of the potential customer missing a "sensible conviction" that the lawyer customer relationship exists. The suggested relationship might be proven by a few elements, including, yet not restricted to, the conditions of the discussion, the instalments of expenses to a lawyer, the level of complexity of the eventual customer, the solicitation for and receipt of legitimate guidance, and the historical backdrop of lawful portrayal between the supposed customer and the professional. While this rundown of elements is illustrative, none of these components, remaining solitary, will certifiably build up the presence of a lawyer customer relationship.<sup>ii</sup>

## **CONFIDENTIAL COMMUNICATIONS**

Accepting that the lawyer customer relationship is entrenched, is each correspondence ensured? That likewise depends. The essential lawyer customer benefit ensures customer correspondences with the lawyer. It likewise reaches out to responsive interchanges from the legal counsellor to the customer. In any case, the correspondence need not be as unmistakable as an oral or composed activity. In actuality, the smallest activity or inaction, for example, an agreed gesture or complete quietness may comprise a correspondence.

For instance, assume that smith is talking with Jones, her lawyer, about an issue including an ongoing offer of stock that is under scrutiny by the SEC. Jones asks Smith whether she got any secret, non-public data before the offer of her stock, and Smith quietly gestures her head in the

agreed. Albeit no words were traded, this correspondence among Smith and her lawyer is unmistakably secured by the benefit.

A customer can't shield certain realities from divulgence basically by conveying them to her legal advisor. In the event that data might be accumulated from another source other than the advantaged correspondence, at that point the basic data itself isn't privileged. Stated in an unexpected way, the lawyer customer benefit "ensures interchanges made to acquire legitimate counsel; it doesn't secure the data communicated". Clients and lawyers the same must remember this significant reality: simply passing on something to a lawyer won't keep the basic realities from constrained revelation, on the off chance that they can be found from a non-special source.

In Indian Evidence Act, 1872 deals with privilege communication between lawyer and client.

Section 126 of the Act gives the extent of benefit joined to professional communication in a lawyer customer relationship. It limits lawyers from revealing any interchanges traded with the customer and expressing the substance or states of records possessing the legitimate guide in course of and for the latter's employment with the customer.

This also gives certain grounds on which such benefit will stand denied, being in encouragement of any unlawful reason or realities going to the familiarity with the lawyer indicating that either wrongdoing or misrepresentation has been submitted since the beginning of the lawyer's work on the concerned issue. It is irrelevant whether the consideration of such lawyer, [pleader], lawyer or vakil was or was not coordinated to such actuality by or for his customer.

Section 127 expands the benefit gave under section 126 to the interpreters, clerks and servants of the lawful counsel.

Section 128 keeps on restricting the lawful counsel from unveiling any data secured under section 126 except if the customer calls the lawful counsellor as a witness and questions him on the equivalent.

Section 129 sets out that nobody will be constrained to uncover to the court any private conversation which has occurred among him and his lawful expert consultant, except if he offers himself as a witness.

To attract section 126 of the Act, a communication by a client to his lawyer are required to be confidential (**Memon Hajee Haroon Mohamed v. Abdul Karim [1878]**). No benefit is given to the communication between a lawyer and client before the creation of a professional relationship (**Kalikumar Pal v. Rajkumar Pal**) 1931.

In India any individual who looks for a counsel from a practicing advocate, enrolled under the Advocates Act, would have the advantage of the lawyer customer benefit and his correspondence would be secured under section 126 of the Act. This segment would likewise stretch out to the employees of the lawyer/law office which could incorporate bookkeepers, paralegals, and such different representatives.

The Bar Council of India Rules ("BCIR") specifies for all lawyer (legitimate guides) certain guidelines of conduct and etiquettes. Part VI, Chapter II, Section II, Rule 17 of BCIR specifies that "A supporter will not, straightforwardly or by implication, submit a penetrate of the commitments forced by Section 126 of the Indian Evidence Act" in this way emphasizing the soul of lawyer customer benefit, break of which will likewise prompt infringement of the Bar Council Rules.

The BCI Rules on An Advocate's Duty towards the Client provides as follows:

Rule 7- Not to reveal the communication that took place between the customer and himself: A lawyer need not use any and all means, legitimately or by implication, unveil the interchanges made by his customer to him. He likewise will not expose the counsel given by him in the procedures. Nonetheless, he is obligated to uncover in the event that it disregards section 126 of the Indian Evidence Act 1872.

Rule 15- A lawyer ought not to abuse or exploits the certainty rested in him by his customer.

Breach of these Rules would expose a lawyer to disciplinary procedure. In the above mentioned, privileged communication between a lawyer and a client are not acceptable as proof.

As we know that privileged communication is enforced by the Act, one outcome is the contention that lawyer customer communications are not completely protected from law enforcement agencies in the course of investigations. Having said that, any privileged material, whenever created, may not be permissible as proof in court proceedings.<sup>iii</sup>



## **MATTERS NOT PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE**

Not all parts of the lawyer customer relationship are ensured by or included inside the lawyer customer benefit. For instance, the presence of the lawyer customer relationship or the length of the relationship is not advantaged pieces of information. Indeed, the overall idea of the administrations performed by the attorney, including the terms and states of the maintenance, is commonly discoverable.

The real conditions encompassing the interchanges between a lawyer and a customer, for example, the date of the correspondence and the personality of people duplicated on correspondence, are in like manner not advantaged. Members in a gathering with a lawyer, the length of a counsel and the records confirming same (e.g., schedules, arrangement books) are not really shielded from constrained disclosure. As for the expenses between a lawyer and a customer, these archives are commonly discoverable, aside from where such revelation would deliver confidential communication with the customer.<sup>iv</sup>

### **WHO CAN WAIVE PROTECTION?**

The benefit concurred under section 126 to 129 of the Act is set up for the security of the customer. Thus, such a benefit must be waived by the customer.

Under section 126 of the Act, a customer is needed to explicitly agree to the waiver of benefit. This need not be in writing, and could be inferred from facts and circumstances. Further, under section 128, if a customer calls their lawyer as a witness and, in the course of examination, poses questions that explicitly require a disclosure of lawyer customer privileged communication, at that point such a customer is perceived to have waived his benefit.

Waiver of benefit under section 126 of the Act happens just when the customer explicitly agrees to it, or on account of section 128, agrees to it by implication. While there is no judicial pronouncement by the courts of India on this issue, considering any waiver must be intentional, accidental exposure may not be considered as a waiver of benefit.

While confidential communication among principal and agent, regardless of whether identifying with issues in a suit (or other prosecution guidance or procedures) are not favored, lawyer customer correspondences are advantaged correspondence. Just the customer entity can forgo such benefit. Subsequently, sharing the lawyer customer correspondence among employees of a customer entity doesn't waive protection.<sup>v</sup>

## **EXCEPTIONS TO THE PROTECTIONS FOR ATTORNEY-CLIENT COMMUNICATIONS**

Section 126 of the Indian Evidence Act, 1872 talks about 2 exceptions-

Any communication made in the furtherance of any unlawful act; and

Anything observed by a lawyer during the course of his employment that reveals a crime or fraud has been committed since the beginning of his or her employment.

## **CLIENT CONFIDENTIALITY PRIVILEGE: ONLY FOR LAWYERS AND NOT FOR ACCOUNTANTS**

As of late, the [Supreme Court of UK](#) (in prudential plc1) re-insisted the tried and true standard that the advantage of lawful expert benefit is just accessible comparable to communication with attorneys and not to different consultants, for example, bookkeepers i.e. accountant. In contrast to different experts, legal counsellors are not allowed to reveal any communication got from customers as a feature of the expert commitment. The advantage of benefit is critical for customers looking for lawful guidance or foreseeing suit.

Having its underlying foundations in the sixteenth century, the regulation of customer classification benefit has become a vital piece of UK customary law and is acknowledged far and wide. It is commonly perceived that benefit would not cover non-lawyers, for example, bookkeepers, business experts and different consultants. For example, in Australia, benefit is accessible regarding classified correspondence with legal counsellors made for the 'prevailing' motivation behind acquiring legitimate advice. Likewise, in Singapore, benefit doesn't have any significant bearing to guidance from non-attorneys. The US just perceives customer lawyer

benefit, and as supported by the [US Supreme court](#) in a 1984 case: "no confidential accountant-customer benefit exists under government law. "Civil law nations like France and Japan additionally perceive benefit as for communication with attorneys. The EU court of human rights read customer lawyer benefit as an aspect of the privilege to security under article 8 of the European charter of fundamental rights. In India, the advantage of benefit is systematized inside the Indian Evidence Act, 1872 which limits its application to correspondence with legal counsellors or lawyers.

Regardless of whether a customer looks for complex expense arranging exhortation or wishes to dispute an authoritative case; she has an option to unreservedly examine the issue with her lawyer without risking penetrate of secrecy. There are a few approach reasons why the advantage of lawful benefit doesn't reach out past the customer lawyer relationship. For example, certain experts, for example, bookkeepers have a legitimate commitment to make exposures either in light of a legitimate concern for investors or the framework all in all. as of late in India, compliant with the Shome Committee report, the Indian finance minister has acknowledged a proposition to make sanctioned bookkeepers answerable for unveiling (as a component of the tax audit) any plan of a customer which is probably going to be treated as a tax avoidance device.

The accessibility of legitimate benefit must be remembered when a customer looks for lawful exhortation and chooses to disclose confidential data.<sup>vi</sup>

## **DRAWBACKS & WEAKNESS OF ATTORNEY-CLIENT PRIVILEGES UNDER THE INDIAN LEGAL SYSTEM**

One of the significant downsides of lawyer customer benefit is that it is altogether reliant on reliability. Each coin has different sides. As loyalty can be indicated from a positive perspective, it can likewise be abused. A lawyer by indicating reliability to his customer can be unfaithful to the state which can prompt unreasonable unfair trial and injustice, then again, a lawyer at that point being disloyal to his own customer can cause loss of reputation of his customer which may result in defamation. A lawyer has an obligation towards his customer not to uncover any secret reality identified with the procedures regardless.



As found on account of *M. Yovas and others v. Immanuel Joseph and others* it was seen that the lawyer of the contrary party was called to be the witness to affirm whether one of the plaintiff had sent a letter after the initiation of the proceedings between the same parties and also, regardless of whether the lawyer has recommended to any compromise proposal to the plaintiff. In the current occurrence, the Kerala High Court held that it was legitimate to decline to be the witness, in the court of law.

Besides, Sec 126 confines benefit to the customer as it were. Furthermore, the arrangement does exclude patent agent while in Sec 129 the word 'the legal professional advisor' may exclude a patent agent.

Communication between attorney and customer is just favored under Sec 126 of the Indian Evidence Act, 1872 however the communication made between the customer and the outsider or lawyer and outsiders, for example, technical expert and witness are not advantaged if the communication has been made to get guidance from the legal advisor.<sup>vii</sup>

## CONCLUSION

The lawyer customer relationship has safeguarded the privileged communication among legal advisors and the customer since the times of Queen Elizabeth that urges customers to be totally honest with their attorneys. Such interchanges are supposed to be favored however with the nonappearance of security for correspondence with the outsiders, certain classes of licensed innovation consultants, specialized specialists, in-house guides the laws are not satisfactory to offer protection to the modern lawyer customer relationship. As the time is developing intricacy in legitimate procedures are likewise developing so certain phrasing in the provisions should be changed so as to bring the equivalent under the ambit of lawyer customer benefit.

## ENDNOTES

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<sup>i</sup> Available at <https://www.sgrlaw.com/ttl-articles/916/>

<sup>ii</sup> Available at <https://www.sgrlaw.com/ttl-articles/916/>

<sup>iii</sup> Available at <https://www.sgrlaw.com/ttl-articles/916/>

<sup>iv</sup> Available at <https://www.sgrlaw.com/ttl-articles/916/>

<sup>v</sup> Available at <https://www.lexology.com/library/detail.aspx?g=1a12eb24-5a71-42c6-890b-a10ea92aeefa>

<sup>vi</sup> Available at <http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/client-confidentiality-privilege-only-for-lawyers-and-not-for-accountants.html#:~:text=The%20US%20only%20recognizes%20client,respect%20to%20communication%20with%20lawyers.>

<sup>vii</sup> Available at <https://blog.ipleaders.in/attorney-client/>

