Global Attorney-Client Privilege Guide - India

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# 01 - Discovery

## What disclosure/discovery is required in litigation?

The Code of Civil Procedure 1908 stipulates that the court may, either of its own motion or on the application of any party, order the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence. Further, a party to a suit may serve a notice on the other party to produce documents referenced in the other party's pleadings or affidavits for inspection. Where such an order for inspection is made, and privilege is claimed in respect of the documents sought, the court will be entitled to inspect the documents to decide the validity of the claim of privilege.

Similarly, the Code of Criminal Procedure 1973 empowers the court or an officer in charge of a police station to issue a summons for the production of documents or any other thing in the power or possession of the person to whom the summons is issued. Privileged communications are not expressly exempted from the scope of this provision, and the dominant view is that privilege is a rule of evidence and becomes relevant only at trial. At trial, the court may be petitioned to exclude it from evidence.

The definition of "court" under the Indian Evidence Act 1872 includes all judges and magistrates, and all persons, except arbitrators, legally authorized to take evidence. As a result, in addition to the regular civil and criminal courts in India, certain tribunals and adjudicating bodies established under statute, such as the National Company Law Tribunal, the Debt Recovery Tribunal, the various fora established under the Consumer Protection Act 2019, etc., have the same power as civil courts under the Code of Civil Procedure 1908 to call for disclosure and discovery of documents or other material that may be produced as evidence.

# 02 - Type of privilege

## Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Yes, India recognizes the concept of attorney-client privilege, which protects professional communications as well as work product created in anticipation of litigation. Professional communications between a client and their advocate are protected under the Indian Evidence Act 1872, the Advocates Act 1961 and the Bar Council of India Rules. The Indian Evidence Act 1872 provides that an obligation of confidentiality rests upon certain categories of legal practitioners, i.e., barristers, attorneys, pleaders or vakils. Vakil is an Urdu word for an advocate, pleader, counsel or attorney. At the time of British rule in India, the term was used to describe a pleader of Indian origin. Subsequent to the enactment of the Advocates Act 1961, a single category of legal practitioners was created, i.e., advocates, and the use of the term vakil was done away with. However, the term still appears in earlier legislation.

Legal practitioners that are subject to an obligation of confidentiality are not permitted to:

Disclose any communication made to them in the course of and for the purpose of their employment, by or on behalf of the client

State the contents or condition of any document with which they have become acquainted in the course and for the purpose of their professional employment

Disclose any advice given by them to their client in the course and for the purpose of such employment

However, privilege does not extend to circumstances where:

The client has expressly consented to disclosure of the privileged information

The communication has been made in furtherance of any illegal purpose

The barrister, pleader, attorney or vakil, in the course of their employment, observes that any crime or fraud has been committed since the commencement of their employment

Under the Indian Evidence Act 1872, a person cannot be compelled to disclose any confidential communication between themselves and their legal professional adviser. The only exception is where a person offers themselves as a witness, and the court compels them to disclose communications necessary to explain the evidence they have given.

The protection of privilege extends to all the work products and communication exchanged between a client and attorney in anticipation of litigation. This includes communication to:

Obtain advice for the litigation

Obtain or collect evidence to be used in the litigation

Obtain information that will lead to such evidence, drafts of notices, pleadings and so forth exchanged between the attorney and the client

Indian law follows the English position concerning work product. The work product must be prepared by counsel or the request of counsel in anticipation of litigation to confer protection.

# 03 - Scope of privilege

## Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

The Indian Evidence Act 1872 treats the contents or condition of any document with which a barrister, attorney, pleader or vakil (now advocates) has become acquainted in the course of and for the purpose of their professional employment as privileged information. Thus, all communications made between clients and their attorneys confidentially with a view to obtaining professional advice are privileged, and privilege is applicable even to a copy held by a client. In *D Veerasekaran v. State of TN*, the court held that a letter written by an advocate to their client (who was accused of terrorist activities) could not be used as evidence against the advocate for establishing the charge of abetment as the said letter would be protected as a professional communication.

## Are in-house lawyers treated in the same way as external lawyers for determining privilege?

The issue regarding the position of an in-house counsel vis-à-vis an outside counsel in the realm of attorney-client privilege in India has been the subject matter of judicial interpretation. Under the Advocates Act 1961, an advocate is one who has been entered in the relevant state bar council rolls. The Bar Council of India Rules stipulate that an advocate must not be a full-time salaried employee of any person, government, firm, corporation or concern. An in-house lawyer (i.e., one who receives a salary) therefore cannot practice as an advocate while employed full-time.

There does not appear to be any decision by the Supreme Court of India as to whether communications with in-house counsel are on the same footing as those with an advocate (although there is case law on whether, in certain instances, advocates working as full-time employees, especially of government corporations/departments, would be considered as advocates). In *Sushma Suri v. Govt. of NCT of Delhi and Anr.*, the Supreme Court, while interpreting Rule 49 of the Bar Council of India Rules, held that the test is not whether an advocate employed by a government or body corporate is engaged on terms of salary or by payment of remuneration, but whether such person is engaged to act or plead on its behalf in a court of law as an advocate. If such person is not acting or pleading on behalf of their employer, but does other kinds of work, then they become a mere employee of the government or the body corporate. Further, in the case of *Satish Kumar Sharma v. Bar Council of Himachal Pradesh*, the Supreme Court held that a full-time salaried employee of a government department could not continue to practice as an advocate, as the relevant state bar council did not frame any rules to provide any exemption to law officers of central/state government from the general rule that bars an advocate from being a full time salaried employee of any person, government, firm, corporation or concern so long as they continue to practice.

The Bombay High Court, in *Municipal Corporation of Greater Bombay v. Vijay Metal Works*, held that privilege should apply to in-house legal advisers so long as the communication relates to advice on questions of law. In *Larsen & Toubro Ltd. v. Prime Displays (P) Ltd*, the Bombay High Court observed that where in-house counsel would, save for their employment with the concerned litigant, otherwise be qualified to give legal advice, communication between the in-house counsel and the litigant would be privileged. However, decisions of the Bombay High Court have only persuasive value before the high courts of other states.

## Does privilege extend to internal communications between in-house lawyers?

There is no reported decision on this issue by an Indian court yet.

## Are foreign lawyers recognized for the purposes of privilege?

Under the Indian Evidence Act 1872, the obligation of confidentiality rests only upon barristers, attorneys, pleaders or vakils (now advocates) and their clerks or interpreters; and under the Advocates Act 1961, on advocates. Foreign lawyers do not fall within the category of advocates.

In 2018, the Supreme Court of India in *Bar Council of India v. A.K. Balaji* clarified that while foreign lawyers are not entitled to practice the profession of law in India, they may "fly in and fly out" on "casual" visits to give legal advice on foreign law to their clients. They may also conduct/participate in international commercial arbitrations, in which case they will be governed by the code of conduct applicable to Indian lawyers. This could arguably include both the Advocates Act 1961 as well as the Bar Council of India Rules pertaining to attorney-client privilege. Since the Union of India and the Bar Council of India have been granted liberty to frame additional rules in respect of the practice of law by foreign lawyers in India, it remains to be seen if these rules, when framed, would specifically extend privilege to foreign lawyers.

## Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

The doctrine of privilege under the Indian Evidence Act 1872 does not extend to nonlegal professionals.

The Bombay High Court in *Larsen & Toubro Ltd. v. Prime Displays (P) Ltd* observed that in order for advice to be protected as a privileged communication under the Indian Evidence Act 1872, it must be given by a person who is qualified to give legal advice. However, due to a lack of pleadings, the court did not make a formal finding on this issue.

# 04 - Sharing documents with third parties

## In what circumstances (if any) can a document be given to a third party without losing protection?

The privilege accorded under sections 126 to 129 of the Indian Evidence Act 1872 can only be waived by the client. Under section 126, a client is required to expressly consent to the waiver of privilege. This need not be in writing necessarily and could be inferred from the facts and circumstances of the case. Further, under section 128, if a client calls their attorney as a witness and, in the course of an examination, asks questions that specifically require disclosure of attorney-client privileged information, then such client is understood to have waived privilege.

Sections 126 to 129 do not contemplate limited waiver or sharing of attorney-client communications or work product among persons with a common interest without waiving protections. As per the language of section 126, a client may waive privilege entirely or not at all. However, where the disclosure is forced by a government authority (e.g., as a part of documents seized), such disclosure may be attempted to be made without waiving protections.

If a document has not passed directly between the legal adviser and the client, but is of such a nature as to make it quite clear that it was obtained confidentially for the purpose of being used in litigation and with a view to being submitted to legal advisers, then the court may not compel the production of such document (*Vishnu Yeshawant Wagh v. New York Life Insurance Co*.).

However, courts have held that for privilege to be claimed, the document or information should be confidential. Therefore, once a document has been obtained, it is imperative that it is kept confidential and not disclosed for any purposes except in the course of litigation or preparation for litigation. In *Diljeet Titus and Ors. v. Alfred A Adebare and Ors.*, the court held that if an associate or advocate works for another advocate and their clients, they owe an obligation not only to maintain the confidentiality between the client and their advocate, but also not to surreptitiously take away what is the final product of the effort put in, to which they may also be a party.

# 05 - Investigations

## Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

Although the provisions relating to attorney-client privilege contained in the Indian Evidence Act 1872 apply in the course of both civil and criminal judicial proceedings, their applicability to investigatory or regulatory situations is not free from doubt. There is no clear pronouncement of the Indian courts that prevents investigative agencies from seizing material solely on the ground that it is marked as privileged.

## Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

While there is no direct judicial precedent on this question yet, notes of interviews (i) conducted by legal counsel or in the presence of legal counsel; and (ii) required by legal counsel in order to provide advice or to prepare for litigation may be covered by privilege.

# 06 - Regulatory investigations

## Can governmental regulators require a privileged document to be provided to them?

Yes, government regulators may require a privileged document to be provided to them. The term "government regulator" has a very broad definition and includes within its ambit courts, tribunals and other adjudicating bodies established under statute, which usually are accorded powers identical to a civil court regarding discovery and disclosure as provided under the Code of Civil Procedure 1908 and the Indian Evidence Act 1872. In *Re: Matter of Great Public Importance Touching Upon The Independence of Judiciary*, the Supreme Court reaffirmed that without production of the information, the court cannot be prevented from inspecting a document even though such document is claimed to be privileged.

# 07 - Recent issues

## What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

The Right to Information Act 2005 ("**RTI Act**") was enacted to secure access to information in the possession of public authorities. Under the RTI Act, citizens may require certain information in the possession of public authorities to be furnished to them. However, the RTI Act sets out certain exceptional circumstances wherein such information need not be disclosed. One such exception is where information is held by a public authority by virtue of a fiduciary relationship between the authority and the person providing the information, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information.

In *The Superintendent, High Court v. The Registrar, Tamil Nadu Information Commission and M. Sivaraj*, the issuance of a summons by the Tamil Nadu Information Commission to the Public Prosecutor's office to disclose certain records under the RTI Act was challenged. It was contended on behalf of the Tamil Nadu Information Commission that a public authority may be required to disclose documents in its possession, even where such documents were exempted from disclosure under the RTI Act, where the public interest in disclosure outweighed the harm to the protected interests. However, the court ruled that the documents sought to be disclosed were protected under the provisions of the Indian Evidence Act 1872, and thus disclosure was not required, especially since it was prohibited under statute and disclosure would have resulted in consequences for counsel.

Further, in *Mukesh Agrawal v. Public Information Officer, RBI*, the public information officer of the Reserve Bank of India contended that advice provided by a lawyer is held by the client in a fiduciary relationship and hence is exempt under Section 8(1)(e) of the RTI Act. The Central Information Commission, while rejecting this contention, held that although communications of a client with a lawyer are held in a fiduciary capacity by the lawyer, a client does not hold communications from a lawyer in a fiduciary capacity.

In *Alok Srivastava v. CPIO, English and Foreign Language University*, the Central Information Commission evaluated the issue of whether the advice given by standing counsel to the client university would be considered to be given in a fiduciary relationship. It concluded that in the circumstances of that case, public interest outweighed the protected interest, and ordered disclosure of the legal opinion.

# 08 - Authors

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