Global Attorney-Client Privilege Guide - India

03 - Scope of privilege

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# 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.

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