

Dispute Resolution Hotline

January 31, 2013

CLIENT CONFIDENTIALITY PRIVILEGE: ONLY FOR LAWYERS AND NOT FOR ACCOUNTANTS

Recently, the Supreme Court of UK (in Prudential Plc¹) re-affirmed the time-tested norm that the benefit of legal professional privilege is only available in relation to communication with lawyers and not to other advisors such as accountants. Unlike other professionals, lawyers are not required to disclose any communication received from clients as part of the professional engagement. The benefit of privilege is extremely important for clients seeking legal advice or anticipating litigation.

Having its roots in the 16th century², the doctrine of client confidentiality privilege has become an integral part of UK common law and is accepted around the world. It is generally recognized that privilege would not cover non-attorneys such as accountants, business consultants and other advisors. For instance, in Australia, privilege is available with respect to confidential communication with lawyers made for the 'dominant' purpose of obtaining legal advice.³ Likewise, in Singapore, privilege does not apply to advice from non-lawyers. The US only recognizes client-attorney privilege, and as noted by the US Supreme Court in a 1984 case: "no confidential accountant-client privilege exists under federal law."⁴ Civil law countries like France and Japan also recognize privilege with respect to communication with lawyers. The EU Court of Human Rights read client-attorney privilege as a part of the right to privacy under Article 8 of the European Charter of Fundamental Rights⁵. In India, the benefit of privilege is codified within the Indian Evidence Act, 1872 which restricts its application to communication with lawyers or attorneys.

Whether a client seeks complex tax planning advice or wishes to litigate a contractual claim, she has a right to freely discuss the matter with her attorney without running the risk of breach of confidentiality. There are several policy reasons why the benefit of legal privilege does not extend beyond the client-attorney relationship. For instance, certain professionals such as accountants have a legal obligation to make disclosures either in the interest of shareholders or the system as a whole. Recently in India, pursuant to the Shome Committee Report⁶, the Indian Finance Minister has accepted a proposal to make chartered accountants responsible for disclosing (as part of the tax audit) any arrangement of a client which is likely to be treated as a tax avoidance device.

The availability of legal privilege has to be kept in mind when a client seeks legal advice and decides to divulge confidential information.

WHY IS LEGAL PRIVILEGE SO IMPORTANT?

Legal privilege is essentially a right that exists for the sole benefit of the client. It ensures full and frank communication between clients and lawyers without any fear of disclosure or incrimination. The right to privilege is critical to the proper administration of law and justice.

The importance of this rule was eloquently explained by the Canadian Supreme Court in a 2001 case (McClure⁷): "This privilege is fundamental to the justice system. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented."

UK SUPREME COURT: CLIENT-ACCOUNTANT COMMUNICATION NOT PRIVILEGED

The case before the UK Supreme Court revolved around disclosure of certain documents in relation to a tax avoidance scheme that was marketed by a prominent accounting firm. The documents were exchanged as part of the advice rendered by the accounting firm to the taxpayer.

The primary issue before the UK Supreme Court was whether legal privilege extends or should be extended to legal advice given by persons other than legal professionals, specifically chartered accountants rendering expert tax advice.

By a majority of five to two, the UK Supreme Court unequivocally held that the benefit of legal privilege is not available with respect to communication with accountants. The Supreme Court noted that "it is universally believed that legal advice privilege only applies to communications in connection with advice given by members of the legal profession."

While the Court concluded that any extension of privilege will require specific legislative amendment, it also noted that the UK Parliament did not accept a 2001 proposal to extend privilege to advice provided by accountants.

The UK Supreme Court felt that extending legal privilege to advice given by non-lawyers would create uncertainty with respect to its application and may potentially dilute the scope of benefit available to clients. The Court noted that it would be difficult to identify the various categories of advisors whose services involve rendering legal advice.

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Further, it will be difficult to separate legal and non-legal advice and selectively apply the principle to specific documents. Therefore, in the interest of certainty, the UK Supreme Court did not consider it necessary to deviate from the well-established principle that legal privilege is only applicable to advice rendered by lawyers.

INDIA FOLLOWS THE CONVENTIONAL RULE OF CLIENT-ATTORNEY PRIVILEGE

The Indian law on privileged professional communication, codified under the Indian Evidence Act of 1872, has developed on the same lines as UK common law.

The benefit of privileged communication under sections 126 and 129 of the Evidence Act is available only in relation to communications and correspondences between client and attorney or advocate. The attorney is not permitted, at any point of time, to disclose details of any communication or document pertaining to the client without the client's express consent. The client can also not be compelled to disclose to the Court any confidential communication with his attorney unless he offers himself as a witness.

Apart from the policy justifications discussed above, the restriction of privilege to advice by lawyers in India is understandable considering that the Advocates Act of 1961 (section 29) states very clearly that advocates are the "only recognized class of persons entitled to practice law" in India. The Madras⁸ and Bombay⁹ High Courts have recently clarified that the practice of law includes advice on both litigious and non-litigious matters.

Non-advocates are not generally authorized to practice law in India. While advocates are governed by a comprehensive code of ethics laid down by the Bar Council of India, there are no governance standards for legal advice provided by other advisors and professionals. Lawyers are also bound by strict norms of conflict so as to ensure that client interests are fully protected, while the lawyer retains her professional independence. The legal profession differs from other professions on account of the formal legal training on procedural and substantive laws, legal interpretational skills, fiduciary nature of an advocate's role, accountability towards clients, and wider professional responsibility as officer of the Court.

It is true that the decision to extend the benefit of privilege to non-lawyers is a policy one. For more than four centuries, governments and courts around the world have considered it appropriate to limit its application to client-attorney communication. Any extension of this doctrine will have to be carefully examined after considering the overall ramifications. At the same time, deliberations on these issues should not come at the cost of certainty for clients.

In a country like India where litigation is the order of the day (especially in matters of taxation and property), the issue of client-attorney confidentiality privilege has assumed unprecedented importance. Clients have a right to receive sound legal advice and the privilege of sharing confidential information with attorneys without fear of disclosure.

International Dispute Resolution Team

You can direct your queries or comments to the authors

¹ [2013] UKSC 1

² The principle is said to have been first applied in 1577 by a UK Court in *Berd v Lovelace*, [1577] Cary 62.

³ *Pratt Holdings Pty Ltd v Commissioner of Taxation*, [2004] FCAFC 122.

⁴ *United States v. Arthur Young & Co.* - 465 U.S. 805 (1984). Quoting *Couch v. United States*, 409 U. S. 322 (1973)

⁵ *Campbell v United Kingdom*, [1992] 15 EHRR 137.

⁶ Please refer to our earlier hotline http://www.nishithdesai.com/New_Hotline/Tax/Tax%20Hotline_Jan1513.htm

⁷ [2001] 1 S.C.R. 445

⁸ *A.K.Balaji vs. Government of India and Ors.*, (2012) 35 KLR 290 (Mad.)

⁹ *Lawyers' Collective v. Bar Council of India & Ors*, 2010 (112) Bombay Law Reporter 32.

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