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Privilege and Waiver

Attorney - Client Privilege

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Privilege and Waiver

Attorney-Client Privilege

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1. Introduction

The Black's Law Dictionary defines “*waiver*” as the voluntary or intentional relinquishment of a known right, benefit or advantage conferred to a person.¹ Waiver stems from the common law principle that an individual is the best judge of his own situation and can thus make a calculated decision with respect to his own rights.² Waiver can be express e.g. in writing or implied e.g. through the conduct of the person, but it is imperative that the person waiving his right has full knowledge of the implications of such choice.³

The Supreme Court, in *P. Dasa Muni Reddy v. P. Appa Rao*⁴ defined waiver as “*an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. In fact, it is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them.*”⁵

1. Black's Law Dictionary (4th ed.).

2. *Durga Das Basu Commentary on the Constitution of India* (8th edn., Wadhwa Nagpur 2007) 805.

3. *Manak Lal v. Dr. Prem Chand Singhvi* AIR 1957 SC 425.

4. (1974) 2 SCC 725.

5. *ibid.*

2. Legal Privilege

The concept of “privileged communication” has evolved over centuries and has often been a topic of debate. Most common law jurisdictions regard ‘legal privilege’ as a substantive right whereas civil law countries view it as a procedural issue. Broadly speaking, the over-arching rationale of legal privilege is to encourage the seeking of legal advice on a confidential basis. The key reason for maintaining such confidentiality is that the information should not be used to the detriment of the client, but rather only to advance the client’s interests. Another form of legal privilege is found within the ‘without prejudice’ principle, whereby confidential documents created or written in pursuance of a compromise or settlement related to a dispute are not admissible in court without prior consent of both the parties involved in such settlement proceedings. Both of these, although relevant documents, are generally inadmissible as evidence.⁶

“

** Refer to our paper on “Privilege and Waiver: ‘Without Prejudice’ privilege”, which delves into the “without prejudice” rule, its applicability in different jurisdictions and waiver of such rule.*

”

Communication for non-legal advice purposes are not covered by the attorney-client privilege. Mere presence of an attorney in a meeting of two individuals does not accord any privilege to the communication. The test is whether a communication satisfies the elements necessary to establish the privilege — not how the communication is identified or labeled.⁷ The privilege will not apply if a lawyer is hired solely as an accountant,⁸ or when the lawyer acts as a negotiator or business agent.⁹ Lawyers cannot act as a ‘safe haven’ for the client to hide information though there are certain exceptions to it as well (as discussed below).

It is also relevant to understand the distinction between ‘privilege’ and ‘confidentiality’. Privilege is an evidentiary principle and a statutory right to protect disclosure of confidential communications and documents from being produced in court. On the other hand, confidentiality is an attribute of a document or communication, which is accorded to it because such document contains sensitive information. This distinction is particularly important in the context of the ‘without prejudice’ privilege, which will be explored in detail subsequently.

I. Attorney-Client Privilege in India

Attorney-client privilege is an important part of the legal system, for it enables individuals to fearlessly obtain sound legal advice to protect their interests. It refers to the idea that any communication between a client and their attorney would be protected from disclosures in the court, which can include advice sought for the purposes of a litigation or in anticipation of a forthcoming litigation. This is in furtherance of the overarching rule of access to justice and the rule of law, whereby open communications with attorneys provide clients an equal footing to defend themselves in court and save themselves from otherwise disproportionate punishment.

6. *Rajesh Bhatia And Ors. v. G. Parimala And Anr* 2006 (3) ALD 415.

7. Douglas R. Richmond, ‘The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post Enron Era’ (2005) 110 Penn State Law Review 381, 382.

8. *In Re Colton*, 201 F. Supp. 13 (S.D.N.Y. 1961).

9. *J. P. Foley & Co., Inc. v. Vanderbilt*, 65 F.R.D. 523 (S.D.N.Y. 1974).

In India, legal privilege is a statutory right and codified in the Indian Evidence Act, 1872 (“**Indian Evidence Act**”). India has adopted a strict approach on privileged professional communication between clients and legal advisors. Sections 126 to 129 of the Indian Evidence Act deal with confidentiality of data that the client shares with his attorney. Privilege extends only after the creation of attorney-client relationship and not prior to that.¹⁰ The creation of *attorney-client* relationship may be by way of an engagement letter or even an oral agreement. Under Indian law, communications with in-house lawyers are not included within the ambit of Section 126 of the Indian Evidence Act. There is no statutory privilege accorded to the communication between in-house lawyers and their employers.

- i. Section 126 of the Indian Evidence Act extends protection to any communication between a client and an attorney, made in the course and for the purpose of his employment, or any document with which he has become acquainted in the course and for the purpose of his professional employment or any advice given by him to his client in the course and for the purpose of such employment.¹¹ However, such privilege would not extend to (a) any such communication made in furtherance of any illegal purpose, (2) any fact observed by the attorney, during his employment, showing that any crime or fraud has been committed since the commencement of his employment.¹²

Referring to the legislative intent behind enactment of Section 126 of the Indian Evidence Act, courts have observed that such protection accorded under Section 126 is designed “*to abort the attempt to intrude into privacy of the close preserve of the fund of information conveyed by the client closeted in confidence.*”¹³

A person may be compelled to disclose confidential communications exchanged with legal advisors, if he offers himself as a witness to any proceedings in court - as may appear to the court necessary to be known in order to explain any evidence which he has given.¹⁴

- ii. Section 23 of the Indian Evidence Act protects admissions from being made in court if the parties had expressly agreed against such disclosure. This is commonly called ‘without prejudice’ privilege. This gains significance specifically in case of negotiations conducted ‘without prejudice’ with a view to a settlement. In such cases, it is not open for one of the parties to give evidence of an admission made by another.¹⁵

In the UK, legal professional privilege is specifically classified into ‘legal advice’ privilege and ‘litigation privilege’:

- a. **Litigation privilege:** Communications between parties or their solicitors and third parties for obtaining information or advice in connection with existing or contemplated litigation are privileged, upon satisfaction of the following conditions:
 - i. litigation must be in progress or in contemplation;
 - ii. the communications must have been made for the sole or dominant purpose of conducting that litigation;
 - iii. the litigation must be adversarial, not investigative or inquisitorial.¹⁶

10. See Indian Evidence Act 1872, s 126.

11. The Indian Evidence Act 1872, s 126.

12. The Indian Evidence Act 1872, s 126 proviso.

13. *Kameswara Rao v. Satyanarayana* C.R.P Appeal No. 1357 of 1983 before Andhra Pradesh High Court (decided on 29 November 1983).

14. The Indian Evidence Act 1872, s 129.

15. See http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/english-courts-dictum-on-the-without-prejudice-rule.html?no_cache=1&cHash=foe60e840d5e14490aadb6dc9936694b

16. *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No. 6)* [2004] UKHL 48 (“*Three Rivers No. 6*”) (para 102).

b. **Legal advice privilege:** Such privilege extends to communications or other documents made confidentially for the purposes of legal advice, which could be non-litigious. Such purposes are to be construed broadly. Thus, such privilege would be attached to a document rendering legal advice from solicitor to client and to specific requests from the client for such advice. Legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.¹⁷

However, the Indian Evidence Act does not make any such classification. It provides the same statutory protection to any communication made to an attorney or any document with which he has become acquainted or any advice given by him to his client in the course and for the purpose of his professional employment.¹⁸ The obligation of the external counsel to maintain confidentiality would not cease even on termination of the engagement of the external counsel. The scope of this privilege would also extend to the documents referred to by the external counsel unless preferred otherwise by the company itself.

Documents provided to an attorney in anticipation of litigation have also been held to be protected by privilege.¹⁹ In this regard, the Bombay High Court had observed that:

“Documents [which] have come into existence in anticipation of litigation for the purpose of seeking legal advice and for use in the anticipated litigation for the purpose of defence or for the purpose of prosecuting that litigation” would be protected under the ambit of “privileged communication.”²⁰

The Bombay High Court relied on the test laid down by Barwick CJ in *Grant v. Downs*,²¹ which is as follows:

“a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time or its production in reasonable prospect, should be privileged and excluded from inspection...the fact that the person... had in mind other uses of the document will not preclude that document being accorded privilege, if it were produced with the requisite dominant purpose.”

The statutory legal professional privilege can be waived by clients on their own accord, for the purposes of presentation of evidence in courts. Waiver can also occur in the context of documents provided by the client to an attorney, as discussed below. In such cases, however, waiver can only occur at the expense of the client, since he is the intended recipient of such benefit. Notably, the Bar Council of India’s Rules on Professional Standards bars advocates from violating the provisions of Section 126 of the Indian Evidence Act.²²

17. *ibid.*

18. The Indian Evidence Act 1872, s 126.

19. *Larsen & Toubro Limited v. Prime Displays (P) Ltd., Abiz Business (P) Ltd. and Everest Media Ltd.* (2003) 105(1) BomLR 189.

20. *ibid.*

21. [1976] HCA 63.

22. Bar Council of India Rules, Part VI, Chapter II, Section II, Rule 17.

II. Waiver of attorney-client privilege in India

A waiver can be express or implied.²³ In this regard, the Supreme Court in *Waman Kini v. Ratilal Bhagwandas & Co.*,²⁴ observed that since a waiver is indicative of an intention to forego a right, the person undertaking this act must be aware of the right being waived and the implications of such choice. Thus, in the absence of an express waiver, the intent to waive may either be deduced from acquiescence or may be implied through the person's conduct.

Section 126 of the Indian Evidence Act allows waiver of attorney-client privilege with the "express consent" of a client, a term that itself remains undefined within the Indian Evidence Act. Furthermore, there is limited jurisprudence in India on this issue. However, few Indian courts have attempted to grapple with this question in the past.

One of the initial cases in this regard was *Bhagwani Choithram v. Deoram*,²⁵ where the court while determining whether failure of a client to plead privilege during cross-examination amounted to waiver of privilege. The court held that the statute was careful to qualify the term "consent" with "express", indicating that it was not generally up to courts to impute intention through conduct. This is further evident from the Kerala High Court's ruling in *Nandanam v. State of Kerala*,²⁶ where it was held that a perusal of the provisions of Section 128 of the Indian Evidence Act²⁷ indicates that privilege under Section 126 cannot be 'deemed' to be waived by mere acquiescence. However, in a subsequent case, the Kerala High Court observed that such consent can be "inferred from facts and circumstances", leaving the possibility of implied consent open under Section 126 of the Indian Evidence Act.²⁸ Thus, while it currently appears that express consent is imperative for waiver of privilege under Section 126 of the Indian Evidence Act currently, in the absence of a conclusive ruling by the apex court, it remains to be seen whether such implied conduct can be relevant for determining waiver of such privilege. All the above cases have only addressed the issue concerning 'oral communications' between a client and attorney, without adequate discussions on the issue of privileged documents.

There may also be circumstances where the waiver is 'deemed'. For, example, if it is found that the client has sought legal advice in front of third parties or has not sought advice that is strictly of a legal nature, the same shall not be protected.²⁹ Indian Courts will strictly assess the document to ensure that it is connected with providing legal advice. In *Chandubhai v. State*,³⁰ the Gujarat High Court held that sending documents to the advocate, without having any connection with the grant of legal advice, is not privileged and can be produced before courts.

There are two important exceptions to waiver of privilege mentioned within Section 126 of the Indian Evidence Act: (i) The attorney is not bound by privilege if the client undertakes communication in furtherance of an illegal purpose; and (ii) If the attorney observes any fact indicating commission of a fraud/crime since his employment. Furthermore,

23. See *Kanchan Udyog Ltd. v. United Spirits Ltd.* (2017) 8 SCC 237.

24. AIR 1959 SC 689.

25. AIR 1933 Sind 47.

26. 1994 SCC OnLine Ker 358.

27. Indian Evidence Act 1872, s 128:

"Privilege not waived by volunteering evidence – If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and, if any party to a suit or proceeding calls any such barrister, pleader, attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose."

28. *Bernad Thattil v. Ramachandran Pillai* 1987 Cri L] 739.

29. *Memon Hajee Haroon Mohamed v. Abdul Karim* [1878] 3 Bom. 91.

30. AIR 1962 Guj 290.

Sections 126 and 128 respectively envisage two more exceptions to this privilege. Section 128 waives privilege if the client questions his own attorney in any court proceedings. Section 129 mandates waiver of privilege if the client volunteers himself as a witness, and the court believes that disclosure of any privileged communications with the attorney are important to explain evidence provided by such client in the proceedings. By virtue of attorney-client privilege, a public prosecutor cannot be approached for disclosure of information concerning a State. Therefore, the party seeking such information must rather approach the State itself as the prosecutor is bound by attorney-client privilege under Section 126 of the Indian Evidence Act.³¹ However, these exceptions seem to indicate that the action of the client must necessarily be “express” to constitute waiver. Therefore, this begs an examination of the interpretation of “express consent” in other common law jurisdictions.

The Indian Evidence Act in its current form does not appear to envisage any partial or limited waivers for compliance with regulatory investigations, requiring intervention, except as provided under Section 126 thereof. While discussions on waiver of legal privilege in the Indian context are relatively scarce, this is nevertheless an important protection accorded to individuals.

In the subsequent chapter, we further explore the contours of the waiver of such right of Attorney-client privilege whilst drawing references from common law jurisdictions such as the UK and Singapore.

31. *High Court v. The Registrar, Tamil Nadu Information Commission and M Sivaraj*, 2010 (5) CTC 238.

3. International Perspective³²

I. Waiver of attorney-client privilege in the UK

English law distinguishes between express and implied waiver of legal privilege, which also extends to waiver of attorney-client privilege. This is particularly important considering the Indian Evidence Act consolidates the English law of evidence.³³ Similar to India, an express waiver occurs through a written agreement while the implied waiver occurs when the person waiving a right, acts in a manner inconsistent with the ordinary exercise of such right. Thus, the implied waiver of legal privilege can be said to occur when the client engages in conduct that indicates an intention to disclose the contents of any privileged communication.

One of the landmark cases in the UK in this regard is *Scottish Lion Insurance Co. Ltd. v. Goodrich Corporation and Others*,³⁴ wherein the court held that the waiver of legal professional privilege can be ascertained only through an objective analysis of the conduct of the person asserting the privilege and its waiver, which will involve evaluating whether the person entitled to the benefit of the privilege is aware and actively seeking to forego a benefit generally or within a particular factual context. Thus, the subjective intention of the person becomes irrelevant and can only be assessed through the lens of another person interacting with him.

Similarly, in case of litigation privilege, courts examine the actions of the client to deduce an intent to waive. For instance, litigation privilege may be held to be impliedly waived³⁵ when the client decided to sue his erstwhile solicitor.³⁵

As a pre-requisite to waiver, and unique to cases where litigation privilege is waived, English Courts first examine whether the communication or document is eligible for legal privilege. Courts generally determine whether documents qualify for legal privilege by ascertaining its “dominant purpose.”³⁶ If it is found that such purpose, at the time of creation of the document or exchange of the communication, is to obtain legal advice in connection with or in anticipation of a litigation - it becomes privileged. Courts have ruled that other documents, such as attachments to confidential documents exchanged between a client and attorney would not be protected.³⁷ However, if the substance of any legal advice can be inferred from the said documents, such documents would be privileged.³⁸

In a recent decision, the English High Court that the mere possibility that a commercial advice may be used in potential litigation may not be sufficient in demonstrating that its sole or dominant purpose was for use in litigation.³⁹ Therefore, it may not qualify for litigation privilege.⁴⁰

A. Express and implied waiver

Pursuant to the above, courts would also examine the existing factual circumstances to determine whether there is an express or implied waiver of the said privilege. The determination of an implied waiver continues to remain

32. We are licensed to practice only Indian law and the chapter on international perspective dealing with US, UK and Singapore laws are purely based on research and a brief overview has been provided.

33. *State of Punjab v. Sodhi Sukhdev Singh* AIR 1961 SC 493.

34. 2011 SLT 733.

35. *Lillicrap and another v Nalder & Son (a firm)*, [1993] 1 WLR 94 at 98B.

36. *The Civil Aviation Authority v. Jet2.Com Ltd*, [2020] EWCA Civ 35; *Waugh v. British Railways Board*, [1980] AC 521 (HL).

37. *Financial Reporting Council Limited v. Sports Direct International Plc*, [2018] EWHC 2284 (Ch).

38. *In the Matter of Edwardian Group Ltd.*, [2017] EWHC 2805 (Ch).

39. *Financial Reporting Council Ltd v Frasers Group Plc. (formerly Sports Direct International Plc)* [2020] EWHC 2607 (Ch)

40. *ibid.*

tricky, since it is essentially a factual determination. Courts tend to check for an implied waiver by examining whether the purpose of reliance on a document, coupled with the contents of such reliance, indicate more than a mere reference to the *existence* of a privileged document.⁴¹

The aforesaid issues have come up for consideration on several occasions before the English courts. For instance, in *TMO Renewables Ltd. v. Reeves and Anr.*,⁴² the appellant's liquidator involved in prior insolvency proceedings made reference to an expert report to refute allegations which he believed were detrimental to his "professional competence." He disclosed the name and valuation method employed in the said report. The respondent sought production of the expert evidence on grounds that this amounted to waiver of privilege. While the Deputy Master permitted such production, this was reversed on appeal. The Court created a distinction between the reference to the 'contents of the document' and to the 'existence of the document'. The former entails a waiver because it is being used to advance a client's case; however, the latter does not because it merely signifies the 'effect' of the document and is not testimony to its contents. Therefore, the liquidator's reference was found to demonstrate only the 'effect' that the valuation method employed in the report had on his analysis and was held not to be a waiver of privilege.

In the subsequent case of *PCP Capital Partners LLP and Another v. Barclays Bank PLC*,⁴³ the court observed that:

“

“...the application of the content/effect distinction, as a means of determining whether there has been a waiver or not, cannot be applied mechanistically. Its application has to be viewed and made through the prism of (a) whether there is any reliance on the privileged material adverted to; (b) what the purpose of that reliance is; and (c) the particular context of the case in question. This is an acutely fact-sensitive exercise. To be clear, this means that in a particular case, the fact that only the conclusion of the legal advice referred to is stated as opposed to the detail of the contents may not prevent there being a waiver.”⁴⁴

”

Referring to circumstances when waiver arises, the Court observed as below:

“

“As to the question of waiver itself, it is not easy to find a succinct and clear definition of when it arises, going beyond general statements to the effect, for example, that the party alleged to have waived them has deployed them in some way as part of its case. But on any view in my judgment, first, the reference to the legal advice must be sufficient... and second, the party waiving must be relying on that reference in some way to support or advance his case on an issue that the court has to decide.”⁴⁵

”

For instance, in the afore-mentioned case, the Court had observed that the use of words such as *“took comfort from the legal advice provided”* in the witness statements was a reference to the 'contents' of legal advice sought from the lawyers.⁴⁶ Such reference was made to advance the client's case, as it indicated that the lawyers were approving what was being done as lawful. Thus, it was held to be an implied waiver.

41. *Marubeni v Alafouzos*, [1986] WL 408062.

42. [2020] EWHC 789 (Ch).

43. [2020] EWHC 1393 (Comm).

44. *ibid.*

45. *ibid.*

46. *ibid.*

Once there is a determination with respect to the existence of a waiver, the Court may also have to examine the extent of this waiver. Generally, the court would consider two things: (i) Whether contents of the entirety of the document have been waived; and (ii) Whether any ‘related’ documents are also admissible as a result of this waiver.

B. Extent of waiver

Courts would also consider if the ‘transaction’ in respect of which waiver has been made is wider and thus extends to documents beyond the one in whose regard a waiver has occurred.⁴⁷ Whilst doing so, common law considerations of fairness will assume primacy.⁴⁸

In the specific context of privileged communications, this has translated into the doctrine of “cherry picking”⁴⁹ – which refers to the practice of clients consciously making selective disclosure of privileged documents only to serve their interests. Such practices are detrimental to the promise of justice as they have the potential to unfairly prejudice the other party or prevent the court from uncovering material facts relevant to a dispute.⁵⁰

Courts are often averse to selective disclosures of documents altogether. In *Great Atlantic Insurance Co. v. Home Insurance Co.*,⁵¹ the plaintiffs had waived a part of the contents of privileged attorney-client communication and it was argued that the entire document was not admissible as evidence in court. Based on the conduct of the plaintiff, the court was of the view that there was an intention to make selective disclosures to the court; further, the remaining contents of the document related to the same subject matter. Thus, the said act amounted to a waiver in respect of the entire document.

As a recent development, under specific circumstances, courts have begun to accept severance of the waived portion of a document from the other parts, if the information waived/disclosed was distinct from other portions.⁵² However, having due regard to considerations of fairness and the doctrine of cherry picking, English Courts have also maintained that privilege with respect to ‘related’ documents forming part of the same transaction is waived collaterally if a client waives privilege with respect to any one of these documents.⁵³

Within this context, it is important to discuss the concept of ‘limited implied waiver’, which operates akin to a qualified version of the general right of legal privilege. While severance of documents assists Courts in determining the amount and extent of disclosure of documents that is to be made, English Courts have resorted to the concept of a ‘limited’ waiver to determine the parameters for which a waiver has been undertaken. As a general rule, privilege waived for a specified purpose does not imply a general waiver for all other contexts unless reference is made to all the circumstances of the alleged waiver, express and implied communications between the sender and receiver, the documents in question, and what a reasonable man would make of such communications.⁵⁴

For instance, in *B v. Auckland District Law Society (New Zealand)*,⁵⁵ during investigation of a law firm by the law society - privileged documents were handed to the counsel appointed by the law society to investigate into the complaint against the law firm. Although the law firm had specified that such handing over would not amount to waiver of privilege, the law society sought to rely on these for subsequent disciplinary proceedings against the firm. While upholding waiver of privilege for limited purposes only, the court observed that:

47. *Fulham Leisure Holdings Ltd v. Nicholson Graham Jones*, [2006] EWHC 158 (Ch).

48. *Nea Karteria Maritime Co v. Atlantic and Great Lakes Steamship Corporation*, [1981] Com. L.R. 132.

49. See, *Great Atlantic Insurance Co. v. Home Insurance Co* [1981] 2 All ER 485.

50. *Brennan v. Sunderland City Council*, [2009] I.C.R. 479 (UKEAT).

51. [1981] 2 All ER 485.

52. *Bullough v. Royal Bank of Scotland*, [2019] CSOH 24.

53. *Paragon Finance v. Freshfields*, (1999) 1 WLR 1183.

54. *Berezovsky v. Hine*, [2011] EWCA Civ 1089.

55. [2003] UKPC 38.

“

“It does not follow that privilege is waived generally because a privileged document has been disclosed for a limited purpose only: see *British Coal Corporation v Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113; *Bourns v Raychem Corporation* [1999] 3 All ER 154...It must often be in the interests of the administration of justice that a partial or limited waiver of privilege should be made by a party who would not contemplate anything which might cause privilege to be lost, and it would be most undesirable if the law could not accommodate it.”⁵⁶

”

Waiver of privilege in certain documents in one set of proceedings, would not automatically amount to waiver of their privilege for other proceedings. Therefore, documents which are otherwise privileged, would lose their privileged status as a consequence of being disclosed in a separate proceeding.⁵⁷

II. Waiver of attorney-client privilege in Singapore

In Singapore, legal advice privilege is a statutory right enacted in Section 128 of the Singapore Evidence Act (which is *pari materia* with Section 126 of the Indian Evidence Act). The principles of litigation privilege are derived from common law principles but have been recognized and accorded the same legal protection by Singaporean Courts, by being read into the scope of Section 131 of the Singapore Evidence Act (which is *pari materia* with Section 129 of the Indian Evidence Act).⁵⁸

The distinction between express and implied waiver in the context of privilege is also similar, insofar as an express waiver would include an agreement in writing and implied waiver would be deduced from conduct. The presence of the phrase “express consent” in Section 128 of the Singapore Evidence Act indicates that it contemplates express waiver. However, in certain cases, courts have also upheld implied waiver of litigation privilege.

In *Rahimah bte Mohd. Salim v. Public Prosecutor*,⁵⁹ the psychiatrists examining the accused informed her that the contents of their examination and what she shared with them could be produced in court if she so consented, and it was alleged that she had consented to the said disclosure. However, the court found that she did not have the requisite mental stability to consent to such request. In this regard, it was held that there was no express waiver of legal privilege, as this had to be a voluntary, informed and unequivocal election, by a person that was aware of their rights.⁶⁰

The test for determination of implied waiver is similar to English law, where courts are to examine inconsistent conduct which is sufficient to demonstrate implied relinquishment of rights.⁶¹ Elaborating on the manner of assessment of implied waiver, the Singapore High Court in *United Overseas Bank Ltd v. Lippo Marina Collection Pte Ltd. and Others*⁶² held that an implied intent to disclose is deduced by examining the context and purpose for disclosure. If circumstances can show that privilege was to be surrendered, or disregarded by the act of sharing, then that act would amount to an implied waiver.⁶³

Singaporean Courts have also grappled with the impact of reference to documents on waiver of the privilege therein. The Singapore Court of Appeal, in *ARX v. Comptroller of Income Tax*⁶⁴ was faced with whether reference

56. *ibid.*

57. *PCP Capital Partners LLP and Another v. Barclays Bank PLC* [2020] EWHC 1393 (Comm).

58. *Skandinaviska Enskilda Banken AB v. Asia Pacific Breweries (Singapore) Pte Ltd.*, [2007] 2 SLR 367.

59. [2016] 5 SLR 1259.

60. *Ibid.*

61. *ARX v. Commissioner of Income Tax*, [2016] SGCA 56.

62. [2018] 4 SLR 391.

63. *ibid.*

64. [2016] SGCA 56.

to the ‘contents’ of the document indicated an implied waiver of legal privilege. Here, legal advice granted by in-house counsel of a corporation was referred to in the affidavit of the respondent’s employee. Examining the English and Australian position at length, the Court held that mere reference, by itself, would not waive privilege impliedly – mere inconsistent conduct is not enough to bar privilege unless underlying considerations of fairness warrant placing disclosure over privilege. The Court examined other factors such as the materiality of the information disclosed and the circumstances under which the disclosure had occurred. Thus, it observed that selective redaction, partial disclosure or incomplete production of documents in courts is likely to pique suspicion, making it a fact-specific legal issue that requires legal advice.⁶⁵ After this, courts similarly progress towards considering the extent of disclosure required.⁶⁶ Other privileged information in a document can be protected if it is severable from the contents of the document for which privilege was waived. Singaporean Courts have endorsed the English approach in this regard.⁶⁷

III. Waiver of attorney-client privilege in the USA

Under the US law, the attorney–client privilege generally protects communications between in-house or external counsel and their clients that are intended to be and are kept confidential; and that are made for the purpose of seeking or obtaining legal advice or assistance.⁶⁸ Such privilege may not be available in case of business advice. Communications made by employees of a company may also be protected, if such communications are pursuant to directions by superiors and within the scope of their employment.⁶⁹ Communications given to agents of the attorneys are also protected.⁷⁰

There are broadly two types of privilege protection (i) attorney–client privilege and (ii) work product protection. While the former refers to the protection that applicable law provides for confidential attorney-client communications; “work-product protection” refers to the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.⁷¹

While the Federal Rule of Civil Procedure governs attorney-client privilege in the context of civil discovery,⁷² the Federal Rule of Criminal Procedure governs discovery in federal criminal cases – in federal courts.

65. *ibid.*

66. *ibid.*

67. *Tentat Singapore Pte Ltd v. Multiple Granite Pte Ltd.*, [2009] 1 SLR(R) 42.

68. *United States v United Shoe Mach Corp* 89 F. Supp. 357 (D. Mass. 1950) [358-59].

69. *Upjohn Co. v. United States* 449 U.S. 383 (1981).

70. *In re Kellogg, Brown & Root Inc* 756 F.3d 754 (DC Cir. 2014) [758].

71. Federal Rules of Evidence, Rule 502 (g); see Federal Rules of Civil Procedure, Rule 26(b)(3).

72. Federal Rules of Civil Procedure, Rule 26(b)(3):

Trial Preparation: Materials.

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person’s own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person’s oral statement.

Federal Rules of Civil Procedure, Rule 26(b)(5):

Claiming Privilege or Protecting Trial-Preparation Materials.

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

The principles related to disclosure of a communication or information covered by the attorney-client privilege or work-product protection are embodied in the Federal Rules of Evidence.⁷³

In the US, courts have been vigilant in preventing litigants from converting such privilege into tools for ‘selective disclosure’.⁷⁴ Courts have often been of the view that a client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.⁷⁵

Therefore, even though the privilege may have been once attached, the subject matter of the communication may not be forever immune from being used as evidence. For instance, a waiver of the attorney-client privilege at a first trial, may prevent a party from claiming it at a subsequent trial – considering the communication may no longer be deemed confidential pursuant to the first publication.⁷⁶

There are certain exceptions to attorney-client privilege as well. For example, the crime or fraud exception may be triggered if a client seeks advice from an attorney to assist in order to commit a crime or fraud or to conceal a crime or fraud.⁷⁷ The common interest exception (also called joint-defence privilege) refers to a scenario where two parties are represented by the same attorney in a single legal matter, and confidential information is shared to the other party.⁷⁸

- (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.
- (B) **Information Produced.** If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

73. Federal Rules of Evidence, Rule 501:

The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Federal Rules of Evidence, Rule 502 - Attorney-Client Privilege and Work Product; Limitations on Waiver:

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

- (a) **Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.** When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:
- (1) the waiver is intentional;
 - (2) the disclosed and undisclosed communications or information concern the same subject matter; and
 - (3) they ought in fairness to be considered together.
- (b) **Inadvertent Disclosure.** When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:
- (1) the disclosure is inadvertent;
 - (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
 - (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B).
- (c) **Disclosure Made in a State Proceeding.** When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:
- (1) would not be a waiver under this rule if it had been made in a federal proceeding; or
 - (2) is not a waiver under the law of the state where the disclosure occurred.
- (d) **Controlling Effect of a Court Order.** A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.
- (e) **Controlling Effect of a Party Agreement.** An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.
- (f) **Controlling Effect of this Rule.** Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.
- (g) **Definitions.** In this rule:
- (1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and
 - (2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

74. See *In re Penn Central Commercial Paper Litigation*, 61 F.R.D. 453, 464 (S.D.N.Y. 1973) as cited in *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

75. *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

76. *U.S. v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 464 (E.D. Mich. 1954).

77. *Clark v. United States* 289 U.S. 1 (1933) [15].

78. *United States v. Henke* 222 F.3d 633 (2000).

4. Conclusion

While Indian jurisprudence is still at a nascent stage in comparison with UK, USA and Singapore in the context of legal privilege and waivers thereto, similarities may be drawn among them. Needless to say, there is scope of sufficient development, for which cues may be taken from the English and Singaporean jurisprudence.

The distinction between express and implied waiver of legal privilege, although present, has not been appropriately culled out in India. Similarly, issues surrounding implied waiver under the Indian Evidence Act and the extent and scope of such waiver, needs to be addressed. This may prove to be important for future cases to create generic parameters. While the approach, in all probabilities, is bound to be case-specific, creating a broad framework will assist courts create objective indicators to judge waivers.

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