The summoned advocate: Supreme Court reaffirming principles of attorney-client privilege

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The Supreme Court of India's recent ruling in ***In Re: Summoning Advocates*** is a landmark act of judicial balance. The judgment reaffirms attorney-client privilege against investigative overreach by preventing Investigating Officers (**IO**) from summoning advocates [¶49 in *Re: Summoning Advocates*], while carving exceptional procedures subject to judicial review.

This article examines how the Supreme Court has sought to balance professional ethics with the legitimate needs of investigation– viz. the summoning of advocates by IOs, the status of in-house counsel, and the extent of privilege over documents and digital devices.

Introduction

What is attorney-client privilege?

Attorney-client privilege is a fundamental legal principle ensuring confidential communications between a client and their advocate, made for the purpose of seeking or rendering legal advice, are protected from disclosure. In India, this privilege is codified and primarily governed under Sections 132-134 of the Bharatiya Sakshya Adhiniyam, 2023 (**BSA**), whereunder clients alone have the privilege to disclose [Section 134, BSA] or consent to be disclosed [Section 133,

BSA] to court any confidential communication with their current or past [Section 132 (1), BSA] legal professional advisors (and any agents/employees engaged thereby) [Section 132(3), BSA].

The rationale behind attorney-client privilege in India is not to shield the guilty from the law but to uphold the administration of justice by encouraging clients to make a full and fearless disclosure to their advocates, *and* enabling advocates to provide comprehensive and effective legal advice to uphold their clients' constitutional rights [¶35 in *Re: Summoning Advocates]*.

The Bar Council of India's (**BCI**) rules of conduct affirm the gravity of attorney-client privilege since a violation of attorney-client privilege amounts to professional misconduct. In *Re: Summoning Advocates*, the Supreme Court tested the limitations and reaffirmed the sanctity of such privilege before investigating agencies.

The underlying issue:

The matter originated from a summons issued by an IO to an advocate [Section 179, BNSS], directing him to appear so the IO could '*know true details of the facts and circumstances*' of the case. In this background, the following questions were framed and adjudicated:

i. "*When an individual has an association with a case only as a lawyer advising the party, could the Investigating Agency/Prosecuting Agency/Police directly summon the lawyer for questioning?*" **The Court emphatically denied the proposition and disposed of the underlying summons [**¶46-50in *Re: Summoning Advocates***].**

ii. "*Assuming that the Investigating Agency/Prosecuting Agency/Police has a case that the role of the individual is not merely as a lawyer but something more, even then, should they be directly permitted to summon or should judicial oversight be prescribed for those exceptional criterion of cases?*" **The Court prescribed a mandatory approval mechanism for exceptional cases [**¶49-53 in *Re: Summoning Advocates***]**.

Evidently, the judgment balances the State's investigative powers against the Bar's professional duties to carve a solution that protects attorney-client privilege without granting absolute immunity to advocates before *bona fide* investigative inquiries and processes.

Case analysis

The central conflict: Investigative power v Professional privilege

The arguments in the case presented a classic clash of public interest vis-à-vis individual rights.

The Bar argued that such summons interfere with the fundamental right to practice under Article 19(1)(g) of the Constitution of India and create a chilling effect on the legal profession [¶5 in *Re: Summoning Advocates*]. Compelling disclosure of client communications would – (i) violate the clients' statutory privilege under the BSA; and (ii) expose advocates to professional misconduct proceedings [¶7 in *Re: Summoning Advocates*].

The State conceded that, under the comprehensive statutory framework of the BSA, no advocate could be summoned merely for giving an opinion or appearing for a party. *However, the State maintained that the privilege did not absolve an advocate's criminal conduct, a scenario expressly carved out as an exception in the proviso to Section 132 [*¶13-14 in *Re: Summoning Advocates]*.

The Court's reasoning and the new guidelines

The judgment affirmed the sanctity of privilege and reiterated the existing statutory framework, *viz*. Sections 132-134 of the BSA [¶27-31, 32-33 in *Re: Summoning Advocates*]. An advocate's duty of confidentiality is not a personal perk but a cornerstone of the justice delivery system [¶18 in *Re: Summoning Advocates*]. Consequently, IOs cannot undermine constitutional protections available to a client, including the right to effective legal representation and the right against self-incrimination under Article 20(3), of which the privilege is a reflection [¶35 in *Re: Summoning Advocates*]. Compelling an advocate to testify against their own client was deemed an "*abject failure of the investigating agency*" which is tasked with collecting independent evidence, not taking shortcuts by violating privilege [¶46 in *Re: Summoning Advocates*].

The Supreme Court laid down a twofold test for the rare instances where an advocate could be summoned thereunder [¶50-52, ¶67.1.2 in *Re: Summoning Advocates*]:

i. Explicit statement of reasons: The summons must explicitly state the facts and reasons forming the basis for invoking the exception, which are subject to judicial review.

ii. Prior approval from a superior officer: The summons can only be issued after obtaining prior written approval from an officer not below the rank of a Superintendent of Police, who must record their *prima facie* satisfaction that the statutory exception applies.

Such an approach does not completely bar the summoning of advocates but makes it an exceptional course of action, subject to internal checks and balances and, crucially, open to challenge under the High Courts' inherent powers [¶51 in *Re: Summoning Advocates*; Sec 528, BNSS].

Ancillary Issues

§ *In-House Counsel*

As a brief but impactful ancillary finding, the Supreme Court also held that in-house counsel are not entitled to the privilege under Section 132 of the BSA [¶67.4 in *Re: Summoning Advocates*]. The reasoning provided was two-fold. *First*, an in-house counsel, being a full-time salaried employee, cannot practice as an "advocate" [Bar Council of India Rules 1975, Pt. VI, Ch. II, R. 49] or take the shield of privilege which to advocates. *Second*, attorney-client privilege, being contingent on lawyers' independence, does not apply to in-house counsel bound by an employment relationship and their employer's commercial interests [¶65 in *Re: Summoning Advocates*]. Notwithstanding, communications between an in-house counsel (as an agent of the company) and the company's external advocate remains privileged [¶67.4.1 in *Re: Summoning Advocates*].

§ *Production of documents and digital devices*

The Supreme Court also clarified that privilege protects against the disclosure of *communications*, but not against the physical *production* of documents or devices [¶67.2 in *Re: Summoning Advocates*]. Inasmuch as a client can be compelled to produce a document [Section 94, BNSS], it follows that their advocate cannot claim a higher privilege thereupon [¶55-58 in *Re: Summoning Advocates*]. However, recognizing the potential for abuse in such situations, the Court mandated such production to be made only before the relevant jurisdictional court, followed by adjudication on objections to production, before making the documents available to investigators.

Similarly, for digital devices sought to be produced before an IO, the Supreme Court mandated the examination of digital devices to occur in the presence of the advocate and their client, with technological assistance, to protect the confidentiality of other clients' data as may be available with the advocate [¶67.3 in *Re: Summoning Advocates*] –which is consistent with international best practices.

Way forward

The judgment will have far-reaching implications for both investigative authorities and advocates, and companies.

Summoning advocates

As detailed above, the Supreme Court has laid down guidelines for piercing the attorney-client privilege in exceptional circumstances. Despite being characterised as exceptional, IOs may find it convenient to invoke these procedures more routinely. Merely allowing jurisdictional courts to adjudicate upon the disclosure of privileged communications to IOs exposes otherwise *bona fide* privileged material to judicial scrutiny, which goes against the grain of the BSA.

Further, the summoning of advocates is an investigative *"shortcut*" [¶46 in *Re: Summoning Advocates*] that can provide specific investigative direction to an IO, incentivizing streamlined investigative efforts towards building more robust cases and summoning advocates in high-stakes / high-visibility / highly sensitive matters on the pretext of the 'illegal purpose' exception. Given the incentives at play, the procedural guidelines devised by the Supreme Court could not only divert limited time and resources away from a meaningful investigation but also subject advocates to unwarranted scrutiny before IOs for their involvement in alleged 'illegal purposes.' Although intended to be exceptional in scope, such procedures may shift the burden of upholding privilege from IOs to advocates (and therefore clients) who would be constrained to object at every juncture and frequently invoke the High Courts' inherent powers for redress.

In-house counsel: Privilege still a far cry

The Supreme Court has reiterated a fundamental principle excluding in-house counsels from privilege, based on past precedents and a European ruling. However, more detailed reasoning exploring more nuanced, hybrid approaches to privilege from other jurisdictions could have served as useful guidance. For instance, some jurisdictions extend a limited, qualified privilege to in-house counsel, distinguishing between their legal and business advice. Other jurisdictions extend privilege to all such documents that are created for the "dominant purpose" of pending, reasonably contemplated / likely, or existing litigation.

This ruling reaffirms the current trend of corporations being strategic in communications, engaging external counsel at the outset when faced with any sensitive matters, particularly in internal investigations, to preserve confidentiality and retain privilege over any pertinent communications / documents. A "***verbal first***" approach for high-risk preliminary discussions may become the norm, and all internal legal documentation will need to be drafted under the assumption of future disclosure, inevitably increasing compliance

costs (*qua* engaging external counsel) and creating a chilling effect on internal reporting (given the lack of privilege between employees and in-house counsel).

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