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*The lawyer-client privilege is a significant characteristic of their fiduciary relationship. The duty of confidentiality obliges the communication that occurred between the client and lawyer should not be disclosed anywhere. This article inspects the significance and importance of the privileged professional communication held between the lawyer and his client. This research piece qualitatively surveys and critically analyses the laws of various jurisdictions including Pakistan, India, the United Kingdom, and the United States to highlight why the communication between lawyer and client is privileged and should not be disclosed. With that aim, this paper pinpoints the broad and loose application of privileged professional communication laws by the various courts. This article finds how the privileged professional communication laws have increased the confidence of clients and strengthened the fiduciary relationship between lawyer and client.*

**Keywords:** Lawyer-client privilege, Privileged Communication, Confidentiality, Disclose**Introduction**

The privilege is basically extraordinary and significant protection that has the power to exempt any kind of document or communication from being disclosed before and after legal proceedings. This is strong protection, but it is wasted when the privileged information or document is handled erroneously. The lawyer-client privilege is a professional privilege in which the lawyer and the client are obliged to not disclose the communication held between them with anyone else. The laws of various jurisdictions including Pakistan, India, the United Kingdom, and the United States acknowledge the lawyer-client privilege. These laws recognize all the privileged communication held between the privileged persons.

The privileged persons not only include the client and lawyers but also include the officials of the lawyers including his agents and clerks. These officials are not allowed to disclose the communication

held between the lawyer and his client. The lawyer-client privilege can be applied to any communication including emails, letters, faxes, and oral statements. The attorney-client privilege can apply to any form of communication, including oral statements, texts, emails, letters, and faxes. This privilege can be extended to phone calls as well. Where the client mailed his attorney to seek legal advice, such communication will also be privileged. The privilege will only be applied when the lawyer and the client had communicated confidentially. Where the client and lawyer have communicated in front of many people then the privilege cannot be invoked. Consequently, the presence of a third party during the conversation between the client and lawyer destroys the privilege. If the information is disclosed to a third party, then the privilege is waived.

To this end, this article by utilizing the qualitative research methodology examines various laws on privileged professional communication. Moreover, this paper scrutinizes the approaches of the courts while applying these laws. The article inspects the laws of Pakistan, India, the United Kingdom, and the United States to highlight how these jurisdictions protect the communication that has occurred between the lawyer and his client. The article pinpoints the subjective approaches used by the courts while evolving the dimensions of privileged professional communication laws or while applying privileged professional communication laws. The article inspects the importance of the duty of confidentiality. In the end, the article provides a reasonable conclusion.

### **Professional Communication between Lawyer-Client considering Pakistani Courts' Jurisprudence**

In Pakistani Law, Article 9 of Qanun-e-Shahadat Order 1984 (hereinafter 1984 Order) deals with professional communications. Considering Article 9, the lawyer is not allowed to disclose the communication made between him and his client. If article 9 will not be part of the law, then no individual would dare to get legal advice from a lawyer. Article 9 permits the discourse of this communication only in the circumstances when the client permits the lawyer to do so. The instructions written in the lawyer's office diary given by the client are also privileged and these instructions cannot be communicated to anyone even such instructions are not disclosed in the courtroom. (CrLJ, 1981).

The word client used in the phrase client-lawyer privilege needs to be defined and whether the term client covers the witnesses as well or not. This has been elaborated by the Lahore High Court in Syed Ali v Lt. Col Muhammad that a client means a person who is a party to the proceeding of a case. The communication between such party to the proceeding and his lawyer is privileged while the witnesses are not clients of the advocates. Hence, the communication between witness and lawyer is not privileged (Syed Ali, PLD 1962 Lahore 558). However, CrLJ, 1981 describes that If the lawyer has recorded any information or statement of the witnesses in the courtroom in extensor with the purpose of preparing himself for the witness's cross-examination, the lawyer can refuse to disclose these statements in the court (CrLJ, 1981). That shows that the communication between the witnesses and the lawyer is also privileged.

In Muhammad Maqsood Sabir Ansari v District Returning Officer, the lawyer got information that his client who was standing in an election against a seat that was reserved for the peasant has been previously involved in a business. The lawyer tried to misuse this information and he provoked another person to challenge the candidature of his client on the ground that his client is incompetent as he has a business and he was an industrialist so he cannot contest the election on the such reversed seat. The Supreme Court of Pakistan held that Article 9 of the 1984 Order protects the privacy of professional communication. Moreover, Article 9 explicitly discourages the lawyer from disclosing any advice, information, and communication made by him or made to him by anyone or received by him during his professional capacity. The Supreme Court further stated that:

*“Said prohibition is not limited to the knowledge of events or things acquired by him but also extends to facts observed by him in the course and for the purpose of his professional employment. Where the counsel had gone to the extent of filing a complaint based on the knowledge acquired by him, in the course of his engagement as an advocate, same was not only unethical but was in patent violation of Art.9 of Qanun-e-Shahadat, 1984. Information contained in such a complaint being not valid, same could not have been entertained by the Presiding Officer of the forum and proceedings carried out in pursuance’s thereof were void and of no legal consequence.” (Maqsood, 2009)*

The Supreme Court of Pakistan in *Nawaz Gardezi v Yusuf* stated that the lawyer should get consent from the client for any documents that he is going to produce in the courtroom. In such circumstances, when this requirement is fulfilled then Article 9 of the 1984 Order will not be applied and the document produced by the lawyer will be then examined in court (Nawaz, PLD 1963 SC 51). However, this decision of the court was incomprehensive as the court remained unsuccessful in describing whether the client should give express consent to produce such a document as the implied consent might cause difficulty in proving it.

Article 10 of the 1984 Order says that the agents, clerks, and the servant of the lawyer are not allowed to disclose communication made between the client and lawyer. Moreover, Article 10 of the 1984 Order discusses that the client, when getting legal advice from the lawyer, such communication held between them is also privileged. *Muhammad Kabiruddin v Muhammad Muniruddin* says that where the client has made communication with a lawyer and the client wanted to achieve any illegal purpose like a commission of fraud or any crime, the lawyer can disclose the communication (Kabiruddin, 1993).

In *Director of Intelligence and Investigation v Aslam Hashim Butt*, The Lahore High Court stated that if the privileged communication between a client and lawyer is disclosed then it can collapse the whole legal system of Pakistan. No member of the Bar can disclose any fact and he can never be compelled to disclose such communication as it is kind of a betrayed and this betrayal is not permitted at any cost. The client-lawyer privilege entertains a vital role in the Pakistani Legal system, and no one has the authority to enquire the lawyer about his discussion with his client regarding any matter. Where the lawyer gains courage and discloses the communication that had been held between him and his client with anyone else, then such a lawyer is guilty of misconduct as well as he has lessened his professional dignity and has affected the fundamentals of moralities. Additionally, the Lahore High Court held that the courts in Pakistan could not permit the public functionary to force the lawyer to disclose his client’s qualifications, backgrounds, and antecedents because all such stuff is covered by the ambit of privileged communication (Director of Intelligence, 2016). However, in the case when the public interest is not affected as well as when the client has an intention to commit any fraud or he is willing to commit any crime and he wants that his lawyer helps him in the performance of such task, then in such circumstances the lawyer is obliged to disclose communication because the act of his client can affect the public at large, as well as lawyer, is not obliged to be part of criminal acts.

In Pakistani Courts’ jurisprudence, the most practical point which is purposefully discussed is that privileged communication should not be disclosed as it not only hurts the sentiments, but it is a non-professional attitude. Usually in Pakistan, the documents or communication that can affect the public interest are not usually disclosed. The public interest is basically a defense against the non-disclosure of such communication. Invoking this defense, the document of the state is generally not disclosed or produced as evidence in open courts. This is a commendable purpose as seen in *Hasmat Khan v Government of Punjab* wherein the Lahore High Court stated the evidence regarding the affairs of

the state cannot be disclosed openly and this disclosure could injure public interest. The Lahore High Court further stated that public interest is supreme and should be considered (Hasmat, 2007). Moreover, such documents should not be produced in open courts, but the courts are obliged to check and examine such documents as the judge can examine such documents in his chambers. There should also be accountability for the document of the state. The realm of their privilege cannot be increased to an extent that they should not be produced in court as well as the judge cannot examine such in his chamber.

### **Indian Judicial and Statutory Approaches towards Privileged Communication and Confidentiality**

The lawyer and the client's privileged communication in India is dealt with in the Indian Evidence Act 1872 (hereinafter 1872 Act). Specifically, section 126 to 129 of the 1872 Act discusses this privileged communication. Section 126 of the 1872 Act promotes the privileged communication between client and lawyer and describes the scope of this communication. It discourages the disclosure of this professional communication. Additionally, section 126 of the 1872 Act describes the circumstances in which this privilege is to be denied and is not followed.

Additionally, Section 129 of the 1872 Act says that no person is authorized to disclose the confidential communication that occurred between him and his client. Section 129 of the 1872 Act says:

*“No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be complete to disclose any such communication as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.”*

In *Munchershaw Bezonji v New Dhurumsey Spinning and Weaving Company*, it was held by the court that the client should not be fearful that whatever he is disclosing in front of a lawyer or legal advisor will be spread and he must face any kind of embarrassment. Intentional and compulsory spreading of information that is confidential is highly discouraged and opposed to the conscience. The disclosure of such information will circulate more and more untruths as to what had already occurred.

*Memon Hajee Haroon Mahomed v Abdul Karim* authenticates any kind of communication made between the client and his lawyer is confidential and that is the true essence of section 126 of the 1872 Act (*Memon Hajee* [1878] 3 Bom). However, In *Kalikumar Pal v. Rajkumar Pal*, the court stated that when the relationship between the client and lawyer has not been made and any communication or information transferred between them before the creation of any fiduciary relationship can be circulated (*Kalikumar* (1931)58 Cal 1379). The court, however, lessened the scope of the privilege communication as it would become difficult to point out whether the spread of information was made before the creation of the fiduciary relation or after the fiduciary relation.

There is no enactment of statute or provision of law that is particularly dealing with data confidentiality. However, Part VI of the Indian Bar Council Rules describes the rules for governing advocacy in Chapter 2 which is entitled Standards of Professional Conduct and Etiquette. Subsection 24 says that the lawyer is not allowed to perform any task or action by which he abuses or takes advantage of his client. Moreover, Sub Section 19 read as “an advocate shall not act on the instructions of any person other than his client or his authorized agent.”

When subsection 19 is read with subsection 24, it is observed that it is necessary for lawyers to maintain the confidentiality of any information received to them by their clients. It evinces that there is a presence of the fiduciary relationship between the lawyer and his client and the fiduciary

relationship is considered one of the most confidential relationships. *Shri D. R. Dhingra v. Department of Personnel & Training (DoPT), Central Information Commission* can be cited in this regard. Moreover, the *Union of India through Ministry of Defense v Central Information Commission* held that a fiduciary relationship is based on trust and confidence that one person has in another person. The Court stated that:

*“Fiduciary relationship in law is ordinarily a confidential relationship; one which is founded on the trust and confidence reposed by one person in the integrity and fidelity of the other and likewise it precludes the idea of profit or advantage resulting from dealings by a person on whom the fiduciary obligation is reposed.”*

### **English Perspective on Litigation and Legal Advice Privilege**

In *Greenough v. Gaskell*, the court held that privileged communication is a protected communication between the lawyer and his client. Moreover, it is also a protected communication between a client and a legal advisor. Additionally, the court stated that

*“It is out of regards to the interest of justice, which cannot go on without the aid of men skilled in jurisprudence in the practice of Courts, and in those matters affecting rights and obligations, which form the subject matter of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his legal resources. Deprived of all professional assistance, a man would not venture to consult any skilled person or would only dare to tell his counsel half his case.”* (*Greenough, 1833*) 1 Myl. & K. 98

English law divides professional privileges into two categories that are “Litigation and Legal Advice Privilege.” Litigation Privilege is a type of privilege that arises when the litigation is initiated, or any other proceeding is initialized. It protects all kinds of legal or ordinary documents, communication, and information that has been circulated between the client and his lawyer. Moreover, it protects the communication circulated to the officials of the lawyers including his agents and the clerks. Additionally, it covers the communication circulated between the third party and the lawyers.

The second type of privilege is the “Legal Advice Privilege” which covers the communication that occurred in a professional capacity between the counsel and his client. These occurred communications are confidential and should not be communicated with anyone. This is usually considered professional dishonesty and the client was seeking a piece of advice in the professional capacity of the lawyer. The circumstances in which the lawyer provides the in-house services to a corporate body, and the communication made between him and the employees of the company while he was rendering his service or giving any legal advice are privileged. This privilege between the communication of the lawyer and the corporate client strengthens the bond between them and this privilege promotes the trust of the client in the in-house counsel (Lisa, 2007).

In *Prudential v Special Commissioner of Income Tax*, the Queen’s Bench Division was least flexible in determining the scope of the confidentiality privilege. The court had limited the extent of this privilege only to the lawyer and the court held that the accountants cannot entertain such privilege. Consequently, the sharing of any information between the account and the client can be disclosed and circulated to anyone.

India and Pakistan are one step forward toward English Laws. Pakistani and Indian laws and statutes have provisions that describe that the communication of a lawyer and his client should be privileged. The 1872 Act under Section 126 while 1984 Order under Article 9 protects such communications while English Law recognizes such communication considering common law.

## Lawyer-Client Privilege the Rule of Confidentiality in the United States Legal Regime

In the United States, the most significant and basic block of legal ethics is the privileged communication between the client and his lawyer. It is considered the ethical and obligatory rule of confidentiality. It is the foundation stone of a relationship that is generated between the attorney and his client (Roy D. Simon, 1995).

There was a need to discover a method that could help the client to have an open discussion about his case with his attorney. Generally, the clients were hesitant about disclosing their acts and circumstances that had happened to them in front of their lawyers as the clients were not so confident and they were scared that their obsessions or happenings might be communicated and circulated outside in the vicinity. The introduction of the doctrine of the lawyer-client privilege and the duty of confidentiality has revolutionized and then the client started to be open and candid in front of their attorneys. This introduction was a good initiative as it helped the lawyers in providing a keen, enthusiastic, and passionate representation to their clients (American Jurisprudence, 2008).

Roy D. Simon says that it is obligatory for the lawyer to keep the information secret that has been provided to him by his client as well as it is his ethical duty. The lawyer should not reveal the information regarding the client's representation to anyone. The lawyer should prevent himself from doing so till the client on his own will not give consent of revealing such information to the lawyer (Roy D. Simon, 1995). It is submitted that with the consent of the client the lawyer can reveal or communicate the information, but he cannot voluntarily reveal such information regarding the client's representation.

The rule of confidentiality in the United States is designed by the American Bar Association Rules are called the "ABA Model Rules of the Professional Conducts." Rule 1.6 says that "[A] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."

There was ambiguity in the argument of Wigmore which says that the realm of the client and lawyer privilege covers the communications to the lawyer's agent, clerks, or stenographers. Because these officials are rendering services to the officers of the lawyers and the representation information is undoubtedly communicated to them as well. So, the question is whether these officials of the lawyers are prohibited from communicating such information with anyone else (Wigmore, 1961). This fact is that the officials of the lawyers are not allowed to communicate private information with anyone else.

The court in Fischel described the ambit of attorney-client privilege. The Court stated that all the documents that are written, prepared, and examined in the office of the lawyer are a privilege. The lawyer or his agents are not allowed to communicate such information with anyone. If a person came to the lawyer for advice, the lawyer or his clerks are not allowed to spread such information. The verdict of the court boarded the scope of the lawyer and client privilege (Fischel, 1977).

The Court in *Dabney v Investment Corporation* held that:

*"Attorney-client privilege applies only to members of bar or their subordinates; protected subordinates include any law student, paralegal, investigator or other person acting as agent of duly qualified attorney under circumstances that would otherwise be sufficient to invoke privilege; but no privilege exists for law student who performs duties of attorney, is regarded and treated as attorney, and is made privy to certain confidential information that would have been disclosed only to an attorney, where law student is acting on his own."* (*Dabney*, 28 FR Serv2d 105)

## Lawyer-Client Privilege is More Protective than Rule of Confidentiality

There is a need to clarify whether there is any difference between the doctrine of lawyer and client privilege and the confidentiality rule or not. As these doctrines are usually used together it creates a sense that these doctrines have the same meanings and descriptions. However, this is not true as both doctrines are distinct from each other on various dimensions.

The lawyer and the client privilege doctrine only cover communication between the client and his lawyer and the lawyer at any cost is not allowed to reveal such information. However, confidentiality duty never confines the attorney from revealing the information if it is the law that requires this disclosure. This means when the law requires the disclosure of any information or facts then these are revealed by the lawyer. It is not clear whether the client has consented to the lawyer to disclose such information or not. It has been stated before revealing any information or fact, it is obligatory for the lawyer to get the consent of the client (Roy D. Simon, 1995).

To this end, it is submitted that the lawyer and the client privilege gives more protection to the client and save the spread of his information. Under this doctrine, the information is not communicated to the courts as well without the consent of the client.

### Conclusion

The survey of laws of various jurisdictions including Pakistan, India, the United Kingdom, and the United States evinces that all the jurisdictions acknowledge the communication between the client and lawyer should be privileged. It is best to regard the confidentiality of information that has been shared between the clients and the lawyers should be acknowledged and recognized. Moreover, it should be an obligatory duty of the lawyers of each jurisdiction to maintain the confidentiality of the information of their clients.

In Pakistan, the courts should have to recognize that the communication between the witness and the lawyer should be privileged. It is better if the client gives express consent for the disclosure of his information rather than the implied consent that is difficult to be proved. In India, the court should not lessen the scope of privileged professional communication as it is highly objective that the entire communication before and after the legal proceedings should be privileged. The English courts' insight is exceptional but there is a need for strong statutory codification of privileged professional communication. The United States' legal professional ethics are extraordinary. Furthermore, the attorney-client privilege gives more safety to the client and saves the spread of his information as due to it the information is not communicated even in the courtrooms.

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CrLJ Year1981 Page 341

*Dabney v Investment Corporation of America* 28 FR Serv2d 105

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Roy D. Simon, Jr. and Murray L. Schwartz, *Lawyers and the Legal Profession: Cases and Materials*, 25 (The Michie Company, 3rd edition 1995).

Section 126 of the 1872 Act reads as: “No barrister, attorney, pleader or vakil, shall at any time be permitted, unless with his client's express consent to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment or to disclose any advice given by him to his client in the course and for the purpose of such employment. Provided that nothing in this section shall protect from disclosure – 1. Any communication made in furtherance of any illegal purpose, 2. Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment. It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client. Explanation - The obligation stated in this section continues after the employment has ceased.”



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