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## Critical Analysis of Section 126 of Indian Evidence Act, 1872

Sanjay Pandey<sup>a</sup>

<sup>a</sup>Advocate, District and Session Courts, Varanasi, India

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*An advocate plays an important role in the judicial system. The profession of an advocate is not a trade or business nor are courts business houses. Clients are not customers of an advocate. Their relationship is based on trust and confidence. On one hand, the advocate is the spokesperson of his client in the courtroom, and on the other he is the partner of judges to ensure justice is served. Section 126 of the Indian Evidence Act, of 1872 safeguards the fundamental right of fair trial of every person as upheld by the apex court in one of its judgements<sup>1</sup>. As popularly said, “A lawyer must always be the high priest at the shrine of justice”, there must be high moral standards in his job. An advocate is required to assure his client that the interests and rights of the client are fully saved in his hands. Section 126 of the Act<sup>2</sup> safeguards the fundamental right of getting professional legal advice to defend oneself.*

**Keywords:** section 126, evidence, professional communication, advocate-client relationship.

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### INTRODUCTION

Among many other differences, communication is also one that differentiates between animals and humans. We cannot live without communicating even for a moment. Humans need other

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<sup>1</sup> *Dwarka Prasad Agarwal v B.D. Agarwal & Others* [2003] 6 SCC 230

<sup>2</sup> Indian Evidence Act 1872

human beings to connect and communicate. Our mind continuously generates ideas. Even when there is no one around us, we communicate with ourselves. It is communication that creates a civilised society. It is the communication that sets rules for a community, a tribe, or a state. It is communication that sometimes creates disturbances in the public order. Poor or faulty communication leads to crime in society. To curb the disturbances which might occur in social life, the judicial system and administration, Chapter 9, sections 118 to 134 of the Indian Evidence Act provide the right to privileged communication to witnesses. Out of these, some are privileges and some are prohibitions. Further, this blog article explains in some detail what is professional communication in the light of s. 126 Indian Evidence Act.

### **PROFESSIONAL COMMUNICATION U/S 126 IS PROTECTED**

Article 21 of the Indian Constitution says that "No person shall be deprived of his life or personal liberty except procedure established by law". The fundamental right enshrined under article 21 of the constitution guarantees every person, citizens and non-citizens, the right to 'life' and 'personal liberty. It guarantees that the state shall not interfere in anyone's life and liberty. If the State is required to interfere in the life and liberty of any person, it shall do so by the procedure established by law. Here, life doesn't mean 'mere living' or 'surviving' anyway. When the word 'life' is read together with 'personal liberty, it covers within its ambit the basic requirements of living a dignified human life. The Supreme Court of India through its various landmark judgments has established the right to live a dignified life.

The right to privacy<sup>3</sup>, the right to a speedy trial<sup>4</sup>, and the right to free legal aid<sup>5</sup> are some of the fundamental rights recognized under Article 21 of the Constitution, which protect the dignity of an accused or a convicted person or a person suspected of having committed an offence. The main objective of the judicial system is to find out the truth and not just to punish the wrongdoer.

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<sup>3</sup> *Kharak Singh v State of U.P.* [1963] AIR 1295 (SC)

<sup>4</sup> *Hussainara Khatoon v Home Secretary, State of Bihar* [1979] AIR 1360 (SC)

<sup>5</sup> *Suk Das v Union Territory of Arunachal Pradesh* [1986] 25 SCC 401

It aims at rehabilitation and reformation so that the same offence does not take place again and again in society.

It is a basic fundamental and human right of every accused that he shall be given a fair opportunity to prove his innocence, defend himself, and may adduce evidence in support of his innocence. The law never denies these rights. If the law does not allow a person to defend himself, all rights mentioned above will be meaningless. For this very reason, there should be someone before whom the accused can talk freely without any fear. There should be someone who keeps her secret and doesn't pass it on to anyone.

### **RELATIONSHIP BETWEEN AN ADVOCATE AND HIS CLIENT**

Advocates are licensed by the bar council to practice law across the country. They are the officers of the court and are bound by the code of professional ethics. They assist the court in the administration of justice, give advice and represent their clients in the court in civil and criminal matters. They also owe some duties towards the opposite party and his advocate. It can be said that advocates perform a tripartite role in their profession. Besides representing their clients in court, they also perform certain other legal work like sending the notice, drafting contracts, etc. The status of advocates is a privileged one under Article 14 of the Constitution.

The relationship between an advocate and a client is that of trust and confidence. A client fully believes in the rationale and advice given by his advocate. In return, the advocate provides him with the assurance of not only backing him in court but also keeping his secrets between themselves. *Rule 15 of the Bar Council of India Rules imposes a such duty on advocates. It states:*

*“An advocate should not misuse or takes advantage of the confidence reposed in him by his client.”*

### **ANALYSIS OF S. 126 INDIAN EVIDENCE ACT, 1872**

As said earlier, all persons, whether guilty or not, are entitled to a fair trial. A fair trial is only possible when the client has an advocate to defend him. And an advocate can only defend him properly when he knows the whole truth. No person shall tell his truth to another person unless

he has complete confidence in that person. Section 126 assures every person that he, in his interest, may freely communicate all his points to his advocate and seek his advice. Section 126 encourages a client to communicate frankly and sincerely to his advocate by protecting the communication made between the two.

Section 126 of the Act imposes a duty on the advocate that he shall not disclose any communication made to him by or on behalf of the client.

***The section says:***

*“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 his employment as a 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 his professional employment, or to disclose any advice given by him to his client in the course and for such employment:*

*Provided that nothing in this section shall protect from disclosure –*

*(1) Any such 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.”*

Rule 7 of the Bar Council of India Rules makes a similar provision to that of s.126 of the Indian Evidence Act. It says:

***“An advocate should not by any means, directly or indirectly, disclose the communications made by his client to him. He also shall not disclose the advice given by him in the proceedings.”***

Let's understand s. 126 of the Indian Evidence Act, 1872 in some detail. Section 126 starts with the wording: "*No barrister, attorney, pleader or vakil...*" It is to be noted that by s. 29 Advocates Act, 1961, advocates are the only recognized class entitled to practice law. Thus, barrister, attorney, pleader, and vakil refer to advocates only. Apart from appearing in court, some other legal works are also performed by advocates such as the preparation of documents, advice to a client on a legal matter, etc. All these are included in the expression 'practice of law'.

Section 126 prohibits the advocate that he shall not disclose communication made between him and his client while it is a privilege to clients that whatever communications he made to his advocate or whatever advice he got from his advocate, are fully protected from disclosure in a court of law. Such communication can be made by the client himself or by any person on his behalf.

The protection also extends to the contents and conditions of any document with which the advocate has become acquainted. Such communication and acquaintance must take place in the course and for employment as an advocate. The phrases: 'in the course of and for the 'purpose of employment' mean that there must be an advocate-client relationship. There is no privilege available before the actual professional relationship starts. Communicating a fact to an advocate casually and not taking legal advice is not considered communication made during an advocate-client relationship.

As long as there is an advocate-client relationship, there is protection. Once this relationship is over, there is no protection. Communication between the defendant and the plaintiff's advocate is not protected because there is no advocate-client relationship between them. Reading together illustrations (a) and (b) appended to the section, it is clear that an advocate-client relationship begins only when an offence is committed first and seeking advice for the defence of that offence is the next step.

If a person takes advice from an advocate regarding committing an offence and commits that offence later, there is no advocate-client relationship rather advocate becomes the co-conspirator of that offence. Thus any wrong done by the client after getting advice from an advocate is not

protected as there is no advocate-client relationship, rather the advocate is equally guilty for the furtherance of criminal purposes. The **proviso 1 of s. 126** makes it quite clear: **Any communication made in furtherance of any illegal purpose is not protected.** The communication is also not protected if *“Any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.”*<sup>6</sup>

Thus, where an advocate finds an entry, in the account books of his client accused of embezzlement, regarding the embezzled amount which was earlier not there at the commencement of his employment, can be disclosed by the advocate.<sup>7</sup> The protection under section 126 extends to interpreters, clerks, and servants of the advocate. It is possible that verbal communication can be overheard by employees of the advocate or they may be acquainted with documents, therefore, employees of the advocate are also prohibited from disclosing confidential information related to professional employment.<sup>8</sup>

Where section 126 prohibits an advocate from disclosing confidential communication made between him and his client, section 129 imposes a similar prohibition on the client. It says: **“No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional legal adviser.”** The section further says that he is permitted to disclose any such communication only if he offers himself as a witness.

#### **EXCEPTIONS TO PRIVILEGE UNDER S. 126**

**Disclosure with the express consent of the client:** Section 126 provides privilege to the client and prohibits the advocate to disclose any communication made between them. This provision is for the benefit and encouragement of the client. The advocate only discloses such communication if the client gives express consent to it. No other person can give such consent on behalf of the client. If the client discloses in the court some part of the communication made

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<sup>6</sup> Indian Evidence Act 1872, s 126

<sup>7</sup> *Ibid*

<sup>8</sup> Indian Evidence Act 1872, s 127

between him and his advocate, it amounts to a waiver of the rest part of the communication<sup>9</sup>. However, **“If the client gives evidence in the court regarding communication between him and his advocate or even if he calls his advocate as a witness, it does not amount to give consent for disclosure. Consent of the client is inferred when he questions his advocate regarding confidential communication between them”**<sup>10</sup>. Only the client can waive his privilege. The death of the client does not amount to a waiver.

**Communication made in furtherance of an illegal purpose:** An advocate should not guide or facilitate a person in committing an offence. It so happens when a person seeks advice from the advocate first and commits the same crime later for which he has gotten the advice. But, where the client commits an offence first and seeks legal help later from an advocate to genuinely and legitimately defend him, he has the privilege. However, by Proviso 2, and illustration (c) which is based on *Brown v Foster*<sup>11</sup>, an advocate can disclose a subsequent fraud committed after his employment started.

**Advocate sues his client:** The privilege is not available to the client where the advocate himself sues the client for his professional services as in such a circumstance, the advocate-client relationship comes to an end. The advocate can disclose only those parts of communication which are relevant to the dispute between them.

**Joint interest:** Where two or more persons have a joint interest in a venture, for example, partners among themselves, then the communication made between one such person and the advocate can be disclosed to other persons having an interest in that very venture.

**Information falls into the hands of a third person:** “Once a privileged document is accidentally disclosed in discovery proceedings, without intention or knowledge, it is generally too late to claim injunctive relief. The court would normally give such relief if the disclosure was obtained by trick or fraud. But where confidential document has come out due to mistake or carelessness

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<sup>9</sup> *Konigsberg Re* [1989] 3 All. E.R. 289

<sup>10</sup> Indian Evidence Act 1872, s 127

<sup>11</sup> *Brown v Foster* [1857] 1 H & N 736

of the party entitled to it or by his legal adviser, or even through judicial error, its use may not refrain"<sup>12</sup>.

## CONCLUSION

The presumption of law is that: "Every person is innocent until he is proven guilty". Every person has the right to defend himself and adduce evidence for that purpose<sup>13</sup>. Thus it is neither illegal to seek legal aid from a legal practitioner nor it is against the professional ethics of the Bar Council to defend one's client.

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<sup>12</sup> *Guinness Peat Properties Ltd. v Fitzroy Robinson Partnership* [1987] 2 All. E.R. 716

<sup>13</sup> Code of Criminal Procedure 1973, s 243