

UPDATE

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Attorney–Client Privilege and the Limits of State Power: A Study of the Supreme Court’s Judgment in *In Re: Summoning of Advocates*.

A. Introduction

In a landmark decision, the Supreme Court has sent a strong message that “*the power to summon is not the power to interfere with the privileged communications between a lawyer and client, as long as the Constitutional Courts sit, in this Country*¹.” The court was confronted with the rising tide of investigative adventurism, it stepped in as the ultimate sentinel of justice to recalibrate the uneasy balance between the might of the State and the independence of the Bar. The ruling reaffirms that professional communications are confidential and cannot be used as tools for investigation. It also introduces a system of judicial oversight and accountability for every summons, document request, or seizure of digital material. Through this judgment, the Court did more than settle a legal question — it reaffirmed that the freedom of the lawyer is the first bulwark of liberty, and that the edifice of justice stands tallest when the voice of counsel is fearless and unshackled. The judgment resonates far beyond questions of professional privilege; it is, in essence, a reaffirmation of the citizen’s fundamental right to fair legal representation and to consult a lawyer in confidence — rights flowing from Articles 19(1)(a), 20(3), and 21 of the Constitution. Considering the profound implications of this pronouncement for both the Bar and the citizenry, it becomes imperative to carefully understand the reasoning and impact of the judgment.

B. Understanding attorney client privilege

Before examining the issues framed and the conclusions reached by the Court, it becomes necessary to first outline the broader contours of the controversy to appreciate the context in which the judgment was rendered.

The relationship between an advocate and client is one of the oldest and most revered fiduciary bonds known to law. An advocate, once engaged, ceases to be a mere professional adviser and becomes an extension of the client’s legal personality. This bond is founded upon absolute confidence — a client must be able to speak freely, without fear that their admissions or strategies could later become evidence against them.

¹ *In Re: Summoning of Advocates Who Give Legal Opinion or Represent Parties During Investigation of Cases and Related Issues*, 2025 INSC 1275.

The concept of attorney–client privilege is not a modern innovation, but a cornerstone of civilized jurisprudence dating back several centuries. Its genesis can be traced to 16th century England, when the courts of chancery first recognized that an attorney could not be compelled to disclose the secrets of his client. The earliest reported instance appears in *Berd v. Lovelace*², where the Court of Chancery held that “the duty of the counsellor is to keep the secrets of his client,” marking the birth of what later came to be known as legal professional privilege.

Over time, this doctrine evolved from a rule of evidence to an ethical commandment governing the conduct of lawyers. It came to symbolise the trust reposed by citizens in those who speak for them before the State and the courts. In India, this historic principle found statutory recognition in Sections 126 to 129 of the Indian Evidence Act, 1872, which codify the lawyer’s obligation to maintain confidentiality. And now by Section 132, the said privilege, was retained in the Bharatiya Sakshya Adhiniyam, 2023 (BSA), protecting the communications between a lawyer and a client as sacrosanct. However, the said section incorporates three limited circumstances when the privilege does not exist:

- when the client expressly consents;
- when the communication was made in furtherance of an illegal purpose; or
- when the lawyer observes a crime or fraud committed after commencement of professional engagement.

In its judgment the Court described this confidentiality as not merely statutory, but constitutional in character, flowing from the client’s right to legal representation and his right against self-incrimination under Article 20(3). To compel a lawyer to reveal communications made in confidence, the Bench observed, would amount to compelling the client to testify against himself by proxy.

C. Conflict between attorney client privilege and power of the investigating agency to compel witness

Yet, in recent years, there has been a disquieting trend — a growing tendency of investigating agencies to summon advocates, seeking their appearance as witnesses or to elicit information regarding opinions rendered or advice given. The controversy reached its tipping point when a senior advocate was summoned by an investigating agency, triggering a national debate on the fragile boundary between the attorney–client privilege and the expansive powers of investigation.

There was a rising concern that investigative agencies are adopting the easier route of summoning advocates rather than tracing the actual evidence. Such conduct is a dereliction of investigative duty and a distortion of criminal process. When enforcement officers summon advocates who have merely discharged their professional duty, they not only erode the client’s right to confidentiality but also send a chilling signal to the legal fraternity. It discourages candid consultation, inhibits fearless representation, and allows investigative authorities to adopt shortcuts instead of building evidence through lawful and diligent means. Such actions risk transforming the advocate — an officer of the court — into an unwilling witness for the prosecution.

² (1577) 21 E.R. 33

Anchored in this understanding that the strength of the criminal process lies in the separation of its functions, the Hon'ble Court proceeded to determine the delicate balance between investigative powers and the privilege of the legal profession.

D. Issues before the Supreme Court

The Court's Suo Motu intervention was triggered aforesaid disturbing pattern, whereby investigating agencies, including the Enforcement Directorate (ED), had summoned practicing advocates for "knowing the true details" of their client's case. The Supreme Court Bar Association (SCBA), Supreme Court Advocate on Record Association (SCAORA), and the Bar Council of India all intervened, arguing that such practice was an "unconscionable interference" with the right to practice the profession under Article 19(1)(g) and the right to life and liberty under Article 21. In its judgement the Court has dealt with the following issues:

- i. Whether an investigating agency or police can directly summon a lawyer for questioning when his only connection to the case is that he advised or represented a party in his professional capacity?
- ii. Whether there is any need for frame fresh "judicial guidelines" under Article 142 to regulate the summoning of advocates?
- iii. Whether an advocate can be compelled to produce documents or digital devices relating to a client's case?
- iv. Whether the In-house counsels are not entitled to privilege under Section 132 of the BSA?

E. Findings of the Supreme Court

The Investigating Agency Cannot Summon an Advocate Merely for Discharging His Professional Duty

The Supreme Court answered the first question with an emphatic and categorical "No." The Bench declared that an investigating agency, prosecuting authority, or police officer cannot directly summon an advocate appearing in a case merely to elicit details concerning that case. Such an act, the Court observed, would amount to an impermissible intrusion into the sanctity of the attorney-client relationship.

The finding of the Hon'ble Court is premised on, *firstly*, right to consult and be represented by an advocate of one's choice, enshrined in Articles 21 and 22 of the Constitution, and would be rendered meaningless if the advocate could later be coerced into disclosing what transpired in confidence. *Secondly*, the Bar is not a "private guild" but a constitutional instrumentality. When an advocate is summoned for acts done in his professional capacity, the independence of the entire Bar is undermined.

Where the Investigating Officer has specific, credible information bringing the matter within the limited statutory exceptions to privilege — for instance, communications in furtherance of an unlawful purpose or knowledge of a crime or fraud obtained after engagement — the summons must explicitly disclose the facts relied upon, so that the advocate concerned may avail the remedy of challenge under Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS).

Rejection of the Need for New Guidelines

Sections 132 to 134 of BSA already provides a complete and time-tested code governing privileged communication between lawyer and client. The privilege had withstood the test of time in and remained a vital part of the justice delivery system. Therefore, it held that there existed no legislative vacuum warranting judicial intervention.

Production of documents and digital devices

The Court held that production of documents, per se, does not fall within the scope of Section 132 BSA, whether in a civil or criminal case. What is protected is the content of professional communications, not the mere act of producing a document. Consequently, both the Court and the Investigating Officer are empowered to seek production of documents under Section 94 BNSS. However, such production must be made only before the jurisdictional Court, which alone can determine the objections, privilege claims, and admissibility of those documents after hearing both the advocate and the client.

Recognising the unique privacy risks posed by digital material, the Court laid down specific procedural directions for production of digital devices, which has been elaborated in the later part of this article.

Status of In-house Counsel

The Supreme Court held that an in-house counsel, being on the payroll of a corporation and bound by employment terms, functions as part of the organisation's management structure rather than as an independent legal adviser representing a client before courts. The privilege under Section 132 of the BSA, therefore, cannot be invoked in relation to communications between an employer and its in-house counsel. However, the Court made an important qualification. It recognised that in-house counsels are still entitled to protection under Section 134 of the BSA, which safeguards legal advice given by legal advisers of a company.

F. Directions by the Supreme Court

The Court proceeded to lay down procedural safeguards designed to protect the interests of both advocates and their clients:

Summoning of advocates

- Investigating Officers in criminal cases or Station House Officers conducting preliminary inquiries in cognisable offences shall not issue summons to an advocate representing an accused to elicit case details, unless the situation falls within one of the recognised exceptions under Section 132 of the BSA.
- If a summons is issued invoking any exception to privilege, it must clearly state the facts relied upon and bear the written approval of a superior officer not below the rank of Superintendent of Police, who must record his satisfaction in writing.
- Any summons so issued shall be open to judicial review at the instance of the advocate or the client under Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS).

Production of documents

- The documents can only be asked to be produced before the jurisdictional court and not the police. Upon production, the Court shall decide all objections regarding the order of production and admissibility of the document after hearing the advocate and the client.

Production of digital devices

- Any direction by an Investigating Officer for production of a digital device must be only for production before the jurisdictional Court, not before the police.
- Upon production, the Court must issue notice to the client whose data is sought and hear both the client and the advocate on objections relating to production, discovery, or admissibility.
- If the Court overrules objections, the digital device shall be opened only in the presence of the advocate and client, who may seek assistance from a technical expert of their choice.
- The Court must ensure that confidential information relating to other clients stored on the device remains inviolable; only the material relevant to the particular investigation may be accessed or extracted.

In-house Counsel

- The Court held that in-house counsels, being employees and not practising advocates, are excluded from Section 132 privilege, though they enjoy limited protection under Section 134 for communications received as legal advisers.

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