Disciplining the Lawyers: Law and Professional Ethics

G. Geethisha*

Lawyer's profession has been regarded as an honourable or noble profession by the world for several centuries. It is a learned profession par excellence. No other profession touches human life at so many points than law. It has always been held in high esteem and its members have played an enviable role in public life. It is different from other professions in that what the lawyers do affects not only the individual but also the administration of justice, which is the foundation of any civilised society. Canons of professional ethics are the most prestigious heritage of the Bar. The greatness and honour of the legal profession is due to the canons of conduct governing the relations of lawyers *inter se* and with others in their professional capacities.

It is through adherence to highest standards of professional ethics that the stature of the Bar can be enhanced. Unless the lawyer observes the highest standards of professional ethics he cannot earn the respect of the community nor do his peers in the profession accept him as an outstanding lawyer. Although the entry to the profession can be had by acquiring merely the qualification of technical competence, the honour as a professional has to be maintained by its members by exemplary conduct both in and outside the court.

If people lose confidence in the profession on account of the deviant ways of some of its members, it is not only the profession which will suffer but also the administration of justice as a whole. The legal profession in India is passing through a critical phase and the declining standards of the lawyers are the talk of the day. The present trend unless properly checked is likely to lead to a stage where the system will be found wrecked from within before it is wrecked from outside. It is for the members of the profession to examine and take the corrective steps in time. The organisation of the Bar is to be so

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* B.Sc. (M.G.), LL.B. (Kerala) LL.M. (Cochin); Lawyer, High Court of Kerala, Kochi-31.
designed that it can ensure discipline of the members by internal arrangements involving inquiries, regulatory penalties etc. without intervention from the courts.

The legal profession regulates the conduct of its practitioners with the help of a set of binding rules evolved in the course of its developments in the context of other professions. The entry into the profession is regulated, internal discipline is ensured and the very conduct of its members is regulated by a set of rules called professional ethics. These set of rules take care of disciplining and even removing its members from the profession.

Further the rights of the lawyers are also to be protected. This is because unless and until their rights are protected and certain professional privileges are given, they cannot fairly and fearlessly discharge their responsibilities. These can be achieved only through an organised Bar. Thus in India, Parliament in its wisdom has entrusted the responsibility of taking disciplinary proceedings against deviant lawyers to the Bar Councils. If there is any erosion in the Bar it indicates some flaw in the administration of disciplinary powers by the Bar Councils themselves. There is need to tighten the exercise of disciplinary control over erring members. Since lawyers behave as officers of court in discharging their functions, people have reposed on them trust and confidence. The active participation of the Bar Associations, is not only desirable but also essential to fortify the efforts of the Bar Councils in matters of enforcement of discipline among members of the Bar. Further, Bar Associations can sponsor schemes offering the services of its members to needy clients on reasonable fees and monitor their conduct for the effective administration of justice.

Even though India has an organised Bar and disciplinary authorities to regulate the profession we cannot run away from the reality that the reputation of the Bar is today at its lowest ebb. There are many reasons for the same. The main reason is the deviant behaviour from the accepted standards of professional ethics. But this deviant behaviour is mostly due to actual ignorance of ethical requirements. Professional misbehaviour can be minimized through self-policing and legal education. The Bar Associations and the Bar Councils through its disciplinary committees have great responsibility in preserving the nobility and honour of the profession.
Professional Ethics: Nature and Scope

Ethics is essentially a moral science. It is that branch of philosophy, which is only concerned with human character and conduct. Ethics condemns every sort of falsehood whereas law condemns and punishes only those which affect the functioning of the society, state and government. What may be legally wrong may be ethically right and vice versa.

In legal profession, the two wings of administration of justice, namely, the Bench and the Bar have to work according to certain norms, which are collectively called legal ethics. Legal ethics mean:

"Usages and customs among members of the legal profession, involving their moral and professional duties towards one another, towards clients, and towards the courts; that branch of moral science which treats of the duties which a member of the legal profession owes to the public, to the court, to his professional brethren, and to his client".

The rules of conduct laid down for the members of the Bar are referred to as professional ethics of lawyers. So, professional ethics is that branch of moral science, which lays down certain duties for the observance of its members, which he owes, to the society; to the court; to the profession; to his opponent; to his client and to himself.

Legal ethics are not exclusively rule-based. The customs and cultures of lawyers, to the extent that they have some effect on the delivery of legal services, should also be included within an extended definition. Lawyers' allegiance to these ethical values and canons of conduct have been shaped through ages. The ethics of the profession developed as the profession grew in the stature and assumed its dignified status as a strong arm of our judicial system. Such canons of conduct serve as a guide to understand the social as well as professional responsibilities of a lawyer.

The four interwoven ethics or conceptions of what a lawyer ought to do can be discovered in lawyers’ ethical debates, treatises, and judicial pronouncements. They are:

1) The ideal of devoted service to clients in a legal system where citizens need advice and representation to use the legal system (the advocacy ideal).

2) The ideal of fidelity to the law and justice if the system is not to be sabotaged by clients who will pay a lawyer to anything (the social responsibility ideal).

3) An ideal of willingness to work for people and causes that are usually excluded from the legal system (the justice ideal).

4) The ideal of courtesy, collegiality, and mutual self-regulation amongst members of the profession (the ideal of collegiality).

These four basic ideals can be found in the U.S. code of legal ethics. In India, the rules made by the Bar Council of India under Section 49(1) (c) of the Advocates Act, 1961 prescribe the standards of professional conduct and etiquette of Advocates. The violation of these standards of conduct will affect the prestigious image of the profession and hence treated as professional misconduct. Thus Justice R.P. Sethi, in *R.D. Saxena v. Balram Prasad Sharma* observed that an advocate is liable to disciplinary action if he departs

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4. The American Bar Association’s Model Rules of Professional Conduct, 1983 include: 1. Rules to ensure that lawyers zealously serve and represent their clients (the advocacy ideal), 2. Rules to ensure that they show candour to tribunals, fairness to opposing parties, and are allowed to reveal information to prevent a client committing a criminal act (the social responsibility ideal), 3. Rules regulating the way public service are given and encouraging lawyers to do pro bono work (the justice ideal) and 4. Rules governing relationship between lawyers within firms and upholding the integrity of the profession as a whole by reporting misconduct (the ideal of collegiality).

5. See S. 1 and Rr. 1 to 10 under S. 49(c) of the Advocates Act, 1961.

from the high standards which the profession has set for itself and conducts himself in a manner which is not fair, reasonable and according to law. It is necessary that every advocate on the roll of a State Bar Council should strictly follow these standards.

Thus an advocate has a four-fold obligation, the obligation to his clients to be faithful to them, the obligation to the profession not to bring down its fair name or injure its credit by any act of his and an obligation to the court as a dependable arm of the missionary through which justice is administered. He has also an obligation to the public at large to protect, to preserve and to save justice for the maintenance of a welfare society.

But the Bar Council Rules are silent with respect to certain conduct usually resorted to by the lawyers, which affects the dignity and image of the profession. The Preamble of Chapter II of Part VI of the Bar Council Rules says that non specific mentioning of any particular conduct shall not be construed as a denial of the existence of that etiquette. For example, the Bar Council Rules are silent about the unethical practices followed by lawyers like bench fixation and giving opinions through media about pending cases. These practices have not been challenged before any court so far. But such practices need to be curtailed.

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7. The preamble of Chapter II, Part VI of Bar Council of India Rule 1961 reads: “An advocate shall, at all limits, comport himself in a manner befitting his status as an officer of the court, a privileged member of the community, and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of a Bar, or for a member of a bar in his non-professional capacity may still be improper for an Advocate. Without prejudice to the generality of the foregoing obligation, an Advocate shall fearlessly uphold the interest of his client, and in his conduct conform to the rules here in after mentioned both in letter and in spirit. The rules hereinafter mentioned contains cannon of conduct and etiquette adopted by general guides; yet the specific mention thereof shall not be construed as a denial of the existence of other equally imperative though not specifically mentioned.”

8. In France, a lawyer is statutorily prohibited from commending on a pending decision.
The Supreme Court of India in *In the Matter of 'G', a Senior Advocate of the Supreme Court* held that the fact of there being no specific rules governing the particular situation is not a reason for accepting a less rigid standard. The absence of rules increases the responsibility of the members of the profession attached to the court as to how they should conduct themselves in such situations, having regard to the very privilege that an advocate of the Supreme Court now enjoys as one entitled, under the law, to practice in all the courts in India.

The importance of legal ethics lies in asking to oneself the fundamental question as to the nature of the conduct, giving honest answers, and living by those answers. Thus here the professional body and the court in turn have to critically analyse the values the professional men hold and the extent to which they live by them. So, if on an analysis it is found that the conduct of a lawyer does not hold the values the community cherish and uphold, then such a conduct will attract disciplinary action i.e., only those unethical conduct which affects image of the profession in the society is subjected to disciplinary proceedings.

Thus no hard and fast rule can be laid down as to what expression a lawyer can use with impunity while addressing the court and what ordinarily is to be tolerated by it. At the same time the lawyer is also confused as to what conduct is unethical or what amounts to a misconduct. Lawyers should be afforded as much certainty as possible about whether their proposed conduct is proper or not. Only a government authority pursuant to its law making authority can adopt legally enforceable rules to regulate lawyer’s conduct. Before assessing whether it is proper to delegate the power to conduct disciplinary proceedings to the Bar Council, it is necessary to discuss the need for a code of ethics.

Moreover the Government of India has signed the General Agreement on Trade in Services, which has covered advocacy or legal profession as one

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9. A.I.R. 1954 S.C. 557. In this case the question for consideration was whether entering into an agreement with a client whereby the client undertook to pay him 50% of any recoveries he might make in the legal proceedings in respect of which he was engaged.
of the services by it. In pursuance of this the process of allowing entry of foreign legal consultants and foreign law firms into India has already started. The review of the Advocates Act is already underway at the hands of the Law Commission of India. This liberalization of the profession will affect the ethical value of the legal profession.

**Need for a Code of Legal Ethics**

The reputation of the Bar depends more on the integrity and sense of responsibility of its members than on their learning and knowledge of technical rules. Mere judicial control is not enough to secure respect for professional observances by the members of the Bar. Judicial supervision, to be effective, is to be supplemented by means of extra-judicial agencies.¹⁰ In the legal profession, as it is with every other profession, professional ethics serves as a guidance to the young man entering into practice to show the right way he should go, so that, in future, he will not depart therefrom. Lawyers are used to the idea of written ‘disciplinary codes’. These set a lowest common denominator of conduct below which the deviants are punished. They may be contrasted with written ‘aspirational codes’ which set out the highest standard to which all should strive.

Before saying that there is a need for a code of legal ethics, one may have to look at the ‘advisability and practicability’ of the adoption of such a code. A code of legal ethics is not only advisable, but under existing conditions, is of very great importance for several reasons like:

a) Legal profession is necessarily the keystone of the arch of Government. So if this key stone is weakened by increasingly subjecting it to corroding and demoralising influence of those who are controlled by greed, gain or other unworthy motive, then the arch will definitely fall. The maintenance of the shrine of justice pure and unsullied is possible only if the conduct and motives of members of legal profession are what they ought to be. For this a code of ethics, adopted after due deliberation, and promulgated by the Bar of the country, is necessary.

b) Members of the Bar, like judges, are officers of the courts. So like judges, they should hold office only during good behaviour. ‘Good behaviour’ should be defined and measured by such ethical standards, however high, as are necessary to keep the administration of justice pure and unsullied. Such standards may be crystallised into a written code of professional ethics. A lawyer failing to conform thereto should not be permitted to practice and retain membership in professional organization. But what is professional misconduct varies from case to case. Misconduct in a particular instance need not be misconduct in another instance.

Codification of legal ethics has many advantages. Some of them are the following:

1. The main reason for lawyer’s deviant behaviour from the honourable and accepted standard of conduct is not intentional delinquencies. It is rather as a result of ignorance of the ethical requirement of the situation. The existence of a code of professional ethics will furnish an authoritative statement of ideals by which every lawyer, when in doubt, may be guided.

2. Codification will tend to raise and strengthen the standard of professional honour. Any departure from the standards prescribed by the organised Bar will lead to a loss of professional reputation and no lawyer in the ordinary circumstances is likely to risk it.

3. Professional character cannot be built in a day. So in order to form a good character, it is necessary that a young lawyer should have correct standards of conduct held up before him. These rules should exist in a simple and readily accessible form, to influence his conduct from the commencement of his career.

4. A code of this kind will be helpful to the bar councils and courts in judging and regulating acts of the lawyer.

11. The first civilised country that ever attempted to put the rules that guide the conduct of a profession in the form of a code of ethics is the United State of America.
5. Existence of a code, based on ancient traditions, for the guidance of lawyers will be of great help in checking the growing tendency in the direction of commercialising the vocation of the Bar.\footnote{12}

The advantage of a disciplinary code is its ability to sanction delinquent lawyers while not intruding on the individual’s moral space. It addresses the commonly expressed concern that we should not police what people think, but what they do. The idea is to provide clear rules with sanctions for unacceptable behaviour, but beyond that to leave lawyers free to do as they (or their clients) please. But to a large extent this turns ethics into merely a form of legal regulation where the rules are made by law societies. Even then, this makes it possible for the regulators to know the subject better and for those regulated to make a greater commitment to the standards of the profession.

One of the objections to a code is the danger of it being regarded as exhaustive and anything not coming within its express prohibition is allowable. It is not possible to formulate a code of legal ethics, which will provide the lawyer with a specific rule to be followed in all the varied relations of his professional life.\footnote{13} The maximum that can be done is to state with as much particularity as possible and with due regard to custom and tradition those general principles which experience has taught us to be observed, so that the profession occupies its high place in the social structure. This makes it possible to fulfil the important and responsible duties, which fall to its lot.

It would be a folly to assume that these canons of ethics are sufficient enough in laying down rules of conduct, which will be sufficient for all purposes and under all circumstances. This is because many duties quite as important and equally imperative though not specified will arise in the course of almost every lawyer’s practice.\footnote{14}

According to P. Ramanatha Iyer, two cardinal rules may be laid down as to professional ethics:

\footnote{12}{\textit{Supra} n.10.}
\footnote{13}{\textit{Bar Council of Maharashtra v. M.V.Dabholkar}, (1976)2 S.C.C.291, at p. 302, wherein Krishna Iyer, J., opined that, “canons of conduct cannot be crystallized into rigid rules but felt by the collective conscience of the practitioners as right.”}
\footnote{14}{10 Cr. L.Rep. 116.}
1. Nothing which politeness and right feeling demand of a lawyer in his dealings with others can properly be withheld by him.

2. Nothing which is morally wrong can be professionally right.\textsuperscript{15}

All the other rules and code provisions which may be laid down are simply applications of these two rules to special situations. In regard to these applications each lawyer must make his own conscience his guide, no matter if he differs as far as may be from the general professional opinion.

Unlike United States\textsuperscript{15a}, India does not have a separate code of conduct to regulate the conduct of lawyers. The Bar Council of India Rules by virtue of Section 49(1) (c) of the Advocates Act, 1961 prescribes the canons of conduct and etiquette for Advocates. But it seems that these rules are inadequate to meet the present situations.

The Supreme Court of India has recognised the importance of a code of conduct and opined:

"It is high time for the legal profession to join hands and evolve a Code for themselves in addition to the mandate of the Advocates Act, Rules made there under and the Rules made by various High Courts and this Court, for strengthening the belief of the common man in the institution of the judiciary in general and in their profession in particular. Creation of such a faith and confidence would not only strengthen the rule of law but also result in reaching excellence in the profession."\textsuperscript{16}

No attempt has yet been made in India to codify the rules in an authoritative form. It is not disputable that codification of professional ethics is a difficult task. At the same time, it is not impracticable. This is evident from the successful attempts made by the American Bar Association and the bar associations of other nations. However, it is not possible to formulate an


\textsuperscript{15a} The ethical code of the American Medical Association was adopted by that Association as early as 1903. While the American Bar Association's Canons of Legal Ethics were adopted by the A.B.A. only several years later.

\textsuperscript{16} Supra n. 6, p.281.
exhaustive code of legal ethics, which will provide a lawyer with specific rules to be followed in all the varied relations of his professional life. The utmost that can be done is to state only the general principles.

It is clear that there is need for a code of ethics for lawyers. But rules of professional conduct that invite inconsistent interpretation and application will not be beneficial. Lawyers should be afforded as much certainty as possible about whether their proposed conduct is proper. Such ethical propositions stated should be readily understandable by every member of the Bar. Also it should be in a practical form and should be sufficiently general to cover the lawyers responsibilities in the great variety of cases with which he will have to deal.

Need for an Enforcement Machinery – Court or Self-Regulation?

It is not doubtful that unless and until there is enforcement machinery, the canons of conduct for disciplining lawyers are fruitless. Now the question that remains is, ‘what form of regulation will best advance the availability, competence, integrity and independence of lawyers which the public needs?’ The profession confronts an insoluble dilemma. If it is insufficiently solicitous of client’s complaints, the public will lose confidence in the disciplinary proceedings and demand more external controls. If it is too responsive the public will gain confidence and flood it with grievances. In the latter event, the profession may have difficulty in financing and staffing the disciplinary system and may be condemned as a traitor by its own members.17

The enforcement of regulatory controls for the legal profession may be divided into many categories:18 1) Disciplinary controls (traditional self-
regulation); 2) Liability controls (negligence etc.); 3) Institutional controls (enforced by courts and state administrative agencies on lawyers who practice before them); and, 4) Legislative controls (enforced by a special independent regulator or commission or even by the Government).

This study concentrates on the question whether self-regulation through the Disciplinary Committees of the Bar Councils is sufficient to meet the public policy goals.

**Professional Self-Regulation**

Professional status, public trust and confidence in the standards of the profession are the essential elements of any profession. In the case of legal profession there is an equally essential element, which must be added namely the element of independence. All these elements adding to the status, mobility and respect of the profession are essential for the concept of self regulation.

The traditional approach to the lawyers' ethics institutionalises lawyers’ autonomy. Firstly, the regulation of legal ethics adopts a self-regulatory model. This may be through Bar Associations, within law firms and lawyers’ chambers or using the rules of court. This is based on the belief that, only lawyers were knowledgeable enough about the law to set standards for its practice. Self-regulation allowed the profession to remain independent of Government so that lawyers could defend individuals against the state wherever necessary without bias or fear of reprisal. Secondly, the traditional ethical theory of lawyers’ role in society is one of isolation from the general community ethics and values. The only consideration that dilute the duty to the client are the overriding duties to neither break the law, nor breach the lawyers’ duty to the court. These overriding duties have been interpreted weakly by courts and disciplinary authorities, and have rarely been applied except when a lawyer is actively dishonest to the profession.

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19. This means that the legal profession sets ethical standards for itself.
21. For example, in *Prahlad Saran Gupta v. Bar Council India*, A.I.R. 1997 S.C.1338, the Court found the advocate guilty of professional misconduct for wrongfully retaining client’s money which had been kept with him in connection with the

*(f.n. contd. on next page)*
Traditional regulatory controls on the ethics of legal practice namely entry to the profession, discipline and liability for breach of fiduciary and other obligations are intended to promote the ideal of the lawyer as adversarial advocate. In self-regulation, clients cannot actively participate in holding the lawyer accountable. They can make a formal complaint that may initiate the disciplinary proceedings. Further, the general public lacks the expertise to contribute to the ethics and standards of the legal profession. Hence the legal profession decides what is in client’s best interest in the context of adversarial justice and the bare duties to the Court that adversarial justice entails. The courts of superior jurisdiction decide what the lawyers’ duty to the court entails.

In India, prior to the enactment of the Advocates Act, 1961 the disciplinary control was vested in the High Courts. There existed a tribunal of the Bar Council for the purpose of conducting inquiry into misbehaviour of advocates. The High Courts had discretion to refer the matter either to the tribunal or to a District Judge for the purpose of inquiry. The tribunal was only a fact finding body and did not have any power to impose punishment.

Now with the enactment of the Advocates Act, 1961, a self regulatory mechanism is provided for the maintenance of the ethics and standard of legal profession. Thus the sole authority to take disciplinary action against advocates is the Disciplinary Committees of the Bar Councils.

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22. Discipline may be imposed by self-regulatory organization or through the inherent jurisdiction of the court to discipline lawyers as officers of the court.
23. Prior to the Advocates Act, 1961, (The Indian) Bar Councils Act, 1926 was in force.
24. Id., S.10.
25. Id., S.11.
26. Id., Ss. 35, 36.
The High Courts and District Courts do not have primary jurisdiction in disciplining lawyers except the jurisdiction of the courts by way of contempt proceedings. The Supreme Court exercises only an appellate jurisdiction over the lawyer conduct by virtue of Section 38 of the Advocates Act, 1961. In addition to it, it may exercise jurisdiction by virtue of Article 142 of the Constitution of India also. Apart from matters connected with complaints and discipline, the regulatory function referred to are now performed by the Bar Councils either as a matter of self-regulation or in the exercise of powers conferred by the Act. In addition to self-regulation, there is institutional regulation of lawyers by courts.

Thus in India, the regulation of legal profession is mainly through self-regulation. This has many shortcomings. For example, the aggrieved client has to approach the Court for damages in cases of breach of contract and tort. Similarly he may have to approach a criminal court in case a lawyer commits cheating or any other criminal offences. It is true that Bar Council of India and Supreme Court by virtue of its appellate jurisdiction can pass any order as it deems fit. But such a power is not given to State Bar councils. The main reason behind this is that, disciplinary controls are meant for maintaining discipline and to ensure that an unworthy person do not continue to practice. It is not to redress the grievances of clients or any aggrieved person.

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27. Advocates Act, 1961, S.38 reads: "any person aggrieved by an order made by the disciplinary committee of the Bar Council of India under S.36 or S.37 (or the Attorney-General of India or the Advocate-General of the state concerned, as the case may be), may within sixty days of the date on which the order is communicated to him, prefer an appeal to the Supreme Court and the Supreme Court may pass such orders including an order varying the punishment awarded by the disciplinary committee of the Bar Council of India thereon as it deems fit."

28. The Kerala High Court Rules, Rule 11; whereby an advocate who has been punished for contempt of court is prohibited from practicing unless he has purged himself of the contempt.

Entry Controls

Entry regulations are attempts to ensure that only those people of ‘good character’ enter the profession. So in addition to the academic qualification, the character of the person to be enrolled is also considered. Thus in India, the character requirement disqualifies from legal practice those who have been convicted of an offence involving moral turpitude or of an offence under the Untouchability (Offences) Act, 1955 or if dismissed or removed from employment or office under the State on any charge involving moral turpitude. For this the candidate for admission is expected to disclose everything that might possibly cloud their character including minor convictions or charges of which they have been acquitted. But the problem is that the disqualification ceases to have effect after a period of two years has elapsed since his release, dismissal or removal, as the case may be. Further, the disqualification is not applicable to a person who having been found guilty is dealt with under the provisions of the Probation of Offenders Act, 1958. Thus, even a rapist or smuggler can become a lawyer in India after the prescribed period of disqualification. In practice, however, the admission authorities generally assume the best of the candidate for admission rather than proactively investigating it.

It is submitted that the State Bar Councils may make rules by virtue of Section 28 (1) (2) (d) of the Act to prevent such an anomaly. Otherwise the High Court or the Supreme Court as the case may be have to invoke its inherent jurisdiction to prevent this from happening.

Disciplinary Jurisdiction

Once a person enters into the profession, under the traditional model, he is assumed to be competent and capable of giving legal service. The

30. Id., S.24A.
32. S. 28 of Advocates Act, 1961 reads: “(1) A State Bar Council may make rules to carry out the purposes of chapter. (2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for:

(d) The conditions subject to which a person may be admitted as an advocate on any such roll.”
regulations then focus its attention on the standards of character. He is punished for his professional or other misconducts. Thus traditional self-regulation is disciplinary in nature and usually has no role to play in resolving disputes with clients about competence or standards of service. This is despite the fact that the vast majority of complaints about lawyers concern poor service. These complaints were not even investigated by disciplinary authorities until recently. Thus in *N.G.Dastane v. Shrikant S. Shivde*, the High Court observed:

"When the Bar Council in its wider scope of supervision over the conduct of advocates in their professional duties comes across any instance of such misconduct, it is the duty of the Bar Council concerned to refer the matter to its Disciplinary Committee. The expression "reason to believe" is employed in Section 35 of the Act only for the limited purpose of using it as a filter for excluding frivolous complaints against advocates. If the complaint is genuine and if the complaint is not lodged with the sole purpose of harassing an advocate or if it is not actuated by malafides, the Bar Council has a statutory duty to forward the complaint to the Disciplinary Committee."

The effectiveness of a legal system largely depends on the integrity and competence of the lawyer. Negligence on the part of the lawyer is a challenge to his integrity and competence. This may be the reason why David K. Malcolm opined that disciplinary jurisdiction over lawyers should be extended to include both negligent and unethical conduct. But only in the case of ‘gross negligence’ a lawyer is sanctioned for lack of care and competence. Mere incompetence or deficiency in professional service is still not sufficient to amount to

33. (2001)6 S.C.C. 135. In this case, the respondents advocates who were the advocates for the accused in a case where the appellant was the complainant sought repeated adjournments on flimsy or frivolous grounds there by abusing the process of the court. Even when the matter was brought to State Bar Council as well as Bar Council of India, they shut its doors informing him that he did not have even prima-facie case against the advocates.

33a. *Id.*, p. 143.

professional misconduct. The Disciplinary Committee is also unlikely to act against lawyers for conduct that is in the interest of client but is against the public interest. This means that lawyers are very rarely disciplined for abuse of the Court process by frivolous or vexatious claims that waste the resources of the Court and the parties.

In countries like England and Australia, disciplinary offences are investigated and prosecuted by self-regulatory legal professional associations and enforced in specialist tribunals dominated by practicing lawyers. But in India, there is no investigation of disciplinary offences. The Bar Council conduct only a preliminary inquiry either suo moto or on receipt of a complaint. The rest of the disciplinary proceedings are similar to that of other countries. Like other countries the Supreme Court exercises an inherent jurisdiction to discipline lawyers. The court can thus interpret and enforce appropriate standards of conduct particularly in relation to the duty towards the administration of justice and resolve cost disputes.

The main disciplinary sanction is the removal of the name of the advocate from the State Roll of advocates and thereby preventing him from appearing as a lawyer. In addition lesser punishments like reprimands, suspending the advocate from practice for a period of time are also given. The Supreme Court and Bar Council of India in its decisions consistently claim that neither punishment nor deterrence is the aim of professional discipline. Rather the aim is to protect the public, the courts and the legal profession and to inquire about fitness of the delinquent lawyer to continue in the capacity of an advocate. The earlier view was that, the findings in disciplinary proceedings must be sustained by a higher degree of proof than that required in civil suits, but shorter than that required to sustain a conviction in a criminal prosecution. But now courts consider a charge of professional misconduct in the nature of

35. Supra n. 31 at p.682.
38. Ibid.
a quasi-criminal charge and require the same degree of proof as in the case of a criminal charge. Thus a charge of professional misconduct is to be proved beyond reasonable doubt.39

As already seen, the power to initiate disciplinary proceedings is vested with the Bar Councils. But it is unlikely that the Bar Councils will initiate proceedings when there is a tug of war between the Bench and the Bar, i.e., where a strike is conducted by the Bar interrupting the court functioning. Now, the question is whether the Court can suo moto initiate disciplinary action against such lawyers who participate in strike and debar them from practicing. Here the lawyer misbehaves before the court violating both ethics and law. The issue was finally settled in Supreme Court Bar Association v. Union of India,40 where the court held that the power to debar a person from practising law vest with the Bar Council rather than with the Supreme Court, over ruling its own decision in V.C.Misra’s41 case.

Even though the decision that the power to discipline the members is given to the professional body (i.e. Bar Council) is welcome, the reasoning does not hold good as it fails to answer questions as to the meaning of contempt of court, professional ethics and the final authority to take the decision whether a person is fit to practice law or not.

When an advocate, who is an officer of the court, commits contempt, he is not only a contemnor but also a person having no proper conduct required of a lawyer. Thus contempt by advocate is different from contempt by an ordinary person. It could be treated as a separate and distinct violation of both ethics and law.42

The Advocates Act, 1961 is silent as to contempt by the members of the profession. So it can be inferred that the contempt of court as part of misconduct has not been envisaged by the legislature. Hence the provision in the Act cannot be treated as law enacted to deal with contempt of Supreme Court. Apparently the Supreme Court’s view, that removal of an Advocate’s name from the rolls cannot be treated as punishment for contempt of the Supreme Court as it is specifically provided for misconduct under Section 38 of the Act, does not hold right. Unless there is legislation, the Court may under Article 142 punish the contemnor by removing him from the rolls.

The provisions in the Advocates Act, 1961 irresistibly establish the supremacy of the courts in giving final decision on question of misconduct of a lawyer. Section 32\(^{43}\) empowers the court to permit appearance in cases and Section 34(1)\(^{44}\) declares that the High Court is competent to make rules for implementing the provisions of the Act. Also by virtue of section 38,\(^{45}\) the final word on the punishment of a lawyer for misconduct is still with the Supreme Court. Further, rules made by the Bar Council of India as to standards of professional conduct and etiquette to be observed by advocates by virtue of Section 49(1) (c)\(^{46}\) is subjected to the approval of the Chief Justice of India.

Also Section 49(1) (c) is related to the conduct of the Advocate in the court room and hence it is associated with contempt of court. From this a

\[\text{43. S. 32 of the Advocates Act 1961 reads : “Not withstanding anything contained in this Chapter, any court, authority, or person may permit any person, not enrolled as an advocate under this Act, to appear before it or him in any particular case.”}\
\[\text{44. S. 34(1) of the Advocates Act 1961 reads : “The High Court may make rules laying down the conditions subject to which an advocate shall be permitted to practice in the High Court and the courts subordinate thereto.”}\
\[\text{45. Supra n.27.}\
\[\text{46. S. 49(1) of the Advocates Act 1961 reads : “The Bar Council of India may make rules for discharging its functions under this act, and, in particular, such rules may prescribe -}\
\[\text{...}\
\[\text{(c) The standard of professional conduct and etiquette to be observed by advocates.”}\]
conclusion can be drawn that the authority to pass final judgment on the conduct having a bearing on contempt of court seems to have been placed on the Supreme Court as it is for the Chief Justice of India to approve these rules.

Another issue regarding regulation of legal profession is ‘whether a Judge who has been dismissed from service after finding him guilty of an offence involving moral turpitude can be allowed to practice as a lawyer?’ This issue came before the Supreme Court of India in Baldev Singh Dhingra v. Madanlal Gupta. In this case the Court held:

“Before Section 35 can be pressed into service by any complainant, the following two requirements of misconduct have to be alleged and proved before any disciplinary proceedings can result in punishment of the delinquent advocate:

1) The advocate concerned must be alleged to be guilty of professional or other misconduct.

2) Such misconduct must have been committed by him while he was a practising advocate, enrolled as such on the role of the State Bar Council concerned.”

The Court in this case held that since the accused has committed the offence when he was not practising as a lawyer, he may resume his practice.

This is not a correct view. It is true that only advocates are entitled to practice law and when an Advocate becomes a judicial officer, he has to surrender his license of practice. This does not mean that he is removed from the roll. It only means his right to practice is suspended, i.e. he remains as an advocate on rolls. The standard of conduct and etiquette that is expected

47. (1999) 2 S.C.C. 745, at p. 754. In this case the respondent whose license to practice was suspended during his tenure as judicial officer was found guilty of offence under Section 5(1) (e) of the Prevention of Corruption Act, 1947 as well as conduct unbecoming a judicial officer. He was dismissed from service. With the permission of the chairman of Bar Council he resumed his practice.
from an advocate is expected from him also. Further both advocates and judicial officers are officers of court and a high standard of conduct than that from an advocate is expected from a judicial officer. Moreover, Bench is the product of Bar. If the judicial officer during his tenure was found unfit for that seat then how can he be fit for lawyering? Does the Supreme Court by this decision mean that a less standard of conduct is sufficient for a lawyer, or that a person committing misconduct or an offence involving moral turpitude not in his professional capacity is excluded from the clutches of the disciplinary jurisdiction of the Bar Council? This is in a way inviting criminals into the profession. It will be really pathetic to see a judge who has been dismissed from service for committing an offence involving moral turpitude practising as a lawyer in the court as an arm of justice.

It has been already submitted that Section 24A of the Act is to be reframed so that criminals can be prevented from entering this noble profession. Further by virtue of Section 49(1) (ag) and Section 49(1) (ah) read with Section 49(1) (c), the Bar Council of India may make rules regarding this.

The Bar Council of India may make rules for discharging its functions under this Act, and, in particular, such rules may contain a provision requiring a person in the profession who is selected for appointment in governmental departments to submit a certificate from the State Bar Council on whose roll his name is enrolled that no disciplinary proceedings is pending against him and that his character is good.

48. The Advocates Act, 1961 which provides for the general power of the Bar Council to make Rules under S.49 which reads:

(1) The Bar Council of India may make rules for discharging its functions under this Act, and, in particular, such rules may prescribe-

... 

(ag) the class or category of persons entitled to be enrolled as advocates;

(ah) the conditions subject to which an advocate shall have the right to practise as an advocate in a court;

(c) the standard of professional conduct and etiquette to be observed by advocates.


It is clear that independence of the profession is an extension of the well-understood notion of the independence of the judiciary. The independence of the legal profession is characterised by its adoption and enforcement of a self-imposed set of ethical rules and restrictions.

From the aforesaid discussion it is submitted that, the power to discipline the members should be with the Bar Council. But the power to ensure good conduct of lawyers should be retained by the Supreme Court. The jurisdiction of court over advocates should remain, with it as advocate is an officer of the court. So where there is a conflict between the Bench and the Bar, it can be heard by the court which is not presided over by the judge who is a party to the conflict.

**Organisation of the Indian Bar**

As a result of the recommendations made by the All India Bar Committee and the Law Commission for a unified Bar the Legal practitioners Bill was introduced in the Lok Sabha on November 19, 1959. When the Bill came to be passed, its name was changed from the Legal Practitioners Bill to ‘The Advocates Act, 1961’. It provided for the constitution of an All-India Bar. Right to practice as an advocate is a statutory right under section 29 and section 30 of the Advocates Act, 1961. Being an advocate, he is entitled to practice in all courts including the Supreme Court, any tribunal or person legally authorised to take evidence and before any other authority etc. Thus only a person enrolled as an advocate under the Act is entitled to practice in any court or before any person.

In India, there are two classes of advocates, namely, senior advocates and other advocates. The State Bar Councils maintain the roll of these advocates. The complete control and jurisdiction regarding enrolment of

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51. *Id.*, S. 16. The Act has abolished various categories of legal practitioners, such as pleaders, revenue agents, *mukhtars*, *vakils*, barristers and solicitors.
52. *Id.*, S. 17.
advocates and their discipline, thus stood transferred to the Bar Council of India and State Bar Councils. Bar Councils are body corporates having perpetual succession and a common seal, with power to acquire and hold property and to contract etc.

The Act provides for two kinds of Bar Councils – State Bar Councils and Bar Council of India. The State Bar Councils have been given powers to admit advocates on roll, to prepare and maintain such rolls, to entertain and determine a case of misconduct against advocates on its rolls and to safeguard the rights and privileges of the advocates on rolls. Each State Bar Council consists of Advocate General of the State, ex-officio and the elected members of Advocates from the State Roll. In addition, there shall be a Chairman and Vice-chairman elected by the Council. Each Council has an appointed secretary who is ordinarily an advocate himself and other supporting staff. Each State Bar Council has: (a) one or more Disciplinary Committees; (b) an Executive Committee consisting of five members; (c) an Enrolment Committee consisting of three members; (d) Legal Aid Committee; and such other committees as may be found necessary. Every Disciplinary Committee consists of three members. The Bar Council from among its members elects two members to this committee and one member is co-opted.

53. *Id.*, S. 5.
54. *Id.*, S. 3.
55. *Id.*, S. 4.
56. *Id.*, S. 6(1) enumerates in detail the function of State Bar Councils. The Section states a number of statutory duties on the State Bar Councils in sub-clause (a) to (i).
57. In the case of the State Bar Council of Delhi in the place of Advocate General, there is Additional Solicitor General of India as ex-officio.
59. *Id.*, S. 10(1) (a).
60. *Id.*, S. 10(1) (b).
61. *Id.*, S. 9A.
62. *Id.*, S. 10(3).
from among advocates having prescribed qualifications of being advocates of a state roll for at least ten years. The senior-most advocate among the three will act as the Chairman of the committee.

The Bar Council of India consists of Attorney General and Solicitor-General as ex-officio members, and one member elected by each State Bar Council from amongst its members. There is a chairman and vice-chairman elected for a two-year period. In addition to various committees as under the State Bar Councils, the Bar Council of India has a Legal Education Committee also.

The Act casts multifarious duties on the Bar Council of India, such as to lay down standards of professional conduct and etiquette for advocates, to lay down procedures to be followed by its Disciplinary Committee as well as that of the Disciplinary Committees of the State Bar Councils, to promote and support law reform, to deal with any matter arising under the Act which may be referred to it by a State Bar Council, to exercise general supervision and control over State Bar Councils, to provide for the election of its members, to recognise the degree of law for admission of advocates, to prescribe standards of legal education, to perform all other functions conferred on it by or under the Act and to do all other things necessary for discharging the aforesaid functions.

The advocates are members of the Bar Association in the jurisdiction of the court in which they are practising. Bar Associations are associations of

63. The Advocates Act, 1961, S. 10(2).
64. In C.I.T. Bombay v. The Bar Council of Maharashtra, A.I.R. 1981 S.C. 1462, the Supreme Court observed that the dominant purpose of a State Bar Council as reflected by the various obligatory functions is to ensure quality service of competent lawyers to the litigating public, to spread legal literacy, promote law reforms and provide legal aid while the benefit accruing to the lawyer member is incidental.
65. The Advocates Act 1961, S. 7 enumerates in detail the functions of the Bar Council of India. The section states a number of statutory duties on the Council in sub-clauses (b) to (m) of clause (1) and sub-clauses (a) to (i) of clause (2).
lawyers for protecting the rights of lawyers. They also conduct many welfare schemes for the advocates. In addition, they play a role in protecting the dignity of the profession. But in India it is not mandatory for an advocate to become a member of a Bar Association.

Both Bar Associations and Bar Councils can do much for the welfare and protection of rights of the advocates. They can guard the legal profession if they exercise their functions properly. The Bar Associations can be helpful in securing the respect for the professional ideals by defining the rules of conduct for the guidance of lawyers. It may interpret these rules and advise its members as to the appropriate course of conduct in specific cases. It is submitted that Bar Associations should take necessary steps to educate the Bar and collect public opinion in respect of the professional standards and conduct, and should assist the Bar Council in taking disciplinary action against advocates. Moreover it should act as the protector and guardian of the rights and welfare of advocates.

**Regulation of the Legal Profession**

In order to satisfy the various needs demanded from the legal profession and the lawyers, the quality of service they provide must command the confidence and respect of the public. This can only be achieved if lawyers establish and maintain a reputation for both integrity and high standards of legal skill and care. The legislature has entrusted responsibility for maintaining standards of professional conduct and discipline for lawyers to the Disciplinary Committees of the respective State Bar Councils. But the power to inquire whether there is a *prima facie* case against an advocate regarding his misconduct is on the State Bar Council.

The essence of professional responsibility is that the lawyer must act at all times *uberrimae fidei*, with utmost good faith to the court, to the client, to other lawyers and to the members of the public. The Bar Council Rules set

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67. *Id.*, S. 35.
the minimum standard of conduct expected from a lawyer. Given the many and varied demands to which the lawyer is subject, it is inevitable that problems may arise. No set of rules can foresee every possible situation, but the ethical principles set out in the Code are intended to provide a framework within which the lawyer may, with courage and dignity, provide the high quality of legal services that a complex and ever changing society demands.

The Act and Rules neither specify the conduct, which would subject a lawyer to discipline, nor define ‘a conduct unbecoming’ or a ‘professional misconduct’ of a lawyer. That responsibility is given under the Act to the Disciplinary Committees of the State Bar Councils. However, the members of Disciplinary Committees and Court in making professional conduct rulings rely on the duty stated in the Bar Council of India Rules. The violations of these Rules have been the basis for findings of conduct unbecoming of advocates. Thus the rules are intended both to provide general guidance and prohibit some forms of conduct.

The State Bar Councils and the Bar Council of India constitute one or more disciplinary committees. The Disciplinary Committee of the Bar Council of India exercises superior powers in as much as it hears appeals from the orders of the Disciplinary Committees of the State Bar Councils and may even on its own motion withdraw for inquiry before itself for disposal, any proceedings for disciplinary action against an advocate pending before the Disciplinary Committee of the State Bar Council.

The disciplinary proceedings commence both before the State Bar Council and the Bar Council of India on a complaint or otherwise made respectively to the State Bar Council or the Bar Council of India. Though the power to refer the complaint against an advocate is vested with the State Bar Council and the Bar Council of India, as the case may be, after the reference the Bar Council has no control over the Disciplinary Committee. However,

68. *Id.*, S. 37.
69. *Id.*, S. 36.
70. *Id.*, Ss. 35, 36.
wide discretion is vested in them in referring a complaint to its Disciplinary Committee. Thus only where there is ‘reason to believe’ that any advocate has been guilty of professional or other misconduct it shall refer the case for disposal to its Disciplinary Committee.\footnote{A.I.R. 1975 S.C. 2092 at p. 2097.}

In \textit{Bar Council of Maharashtra v. M.V. Dabholkar},\footnote{Ibid.} the Supreme Court examined the meaning of the words ‘reason to believe’ and observed that the State Bar Council on receiving a complaint has to apply its mind to find out whether there is any reason to believe that any advocate has been guilty of professional or other misconduct. The State Bar Council acts on that reasoned belief.

In \textit{Nandlal v. Bar Council of Gujarat},\footnote{A.I.R. 1981 S.C. 477.} there was nothing evident from the record of the case to suggest that before referring the complaint to the Committee, the Bar Council applied its mind to the allegation made in the complaint to find that there was a prima facie case to go before the Disciplinary Committee. So the Supreme Court held that the reference made by the State Bar Council to the Disciplinary Committee was incompetent. The Court concluded that the proceedings before the Disciplinary Committee of Bar Council of Gujarat and also before the Disciplinary Committee of the Bar Council of India on transfer were invalid. Thus the requirement of ‘reason to believe’ cannot be converted into a formalised procedural roadblock. It is essentially a barrier against frivolous enquiries.

If the Bar Council of India finds that there is \textit{prima facie case}, it refers the case for disposal to its Disciplinary Committee. Even though the wordings in Section 36(1) gives power to the Bar Council of India to refer the case against a delinquent advocate for disposal to the Disciplinary Committee, the wording ‘whose name is not entered on any state roll’ is inconsistent with the definition provided in Section 2(a). This is because a person whose name is not entered in any roll is not an advocate and hence immune from any action...
under the Act. It is submitted that the words ‘whose name is not entered on any state roll’ in sub section 1 of Section 36 is to be deleted. The Disciplinary Committee then fixes a date for the hearing of the case and shall cause a notice thereof to be given to the advocate concerned and to the Advocate General of the State or the Attorney General of India, as the case may be.\textsuperscript{74} The Disciplinary Committee after giving the advocate concerned and the Advocate General or the Attorney General, as the case may be, an opportunity to be heard, makes an order. Such an order may dismiss the complaint, where the proceedings are found to be not fit for consideration.\textsuperscript{75} Where the Committee finds the advocate guilty, it may reprimand him or suspend him from practice for such period as it deems fit, or may remove him altogether from the roll of advocates.

In considering the question whether an advocate whose name has been removed from the rolls for professional misconduct is to be re-admitted, it was held that there is no absolute bar to the re-admission of an advocate removed for misbehaviour involving moral turpitude.\textsuperscript{76} The punishment is not perpetual. The test is whether the sentence of exclusion has had the satisfactory effect of awakening in the delinquent a higher sense of honour and duty; whether during the period between his expulsion and the date of application for reinstatement the applicant’s conduct has been such as to satisfy the disciplinary authority that he might be safely entrusted with the affairs of the client and be re-admitted to the profession without that profession suffering degradation.\textsuperscript{77}

The \textit{onus} of proving that his character has been reformed is on the applicant, and he must discharge that by evidence. But what type of evidence is required will depend on the facts of each case. It certainly cannot be a mere assertion by the applicant himself coupled with an assurance to behave proper

\begin{tabular}{l}
\textsuperscript{74} The Advocates Act, 1961, S\textsuperscript{s}. 35(2) and 36(3). \\
\textsuperscript{75} \textit{Adi Pheroz Shah Gandhi v. H.M. Seervai}, (1970) 2 S.C.C. 484, 497. \\
\textsuperscript{76} \textit{In re G, ex-Advocate}, A.I.R.1946 Lah. 338. \\
\textsuperscript{77} \textit{In the Matter of Advocate}, A.I.R.1937 Bom.48.
\end{tabular}
in future. The nature and gravity of the offence originally committed by him, the effect that the punishment for the offence and hardship during the period of exclusion are likely to have had on his character etc. has to be considered. The applicant must show that during the period of exclusion he has behaved in such a way that, he is reasonably immune to the type of temptation to which he is succumbed. Thus he must satisfy the conscience of the Bar Council dealing with the petition of reinstatement that he has in fact acquired that sense of duty, responsibility, honour and integrity which he once lost and that therefore, it would be safe to re-admit him without degrading the profession of law and danger to the litigant public.

The Bar Council has the power to initiate *suo moto* disciplinary action against an advocate. Two members of the Bar Council are present in the Disciplinary Committee, which conduct inquiry as well as give order about the conduct of the advocate. These members constitute the majority. Principles of natural justice demands that no one can be judge for his own case.\(^78\) Thus in disciplinary proceedings against an advocate, the charge of violation of the principles of natural justice cannot be completely ruled out. A charge of victimisation may be easily raised when the Bar Council itself initiates the disciplinary proceedings. Thus even a reasonable suspicion alone is sufficient to render a decision void.

From the decision of the Disciplinary Committee of the State Bar Councils, an appeal lies to the Bar Council of India.\(^79\) The appeal may be made to the Bar Council of India or to the Supreme Court as the case may be within sixty days of the date of communication of the order to the aggrieved person. There it is heard by the Disciplinary Committee of the Bar Council of India which may pass such orders thereon as it deems fit. But in many other professions appeals from orders of the Disciplinary Committee of the professional bodies lie to the High Court.\(^80\) From the decision of the Disciplinary

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78. *Nemo debet bis vexari pro edam causa.*
79. *Supra* n. 68.
80. For example, in the case of Chartered Accountants, appeal can be preferred to High Court under S. 22-A of Chartered Accountants Act, 1949.
Committee of the Bar Council of India an appeal lies to the Supreme Court of India. The Supreme Court also has the power to pass such orders as it deems fit. But if the appellate authority gives an order prejudicially affecting the aggrieved person, then such an order shall be given only after giving the aggrieved person a reasonable opportunity to be heard.

In D. P. Chadha v. Triyugi Narain Mishra, the Supreme Court has discussed the conduct to be followed by the Bar Council of India while enhancing the punishment given by the State Bar Council. The Court held that the Bar Council of India should first place its opinion on record that the findings arrived by the State Bar Council against the delinquent advocate is being upheld by it. Then he should be issued a reasonable notice calling upon him to show cause why the punishment imposed by the State Bar Council be not enhanced. After giving him an opportunity of filing a reply and then hearing him the Bar Council can have for reasons to be placed on record, enhance the punishment.

The amendment made in 1973 has inserted Advocate-Generals and Attorney-General as 'persons competent' to prefer appeal against the order of the Disciplinary Committee of a State Bar Council or the Bar Council of India, as the case may be. They are made party to the proceedings. But the Act as well as the Rules does not reveal under what capacity and for whom they appear before the disciplinary committee or for whom they prefer an appeal. In Adi Pheroz Shah Gandhi's case, Hidayatullah, C.J., has observed:

"In our country the Advocate-General does not represent the Executive or Legislature or the Judiciary in disciplinary proceedings before the Disciplinary Committee. His function is advisory and more akin to

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81. The Advocates Act, 1961. S. 38 (Unlike many other statutes this Act gives statutory rights to the aggrieved party to file appeal to Supreme Court against an order of a tribunal).

82. Ibid.


84. Supra n. 75, p. 484.
amicus curiae. He is not to take sides except in so far his arguments lend weight to the case of one side or that of the other. Beyond that he is not interested in the dispute either in his personal capacity or in his capacity as an Advocate General…”

But Ray, J., opined in this case in the following words:\textsuperscript{84a}:

“Neither on logic nor on principle could it be said that the Attorney General and the Advocate General who have the right to be heard could not be persons aggrieved by the decision. If they have the right to be heard they may have grievance as to the result of the hearing. It is manifest that their \textit{locus standi} and interest is based on professional code of conduct and for the purpose of upholding the purity of the Bar and preservation of correct standards and norms in the profession. The profession touches the public on the one hand and the Courts on the other. On no other basis could the presence of the Advocate General be explained.”

It is submitted that an Advocate General or Attorney General is a trustee to the profession and a useful medium to guide both parties and even the judge to find out truth and come to the proper conclusion. Thus their presence in the disciplinary proceedings is highly essential to avoid miscarriage of justice.

The Bar Council of India Rules 1996 deals with the procedural formalities for filing and disposal of appeals. According to the Rules, application for appeal shall be in the form of a memorandum in writing.\textsuperscript{85} If it is in a language other than English, it shall be accompanied by translation thereof in English.\textsuperscript{86} In every appeal, all persons who were parties to the original proceedings shall alone be impleaded.\textsuperscript{87} Provisions exist for the continuance of the proceedings

\begin{footnotes}
\item \textsuperscript{84a} Id., at p. 529.
\item \textsuperscript{85} R. 19(1) of Part VII, Chapter II, The Bar Council of India Rules, 1975.
\item \textsuperscript{86} Ibid.
\item \textsuperscript{87} Id., R. 19(2).
\end{footnotes}
after the death of the complainant\textsuperscript{88} for mode of presentation,\textsuperscript{89} condonation of delay,\textsuperscript{90} payment of fee,\textsuperscript{91} rectification of defects,\textsuperscript{92} allocation of the matters to the disciplinary committee,\textsuperscript{93} and sending of notices to the parties.

An appeal filed against an advocate shall not be permitted to be withdrawn on account of settlement or compromise or adjustment of the claim against the advocate. An appeal against an advocate abates only on the death of the advocate so far as he is concerned.\textsuperscript{93a}

Order V of the Supreme Court Rules, 1966, deals with appeals under section 38 of the Advocates Act. According to the Rules, the memorandum of appeal shall be in the form of a petition. It should state all the relevant facts leading up to the order complained of and shall set forth in brief the objections to the decision appealed from and the grounds relied on in support of the appeal.\textsuperscript{94} The petition should be accompanied by an authenticated copy of the decision appealed from and at least seven spare sets of the petition and the papers filed with it.\textsuperscript{95} There are clear rules regarding preparation of memorandum,\textsuperscript{96} the payment of prescribed fee\textsuperscript{97} and the registration of petition.\textsuperscript{98}

\textsuperscript{88} Id., R. 19(3).
\textsuperscript{89} Id., R. 20(1).
\textsuperscript{90} Id., R. 20(2).
\textsuperscript{91} Id., R. 21(3).
\textsuperscript{92} Id., R. 21(4).
\textsuperscript{93} Id., R. 22(1).
\textsuperscript{93a} The Bar Council of India Rules, 1975, Part VII, Chapter I, R. 11(3).
\textsuperscript{94} Supra, n.85, R. 2, The petition should also state the date on which the order complained of was received by the appellant. The allegations of facts contained in the petition which cannot be verified by reference to duly authenticated copies of documents accompanying it shall be supported by affidavit of the appellant.
\textsuperscript{95} Id., R. 5.
\textsuperscript{96} Id., R. 3.
\textsuperscript{97} Id., R. 4.
\textsuperscript{98} Id., R. 6.
After giving notice to the appellant or his advocate on record, if any, the Registrar shall post the appeal before the court for preliminary hearing and for orders as to issue of notice. Upon such hearing, the Supreme Court, if satisfied that no prima facie case has been made out for its interference, may dismiss the appeal, or direct that notice of the appeal be issued to Advocate General of the State concerned or to the Attorney General of India or to both and to the respondent. The other rules prescribe formalities of transmission of record, appearance of respondents, ex-parte judgment, presentation of documents, posting of hearing and avoidance of delay. The costs

100. Id., R. 8. The secretary of Bar Council of India shall transmit to the court the entire original record relating to the case within seven days of the receipt by him of the intimation of admission of appeal.
101. Id., R. 9. Within fifteen days of the service of the notice of admission of appeal under rule 7 the Advocate – General of the state or the Attorney – General or the respondent may cause an appearance to be entered either personally or by an advocate on record on his behalf.
102. Id., R. 10. Where the respondent does not enter appearance within the time limited under rule 9, the appeal shall be set down for hearing ex parte as against him on the expiry of the period of one month of the receipt by him of the notice of the admission of appeal.
103. Id., R. 11. After the receipt of the original record the Registrar shall with all convenient speed, in consultation with the parties to the appeal, select the documents necessary and relevant for determining the appeal and cause sufficient number of copies of the record to be typed or cyclostyled or printed at the expense of the appellant.
104. Id., R. 12. Unless otherwise ordered by the Court every appeal shall be made ready and if possible posted for hearing before the court within four months of the registration thereof.
105. Id., R. 13. Where the appellant fails to take steps in the appeal within the time fixed for the purpose by these rules or unduly delays in bringing the appeal to a hearing, the Registrar shall call upon him to explain his default and if no explanation is offered, or if the explanation offered is in the opinion of Registrar insufficient, the Registrar, may after notifying all the parties who have entered appearance, place the appeal before the court for orders on the default, and court may dismiss the appeal for want of prosecution or give such directions in the matter as it may think fit and proper.
incidental to all proceedings in the appeal shall be in the discretion of the court.\textsuperscript{106} There will be no delay in disposing appeals since time limit is prescribed for posting the petition for hearing. But, there is no time limit for the Bar Council of India in disposing appeals.

Bar Council of India is having the power to call for the record of any proceeding disposed of by a State Bar Council or a Committee thereof.\textsuperscript{107} Further the Disciplinary Committee of Bar Council is having power to review any order passed by it.\textsuperscript{108} However the Bar Council Rules are silent as to the grounds for review. So the general provision for review contained in Order 47, Rule 1 of the Code of Civil Procedure is applicable.

The legal proceedings in the case of criminal offence and misconduct differ very much, also the punishment. The purpose of disciplinary proceedings against misconduct of an advocate is to ensure that the highest standards of professional conduct are maintained at the Bar. In other words, its object is to maintain discipline and to ensure that unworthy persons do not continue to practice. In these proceedings the Court consider whether the accused advocate has so conducted himself as no longer to be permitted to continue as a member of an honourable and responsible profession. But the object of criminal proceedings is to punish the accused in accordance with the specific criminal law against which he has committed an offence. For example, an advocate who commits a murder will be punished according to the Indian Penal Code. The trial will be conducted in a criminal court. The advocate’s conviction for murder can be a cause for disciplinary action by the Disciplinary Committee of the Bar Council. But all criminal convictions are not grounds for the exercise of the disciplinary action. For example, in the case of motor vehicle offences it is very difficult to draw a distinction as to when such law breaking amounts to an offence implying a defect in character which unfits a lawyer from practising. The principle which should be followed is that, where

\textsuperscript{106} Id., R. 14.
\textsuperscript{107} The Advocates Act, 1961, S. 48A.
\textsuperscript{108} Id., S.44.
a lawyer breaks the law upon one or two isolated occasions, it may not be necessary to take disciplinary proceedings against him, provided it is not of grave nature. On the other hand, where it is shown that the practitioner has wilfully and habitually broken the law, then it may quite reasonably be concluded that his acts imply such a defect in character as to render him unfit of an advocate. In such a case, he may be dismissed from practice. Where the acts of the lawyer fall midway between the two extremes then a more lenient view may be taken and it would be sufficient to warn the lawyer by inflicting upon him a period of suspension or otherwise.

**Professional Misconduct and Judicial Response**

From the earlier discussions, it is evident that, in order to take disciplinary action there must be something that can be fairly described as misconduct. The term “misconduct” itself is a very wide concept. Even in the absence of the moral turpitude, a disciplinary action may be taken against a delinquent lawyer.

**Misconduct : Meaning**

Both in law and in ordinary speech, the term “misconduct” usually implies an act done wilfully with a wrong intention. When this definition is applied to professional people, it includes unprofessional acts even though such acts are not inherently wrongful. Misconduct is “a transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, wilful in character, improper or wrong behaviour; its synonyms are misdemeanour or, misdeed, misbehaviour delinquency, impropriety, mismanagement, offence, but not negligence or carelessness.” This definition cannot be accepted fully as a lawyer is liable for his negligence and carelessness also. Professional misconduct may consist in betraying the confidence of the client, in attempting to practice a fraud, or deceive the court or the adverse

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party or his counsel. In fact, any conduct which tends to bring reproach on the legal profession or to alienate the favourable opinions which the public should entertain concerning it may in a wider sense constitute professional misconduct.\(^{111}\)

At common law ‘professional misconduct’ is defined in a circular and self-regulatory way as ‘something which would reasonably be regarded as disgraceful or dishonourable by his professional brethren of good repute and competency.’\(^{112}\) Darling, J., applied this definition in \textit{In re A Solicitor ex parte the Law Society}, in the following words:

“If it is shown that an advocate in the pursuit of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to say that he is guilty of professional misconduct.”\(^{113}\)

This definition was later approved by the Privy Council in \textit{George Frier Grahame v. Attorney General, Fiji}.\(^{114}\)

In India, as per Section 35 of the Advocates Act 1961, the State Bar Council has the power to refer the case for a disciplinary action against any advocate on its role to its Disciplinary Committee, if there is a reason to believe that he is guilty of professional or other misconduct. But the Act fails to define the term “professional misconduct or other misconduct.” So it has to be read as a relative term, i.e. it has to be considered with reference to the subject matter and the context where in it occurs and on the basis of facts and circumstances of each case. It should be read in their plain and natural meaning.\(^{115}\) Thus disciplinary proceedings can be taken against an advocate


\(^{112}\) \textit{Allinson v. General Medical Council}, [1894] 1 QB 750, 761 (Lord Esher), 763 (Lopes L.J.) (Emphasis added).

\(^{113}\) (1912) 1 K.B. 302.

\(^{114}\) 1936 P.C. 224.

\(^{115}\) \textit{In the matter of N. an Advocate}, A.I.R. 1936 Cal. 158.
for his misconduct whether it is committed in his professional or other capacity. The reason for this is very well put forward by Justice Hill when he said:

“It is obvious that if extra-professional offences do not constitute reasonable cause for dismissal, persons of the worst and vilest livelihood may, when once admitted into the profession, be irremovable.” 116

At the same time, it is to be noted that a mere conviction is not sufficient to find an advocate guilty of misconduct. The court must look into the nature of the act on which the conviction is based, to decide whether the advocate is, or is not an unfit person to be removed from, or to be allowed to remain in the profession. The Calcutta High Court in Roma Banerjee's case said:

“Professional misconduct is of infinite variety, and it is of utmost importance in the administration of justice that proved professional lapses which shake the confidence of the litigants should be punished.” 117

Thus India is also inclined to take a wide canvas for understanding the import of the expression ‘misconduct’. It is used in that context in Section 35 of the Advocates Act, 1961. 118 The term ‘misconduct’ is sufficiently comprehensive to include misfeasance as well as malfeasance and as applied to professional people it includes unprofessional acts even though they are not inherently wrong. Thus even when the proved misconduct does not amount to any specific offence, the lawyer is to be punished if his act is of the nature to degrade the dignity of the profession. 119

The Bar Council of India Rules expressly mentions certain canons of etiquette of professional behaviour 120, the violation of which are usually considered as professional misconduct. At the same time Section 35 says that a legal practitioner may be punished for professional misconduct as well

119. Id., p.272.
as for other misconducts. In this regard the Supreme Court of India has observed:

"An Advocate invites disciplinary orders not only if he is guilty of professional misconduct but also if he is guilty of other misconducts and this other misconduct which may not be directly concerned with his professional activity as such may nevertheless be of such a dishonourable or infamous character as to invite the punishment due to professional misconduct itself. An illustration in the point would be conviction of an advocate for a criminal offence involving moral turpitude though it may not be connected with his professional work as such."^{121}

Misconduct in Relation to Clients

The question as to the scope of the lawyer’s duty to the client is not new, and may well have begun with the first client. The extent of duty of the lawyer to be honest in the representation of the client is often disputed among many writers.\(^\text{122}\)

Lord Brougham’s statement of the advocate’s duty to client is relevant in this context when he said:

"An advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save that client at all expedient means—to protect that client at all hazards and costs to all others, and among others to himself—is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other."\(^\text{123}\)


This dictum, which has exerted influence on legal ethics, has been relied on by lawyers, to cover all kinds of dishonest practices and defenses. But some lawyers go to the other extreme and thereby misuse or cheat their clients for their own selfish intentions.

In equity the relationship between a lawyer and client gives rise to various fiduciary obligations, which are enforceable at the suit of the client. The lawyer must avoid situations involving a conflict of interest between the lawyers' personal interest and his duty to the client, and refrain from using the fiduciary relationship as a conduit for personal gain.

The measure of the lawyers' duty to the client contained in the Bar Council Rules differs markedly from that apparently exists in the minds of most lawyers. Lawyers' duty to the client often conflict with his duty to the Court. Here the main question that arises is 'does the lawyer's duty to the client justifies him in refusing to reveal to the court the clients' perjury? How far the component of the lawyers' duty of loyalty and confidentiality can be exercised? The Supreme Court of India in Lalit Mohan Das v. The Advocate-General, Orissa held:

"A member of the Bar undoubtedly owes a duty to his client and must place before the court all that can fairly and reasonably be submitted on behalf of his client. He may even submit that a particular order is not correct and may ask for review of that order. At the same time, a member of the Bar is an officer of the court and owes a duty to the court in which he is appearing. He must uphold the dignity and decorum of the court and must not do anything to bring the court itself to disrepute."

Thus where there is a conflict of interest as to lawyers' duty to the client and duty to the court, he is in a state of dilemma about his conduct. He must of course, try to strike a balance.

124. See United States v. Grayson, 430 U.S. 41, 54 (1978). The Court held that there is no protected right to commit perjury.
In India, the Bar Council of India Rules imposes the duty of confidentiality of the lawyer towards his client. The rule says that an Advocate shall not directly or indirectly commit a breach of the obligations imposed by section 126 of the Indian Evidence Act. But the rules are silent as to whether an advocate is bound to defend a client’s case, which he believes to be false. It only prohibit the withdrawal of engagement once accepted, the appearance for a case in which there is possibility of becoming a witness, and receiving instructions from persons other than his client.

Prohibition from Appearance

An advocate is prohibited from appearing in a case where there is a possibility of he becoming a witness. This issue involves the consideration

126. The Indian Evidence Act S. 126 reads: “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 conditions 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 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.”

127. Bar Council of India Rules, Chapter II, S. 11, R. 12 Withdrawal is allowed only after reasonable and sufficient notice is given to the client.

128. Id., R. 13, If he is a witness in a material question of fact, he should not continue to appear as an advocate, if he can retire without jeopardizing his client’s interest.

129. Id. R. 19, He shall receive instruction from the client and his authorized agent.

130. Supra, n.128.
of conflicting principles. On the one hand, an accused person is entitled to select the advocate whom he desires to appear for him. Certainly, the prosecution cannot fetter that choice merely by securing a *sub poena* on the advocate to appear as a witness. On the other hand, the Court is bound to see that the due administration of justice is not in any way embarrassed. Thus, here not only the interest of the advocate is to be protected, but also the rights of the party whom he represents in a proceeding. For relinquishment of *vakalath*, the advocate must be a relevant witness on a material question of fact. Moreover, such relinquishment shall not jeopardize the client’s interest. In such cases, it is the duty of the court to order the relinquishment of *vakalath* because appearance of counsel in the case, in which he is a witness, is not in keeping with the traditions of the Bar. Before ordering such relinquishment, the court has to enquire and satisfy as to the existence of the above conditions.

A lawyer is not duty bound to investigate into the truth and falsehood of the story given by the client, and so he is bound to defend the client. But this does not mean that the client is entitled to have the services of a lawyer who disbelieves his story. At the same time an advocate having moral conviction against the conduct of a particular case may advise the client to approach another lawyer.

Even though the Bar Council Rules says that an advocate may refuse to accept a particular brief in special circumstances, it does not state what those special circumstances are. In *Muraleedharan Nair v. N.J. Antoney*,

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135. Bar Council of India Rules R.11 reads :- An Advocate is bound to accept any brief in the courts or tribunals or before any other authority in of before which he professes to practice at a fee consistent with his standing at the Bar and the nature of the case. Special circumstances may justify his refusal to accept a particular brief.
136. (1985) K.L.T. 1. at p. 6. In this case the police officer who assaulted an advocate moved for the transfer of the criminal case filed against him by the advocate on the ground that the members of the local Bar were not prepared to accept his brief.
Bhaskaran Nambiar, J., discussed certain circumstances in which a lawyer may reject a brief: 1) When he is physically disabled from appearing for the client; 2) When he may not be available to present the case in court; 3) Where his training in a special branch limits his usefulness in other branches; 4) Where the client is not prepared and able to pay him his reasonable fees; 5) Where he confines his practice in some courts and in some places only; 6) When he is likely to be called as a witness in the same case; and 7) When he has been already consulted by the other side.

These circumstances are not exhaustive. The court failed to consider whether an advocate can be excused from accepting brief against his close relatives even where he will not be made a witness. Similarly, it is contrary to the notions of morality to compel a person to do a thing which he believes to be contrary to his acquired convictions. It will be unfair to compel him to do so in the name of professional ethics. ‘Special circumstances’ is a justification to reject a particular brief in England also.137

**Misconduct in Relation to Fee**

A client is duty bound to pay remuneration to his lawyer. Professional ethics demand that the lawyer should charge reasonable fees from his client. This is because the prospect of extra ordinarily high legal fees may cause the lawyer to compromise the lawyer’s fiduciary obligation to the client.138 This does not mean that charging exorbitant fees by a pleader amounts to misconduct, unless there is a clear evidence to prove fraudulent conduct.139 The Constitution

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of India\textsuperscript{140} expressly empowers the High Courts to prescribe the table of fee payable to advocates practicing before them\textsuperscript{141} and various courts have formulated fee schedules under this provision. But it remains purposeless because of the failure to get it periodically revised.\textsuperscript{142} An advocate's fee is related to the eminence and the standing of the lawyer at the Bar. The Bar Council Rules has not imposed any restriction on lawyers' fee.\textsuperscript{143}

In practice, a lawyer will stipulate his fees at the time of signing the \textit{vakalat}. He cannot leave it till the conclusion of the trial or make it dependent upon how the litigation ends, except in cases of suit for accounts.\textsuperscript{144} Failure of a lawyer to appear before the court after the acceptance of the \textit{vakalat} amounts to professional misconduct even if there is non payment of fee.\textsuperscript{145} Thus, on accepting \textit{vakalat} an advocate has to conduct the case irrespective of payment of stipulated fee by the client.

It is highly reprehensible for an advocate to stipulate or receive remuneration based on the result of litigation or claim.\textsuperscript{146} But in United States contingent fee is permitted.\textsuperscript{147} They justify it on the ground that it enables a poor litigant with a meritorious claim to obtain competent legal services. Here the client pays no fees for the legal service if the claim does not succeed. Even though this type of payment is susceptible to many criticisms, it is useful

\textsuperscript{140} The Constitution of India, Art. 227(3).
\textsuperscript{141} Practically this has reference only to the cost of the litigation as entered in the decree and not to the actual fee paid or promised to and advocate.
\textsuperscript{142} It is surprising to see that, no case has yet come before the Bar Council alleging that a lawyer had demanded exorbitant fees in excess of that prescribed.
\textsuperscript{143} But the Law Commission recommended for statutory ceiling on lawyers' fees in its 128\textsuperscript{th} and 131\textsuperscript{st} Reports.
\textsuperscript{146} The Bar Council of India Rules, R.20.
in certain areas of litigation. For example, it may be used experimentally in
the areas of motor accident claims and compensation for land acquisition,\textsuperscript{148} which may help poor litigants to enforce their claims. It is submitted that a
regulation through Court or Bar Council will be helpful in this regard. Further
it is submitted that necessary amendments may be made in the Act giving
appropriate power to the Court\textsuperscript{149} for fixing and regulationg the fees payable
in this manner.

In U.S. Rule 1.5 of the Model Rules of Professional Conduct says
about the factors to be considered for determining the reasonableness of fees
as under:

1) The time and labor required, the novelty and difficulty of the question
involved, and the skill requisite to perform the legal service properly;
2) The likelihood, if apparent to the client, that the acceptance of the
particular employment will preclude other employment by the lawyer;
3) The fee customarily charged in the locality for similar services; 4)
The amount involved and the results obtained; 5) The time limitations
imposed by the client or by the circumstances; 6) The nature and the
length of the professional relationship with the client; 7) The experience,
reputation and ability and ability of the lawyer and 8) Whether the fee
is fixed or contigent\textsuperscript{149a}.

The Bar Council of India can make rules prescribing the highest amount
of fee that is to be realised from the client in a particular cases. This will help
in checking certain people carrying on this profession as a profession of
commercial nature.

\textsuperscript{148} Vijayawada - Guntur - Tenali Urban Development Authority v. Movva Ranga
Rao. (1996) 4 S.C.J. 2. In this case Court held that the fine depends upon the
valuation of the claim awarded and the amount to be calculated varies between
the minimum and maximum.

\textsuperscript{149} S. 34(1)(1A) – By virtue of this provision, the High Court shall make rules for
fixing and regulating the fees payable as cost by any party.

\textsuperscript{149a} Available at \texttt{<http://www.ahanet .org/cpr/rule15draft.html>}, visited on 20th May
2003.
Misappropriation of Client's Money

It is well established through a catena of decisions that misappropriation of client’s money is a grave misconduct. In *J.S. Jadav v. Mustafa Hazi*, the Supreme Court went to the extent of passing a decree in favour of the client for the amount misappropriated by the lawyer with interest at 9% per annum. Misappropriation of decree amount payable to the client was held to be a misconduct. The payment of misappropriated money or a settlement with the client after the commencement of the disciplinary proceedings will not absolve him from the guilt and he is liable to the disciplinary action. Thus, taking advantage of ignorance and illiteracy of the clients, demanding from them on false representations that it was required for court purposes, and misappropriating will amount to professional misconduct.

The Bar Council Rules provide that an advocate shall not do anything abusing or taking advantage of the confidence reposed on him by the client. Hence an advocate who is authorized to draw money from court due to the


151. A.I.R. 1993 SC 1535, (1993) 2 S.C.C. 562. In this case the advocate was found guilty for withdrawing money from court on behalf of his client in pursuance of a compromise decree and returning only a small amount to the client and for misappropriating the balance amount.

See also in D.C. No. 49/2000, the Disciplinary Committee of the Bar Council of Kerala found an advocate guilty of professional misconduct for impersonating the signature of his client and thereby receiving the claim amount in a motor accident claim.


153. *V.C. Rangadurai v. D. Gopalan*, A.I.R. 1979 S.C. 281. In this case the delinquent advocate, who was entrusted to institute two suits for the realization of money due under two promissory notes, fraudulently represented to the clients that the suits had been filed and were pending, giving them the various dates fixed in these two suits. Later he told them that the court had passed decrees in their favour on the basis of the two promissory notes, while no such suits were ever filed.

client has the duty to pay him the same.\textsuperscript{155} An advocate thus should keep accounts of the client’s money entrusted to him.\textsuperscript{156} The purpose is to prevent the advocate from diverting any portion of the client’s money towards his fees.\textsuperscript{157}

Thus in \textit{In re an Advocate},\textsuperscript{158} the High Court of Kerala observed that an advocate receives or realises the amount in his capacity as his client’s advocate and that jural relationship ought to determine the nature and character of his liability. If any amount is received or given to him on behalf of his client the fact of such receipt must be intimated to the client as early as possible.\textsuperscript{159} If any amount of fee remains unpaid, after the termination of proceedings the Bar Council Rules provides for deduction of such amount from any amount belonging to the client remaining in his hands.\textsuperscript{160} If the fee has been left unsettled, then he may deduct the fee payable under the rules of the court in force for the time being out of any money belonging to the client in his hands and the remaining shall be refunded to the client.\textsuperscript{161}

When the suit has been decided on the admission of the defendant after the settlement of issues and before any other enquiry is made, the advocate concerned is entitled only to one half of the full fees prescribed in the rules.\textsuperscript{162} Moreover, an advocate is prohibited from entering into arrangements where by funds in his hands are converted into loan.\textsuperscript{163}

\begin{itemize}
\item \textsuperscript{155} D.C. No. 3/1983 of Kerala Bar Council. In this case the clerk of an advocate retained the money withdrawn from a court which has been deposited in execution of the decree.
\item \textsuperscript{156} Bar Council of India Rules, R. 25 and 26. Also by R. 30, copies may be furnished to the client on demand provided necessary copying charge is paid.
\item \textsuperscript{157} \textit{Prof. Krishna Raj Goswami v. Viswanath D.Mukasikar}, D.C.Appeal No.40/1995 of Bar Council of India.
\item \textsuperscript{158} 1979 K.L.T. 236.
\item \textsuperscript{159} Bar Council of India Rules, R. 27.
\item \textsuperscript{160} \textit{Id.}, R. 28.
\item \textsuperscript{161} \textit{Id.}, R. 29.
\item \textsuperscript{163} Bar Council of India Rules, R. 27.
\end{itemize}
Going through various decisions, it can be seen that court makes a distinction between delayed payment when the client makes demands, and non payment even after request. Court is taking a lenient view in the former case, i.e. by giving a punishment of reprimand only.

The common law rule, which governs advocate’s particular lien, is founded on the principle that the advocate is entitled to have his costs out of the property obtained for his client by the advocate’s exertions. But this rule will not apply where the property is part of a fund, which has come into the advocate’s hands for a particular purpose. An advocate has a lien upon the funds, money or property recovered for his client and not on documents and papers.

Regarding lawyers lien, the decision of Supreme Court in In re ‘M' an Advocate164 is worth noticeable. The Court said :

“The high standards of the profession demand that when the moneys of the client come into the possession of an advocate, otherwise than as earmarked fees, he has to treat himself as in the position of a trustee for the client in respect of the said moneys, it would be improper for him to retain i.e., to appropriate the same towards his fees without the consent, express or implied, of his client or without an order of the court. It may be in certain circumstances he is entitled to exercise a lien, but he has to give reasonable intimation both of the fact of moneys having come into his hands and of the exercise of the lien over them until his accounts is settled. If there has been no prior settlement of fees he cannot constitute himself a Judge in his own cause as to what would be reasonable to him. The position of trusteeship in respect of moneys of the client in his hands is all the greater where the moneys represent the unspent balance of what was given for a specific purpose, such as, for payment of printing charges. On any such unspent balance, it is well settled, that he has no lien, either under the common law or by the statute”.

Thus it is a well-settled principle that an advocate cannot hold lien over the case-file on the plea that he was not paid his fees. The advocate can sue the client for recovery of fee, but in no way is authorized to hold back papers.¹⁶⁵

Further it has been held in *R.D. Saxena v. Balram Prasad Sharma*¹⁶⁶ that permitting an advocate to have lien over the case files in lieu of fees claimed by him would result in serious abuse and exploitation of illiterate litigants. The court also held that the cause in a court or tribunal is far more important that the right of an advocate to his fees. This decision even though beneficial to the poor clients, has left the advocate’s right to receive his fees at no where, especially where the case is of criminal nature. It is very pitiable for an advocate to go after his clients requesting them to pay his fees. It is submitted that the Bar Council of India has to make rules to protect the rights of advocates by virtue of section 7(d)¹⁶⁷ read with section 49(h)¹⁶⁸ of the Act.

**Purchasing Client’s Property**

A relationship of trust exists between lawyer and his client. Indeed, the position of a trustee is so capable of abuse that in some respects the law prefers to completely prohibit a purchase by a trustee of trust property. Thus no matter how fair the contract itself, the law permits no inquiry into the transaction but simply declares it voidable. In any case of trust or confidence or where one person turns to another for advice and the court thinks that the relationship of the parties is such as to require confidence and good faith, the duty not to abuse that confidence may be imposed. This is applicable in the case of lawyer-client relationship also.

¹⁶⁵. *Supra* n.155.
¹⁶⁷. The Advocate Act 1961, S. 7(d) reads: “The function of the Bar Council of India shall be....to safeguard the rights, privileges and interests of advocates.”
¹⁶⁸. *Id.*, S. 49(1) (h) reads: “The Bar Council of India may make rules for discharging its functions under this Act, and, in particular, such rules may prescribe the fees which may be levied in respect of any matter under this Act.”
The principle is recognised in India and the Bar Council of India Rules expressly prohibit an advocate from directly or indirectly bidding or purchasing, either in his own name or in any another name, for his own or any other persons benefit, any property sold in execution of a decree or order in any suit, appeal or other proceeding. The question that remains is whether purchase by an advocate otherwise than in execution would be misconduct. In *Ajmer Singh v. Jagir Singh*, it was held that the act of purchase of client’s property when the title of property itself is the subject matter of pending litigation amounts to misconduct. Moreover, public policy also demands such a restriction on the advocate. Even before the incorporation of this rule in the Bar Council of India Rules, various High Courts have held that purchase of client’s property amounts to misconduct. Thus in *Qurban Alikhan v. G, a Pleader*, the lawyer was held guilty of professional misconduct, where he caused such property to be purchased by his own father. In *Sheo Narain Lal v. Mr. Ahmad Ali*, the lawyer was found guilty of professional misconduct for purchasing property of the client benami and thereafter appearing for him.

169. Bar Council of India, Rules R.22. But this prohibition does not prevent an advocate from bidding for or purchasing for his client any property which his client may himself legally bid or purchase; provided the advocate is expressly authorised in writing in his behalf.


171. The Transfer of Property Act, 1882 and the Code of Civil Procedure, 1908 contain similar provisions. Order 21, Rule 73 of C.P.C reads thus: No officer or other person having any duty to perform in connection with any sale shall either, directly or indirectly, bid for, acquire to attempt or acquire any interest in the property sold. Transfer of Property Act S. 136. reads thus: “No judge, legal practitioner or officer connected with any court of justice shall buy or traffic in, on stipulate for, or agree to receive any share of or interest in, any actionable claim, and no court of justice shall enforce, at his instance or at the instance of any person claiming by or through him any actionable claim, so dealt with by him as aforesaid”.

172. A.I.R.1938 Pat. 28. But in this case, the advocate was not punished since the purchase was with the client’s consent. This decision is erroneous because the standards of conduct was evolved for the preservation of the integrity of the profession and the consent of the client is not sufficient to overcome such a “suspicious conduct”.

173. A.I.R.1925 Oudh.130.
In *P.D.Gupta v. Ram Murti*,\(^{174}\) while holding the advocate guilty of professional misconduct confirmed the observation made by the Bar Council of India and said:

“It is an acknowledged fact that a lawyer conducting the case of his client has a commanding status and can exert influence on his client. As a member of the Bar it is common knowledge that lawyers have started contracting with the clients and enter into bargain that in case of success he will share the result. A number of instances have been found in the cases of Motor Accident Claims. No doubt there is no bar for a lawyer to purchase property but on account of common prudence specially a law-knowing person will never prefer to purchase the property, the title of which is under doubt.”

Moreover, the Advocates Act expressly prohibit an advocate from doing anything where by he abuses or takes advantage of the confidence reposed on him by his client.\(^{175}\) Thus in *P.D.Khandekar v. Bar Council of Maharashtra*,\(^{176}\) the Supreme Court held that: ‘for an Advocate to act towards his client otherwise than with utmost good faith is unprofessional. Nothing should be done by any member of the legal fraternity which might tend to lessen in any degree the confidence of the public in the fidelity, honesty and integrity of the profession.’

In addition to these there are various other misconducts relating to client like sharing of fruit of litigation, failure to file the action, failure to give correct

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\(^{174}\) (1997) 7 S.C.C.147. The Advocate disputed property under litigation at a throw away price from his client, whose title to the property was in doubt and sold it to a third party for profit. See also *In re, L, a Pledger*, 1938 A.I.R.Mad.276.

\(^{175}\) Bar Council of India, Rules R. 24.

\(^{176}\) A.I.R.1984 S.C.110. In this case the delinquent advocate along with another was accused of impersonating as other advocates for whom the briefs were meant. At times they directly approached the clients and adopted questionable methods charging exorbitant fees. Further they gave improper legal advice. But the Supreme Court did not punish them for misconduct saying that there was lack of convincing preponderance of evidence.
information to client, delaying the course of justice,\textsuperscript{177} failure to appear\textsuperscript{178} etc. What is needed is a statement of policy or general standards defining the manner in which lawyers may limit their engagements with their clients.\textsuperscript{179} Even though failure to appear in a case is a grave misconduct, the Bar Council Rules are silent on this aspect. In England, such an act amounts to contempt of court.\textsuperscript{180}

In \textit{Kamala Prasad Roy v. Binod Kumar Roy},\textsuperscript{181} it was held that a responsible counsel is the best judge as to what code of conduct he should adopt. If the counsel having considered the pros and cons of the matter is of the opinion that he is not debarred from appearing in the case and insist to appear, his opinion should be treated as final and the Court should not sit in appeal on the same.

It is submitted that when a lawyer engages in a transaction with a client during the lawyer-client relationship and benefits thereby, inorder to show that the benefit he received did not proceed from undue influence, he must prove that: 1) he made a full and frank disclosure of all the relevant information that he had, 2) the consideration was adequate, and 3) the client had independent advice before completing the transaction.

\begin{footnotes}
\item[177] \textit{In re First Grade Pleader}, 1931 A.I.R. Mad.423.
\item[181] 1988 Pat. L.J.R.975 as reported in A.I.R.1990 Pat. 157,163. In England, the generally accepted view is that while solicitors are officers of the Court, barristers are not. This is because, there, the function of disciplining barristers is not directly in the hands of the courts, but left to the Inns of Court and the Bar Council. See \textit{Rondel v. Worsley}, [1969] 1 A.C.191 per Lord Upjohn at p.282 and \textit{In re S (A Barrister)}, [1970] 1 Q.B.160. If such a view is accepted in India, a lawyer in India cannot be considered as an officer of the court.
\end{footnotes}
Misconduct in Relation to Court

It is the lawyers who are the wheels of the chariot of justice. They are considered as officers of the Court and owe certain duties to the Court. The underlying purpose of his duties to the court is to enforce appropriate behaviour by the lawyer so as to achieve the goal of just operation of the legal system. The duties which a lawyer owes to the court can be broadly classified into five categories namely, duty of disclosure, duty not to abuse the court process, duty not to corrupt the administration of justice, duty to conduct cases efficiently and expeditiously and duty to respect the Court. The violation of these duties amounts to misconduct. Thus an advocate is responsible for his conduct in court and cannot be excused for his improper conduct on the ground that he is acting on the instructions from his client in so doing.

(i) Violation of Duties of Disclosure to the Court

It is true that a lawyer owes duty of confidentiality to his client. At the same time an advocate is obliged to act honestly in all positive statements he make in the court room. Thus the duty of confidentiality owed to the client is subjected to the duty of disclosure owed to the court. Both non-disclosure and disclosure of wrong facts or law is not expected from a lawyer. The Supreme Court of India has observed that a lawyer must not hesitate in telling the court the correct position of law when it is undisputed and admits of no exception. He is not entitled to drag a settled and non-controversial point of law into doubt solely to mislead or confuse court so as to gain an unfair advantage for his client.

183. Ibid.
184. D.P.Chadha v. Taryugi Narain Mishra, (2001)2 S.C.C 221,237. In this case the Court found the delinquent lawyer guilty for professional misconduct for deliberately attempting to mislead court into accepting position that personal presence of parties was not a mandatory requirement for verification of compromise.
Even though non-disclosure of fact is not expected from a lawyer, it is erroneous to treat such a non-disclosure as misconduct. In *Ratnamma v. Abdul Khader* while ordering to suspend delinquent advocate, the Andhra Pradesh High Court held that it is professional misconduct for an advocate to apply for a succession certificate in the name of the daughter of the deceased without reference to the widow when he knew both were interested in the matter. This is not a right view. It is submitted that the paramount duty vested in an advocate is to protect the interest of the client. For that purpose he may point out only those materials favourable to him. He may not place all the materials before a court because the system provides adequate opportunities to the opposite side to adduce evidence favourable to them and to rebut the evidence produced by the other side. Hence it is submitted that, concealment of some material facts from the court may not be treated as a professional misconduct. At the same time a wrong disclosure should be treated as misconduct.

(ii) *Abuse of Court Process*

The freedom and responsibility with which a counsel has to present the case are so important to the administration of justice. He has the duty to conduct cases fairly, reasonably and with due regard to the client. At the same time lawyers should not "degrade" themselves in anyway for the purpose of winning their client's case. Hence it is submitted that lawyer is not entitled to use the litigious proceedings for unjustifiable reasons or for pursuing a case known to be dishonest. Thus in *N.G.Dastane v. Shrikant S.Shivde*, Supreme Court held that seeking repeated adjournments for postponing examination of witness who were present in court without making alternative arrangement for their examination amounts to misconduct of the advocate concerned. Strict disciplinary proceedings need to be taken against such lawyers who cross every limit of professional ethics.

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186. (2001)6 S.C.C. 135. The respondent advocates sought unnecessary adjournments which made the appellant who was a witness in a case where the respondent was lawyer for the opposite party, to come down from New York several times for cross examination. See also *State of Uttar Pradesh v. Shambhu Nath Singh*, (2001)4 S.C.C.667.
(iii) Corrupting the Administration of Justice

Allied to lawyer’s duty not to assert or connive at perjury or a fraud is the duty not to assist such improper conducts. But difficulty may arise when lawyers advice regarding commercial transactions which have the potential to be unlawful. This is particularly so in regard to tax avoidance. In such cases the lawyer is required to take reasonable amount of professional care.

It is interesting to note that more than 100 years ago it was said that counsel’s signature on a pleading is a “voucher that the case is not a mere fiction”. Thus, making false statement in a pleading drafted by an advocate, giving false certificate to a person, giving false identification etc, amounts to misconduct. Further swearing of untrue affidavit or documents is perhaps the obvious example of conduct, which a lawyer cannot knowingly permit. In such cases the lawyer must assist and advise his client as to the latter’s bounden duty in that matter. If the client persists in omitting relevant documents from his affidavit, then the lawyer should decline to act for him any further. But what if the lawyer believes initially that the original affidavit is true, but before the trial discovers that it was untrue and important documents have been omitted? In such situations lawyer has to advise the client that the opponent’s

187. In Forsythe v. Rodda, (1989)42 A.Crim.R.197, as reported in (1998)114L.Q.R 90, which concern an application for the review of a magistrate’s decision committing the barrister concerned for trial on charges of conspiracy and incitement regarding his advising clients in a tax avoidance scheme. The Full Court of the Federal Court of Australia held that barrister was required to answer.

188. Great Australian Gold Mining Co. v. Martin, (1877)5 Ch.D.1.

189. In re, a Pleader Vellore, A.I.R 1944 Mad.268. In this case the advocate inserted in the plaint a statement that the promissory note had been endorsed to the plaintiff for good consideration, even though he knew that a promissory note had been merely endorsed for collection. Court ordered suspension for one month.

190. In the Matter of P, a Pleader Rangpur, A.I.R. 1936 Cal. 372. In this case Court punished the Pleader who had given a false certificate that the probationer had completed the probation.

lawyer must be informed of the omitted documents and if this course is not assented to; he must cease to act for the client. Otherwise the lawyer would be conniving at the fraud.\(^{192}\)

(iv) **Violating Duty to Conduct Cases Efficiently and Expeditiously**

A lawyer has to conduct the cases efficiently and expeditiously. He should not be negligent while conducting cases. Negligence of a serious nature will be a breach of the general duty to conduct case efficiently. But it is difficult to say that mere negligence amounts to professional misconduct unless it is accompanied by suppression of truth or deliberate misrepresentation of fact involving an element of moral turpitude.\(^{193}\) Thus in extreme cases negligence also amounts to misconduct, if it affects the proper administration of justice. In *P.D. Khandekar v. Bar Council of Maharashtra*,\(^{194}\) the Supreme Court observed that mere negligence unaccompanied by a moral delinquency on the part of a legal practitioner in the exercise of his profession does not amount to professional misconduct.

Whether negligence will amount to professional misconduct or not will depend upon the facts of each case. Gross negligence in the discharge of duties partakes of shades of delinquency and would undoubtedly amount to professional misconduct.

It is submitted that the mandate of presence of element of moral delinquency or turpitude in order to sustain a charge of misconduct seems to give the lawyer a practically secured professional career.

(v) **Disrespect to Court**

An Advocate shall maintain towards the court a respectful attitude bearing in mind that the dignity of a judicial office is essential for the survival of


\(^{193}\) *Ali Mohammed v. An Advocate*, A.I.R. 1960 All. 660. Here an advocate who was entrusted to file a writ petition deliberately delayed the filing for one year. Court directed admonition of the advocate.

a free community. So it is most irregular and unfair for members of the legal profession to make personal attacks or make reckless and unfounded charges of corruptions and improper imputations against court. In *In re D.C. Saxena* it was held that an advocate appearing before court should maintain dignity and decorum of Court. He should not indulge in writing in pleadings, the scurrilous allegations or scandalisation against judge or court.

When an imputation is made against a judge, it is not only against the judge but also against the dignity and decorum of the court and thus it amounts scandalising the court. Moreover, such an accusation against a judicial officer or authority, undermines the public confidence of the court in proper dispensation of justice. At the same time effective working of a judicial system is absolutely essential for proper functioning of the administration of justice in a democratic polity.

In order to keep the stream of administration of justice pure and clean both Bench and Bar needs to be unpolluted. So if the lawyer thinks that he has a just and proper ground for serious complaints against a judicial officer, it shall be the right and duty of the lawyer to submit grievance to proper authorities. No counsel should be punished for *bonafide* statements but he would be liable for contempt of court if he makes reckless allegations without making proper enquiry or concocts mischievously twists facts casting aspersions on the court.

No hard and fast rule can be laid down as to what expression a lawyer can use with impunity while addressing the court and what should ordinarily be tolerated by it. A lawyer should always conduct himself properly in court of law and exert his best at all times to maintain the dignity of the court. At the same time court has a reciprocal duty to perform. It should not be discourteous to a lawyer and should try to maintain his respect in the eyes of his clients and

the general public with whom he has to deal in his personal capacity. Thus mutual respect and not mutual antagonism should be the end in view of both sides eliminating, all ideas either of domination or of servility.\textsuperscript{199}

**Advocates and Contempt of Court**

An unfair attitude of advocate to the court will affect the very root of administration of justice. Any criticism of the judiciary must be rational and sober and must proceed from the highest motives without being coloured by any partisan spirit or tactics. Misconduct to court is viewed seriously and contempt of court jurisdiction is invoked in such cases.

In India, the law relating to contempt of court is embodied in the Contempt of Court Act, 1971. The Bar Council Rules did not contain any express provision as to contempt of court, but judicial decisions say that contempt committed by lawyer is professional misconduct. In *P.N. Dube v. P.Shiv Shankar*,\textsuperscript{200} it was held that any criticism about the judicial system or the judges which hampers the administration of justice or which erodes the faith in the objective approach of judges and bring administration of justice into ridicule must be prevented. This is because any criticism against a judge brings the administration of justice to deep disrepute as it will impair and hamper the administration of justice. In *Registrar, High Court, Bombay v. S.K. Irani*,\textsuperscript{201} it was held that scandalising a court by sending a letter by an advocate even on the instruction of the client is professional misconduct and he can be prosecuted for contempt of court. An attack on a judge ascribing to him favouritism in his judicial or official capacity,\textsuperscript{202} saying that a judge is prejudiced\textsuperscript{203} etc. amounts to professional misconduct. In India, the Supreme Court had the painful experience to observe:

\textsuperscript{200} A.I.R. 1988 S.C. 1208.
\textsuperscript{201} A.I.R. 1963 Bom. 254.
\textsuperscript{202} *Mohammed Vamin v. Om Prakash*, 1982 Cr. L.J. 322 (Raj.).
\textsuperscript{203} A.I.R. 1967 Cal. 153.
"The tendency of maligning the reputation of judicial officers by disgruntled elements who fail to secure the desired order is ever on the increase and it is high time it is nipped in the bud. And, when a member of the profession resorts to such cheap gimmicks with a view to browbeating the judge, into submission, it is all the more painful. Veiled threats, abrasive behaviour, use of disrespectful language and at times blatant condemnatory attacks are often designedly employed with a view to taming a judge into submission to secure a designed order. Such cases raise larger issues touching the independence of not only the concerned judge but the entire institution...It is high time that we realise that the much cherished judicial independence has to be protected not only from the executive or the legislature but also from those who are an integral part of the system (emphasis supplied). An independent judiciary is of vital importance to any free society...And when a member of a profession...who should know better, so lightly trifles with the much endeared concept of judicial independence to secure small gains it only betrays a lack of respect for the martyrs of judicial independence and for the institution itself."²⁰⁴

If timely action is taken by Bar Councils, the decline in the ethical values can be easily arrested.²⁰⁵ It is submitted that strong disciplinary action must be taken against the advocate who commits the offence of contempt of court. Unlike an ordinary citizen, being an officer of the court, he should have more responsibility to keep the dignity of the court. If he has any complaint against a judicial officer he may pursue the remedies before proper authorities.²⁰⁶

It was correctly observed by the Supreme Court in C. Ravichandran Iyer v. Justice A.M. Bhattacharjee²⁰⁷ that where a judge cannot be removed

²⁰⁴. M.B. Sanghi v. High Court of Punjab and Haryana, A.I.R. 1991 S.C. 1834, 1835. In this case appellant, a practicing advocate having failed to persuade the judge to grant an ad interim injunction, made derogatory remarks with a hope that it would succeed and the judge would be browbeaten into submission.

²⁰⁵. Ibid.


by impeachment process though his conduct generates widespread feeling of dissatisfaction among the general public, the Bar Association can take up the matter with higher judicial authorities. This procedure, according to the court, would facilitate nipping in the bud the conduct of a judge leading to loss of public confidence and sustain public faith in the efficacy of the rule of law and the respect for the judiciary. As to the lawyer who committed contempt of court, it is submitted that he should not only be prosecuted under the Contempt of Courts Act, but also disciplinary action be taken against him under the Advocates Act. In *Supreme Court Bar Association v. Union of India*, the Supreme Court observed as under:

“In a given case an advocate found guilty of committing contempt of court may also be guilty of committing ‘professional misconduct’, depending upon the gravity or nature of his contumnacious conduct, but the two jurisdictions are separate and distinct and exercisable by different forums by following separate and distinct procedures. The power to punish an advocate by suspending his license or by removal of his name from the roll of the State Bar Council for proven professional misconduct vests exclusively in the statutory authorities created under the Advocates Act, 1961, while the jurisdiction to punish him for committing contempt of court vests exclusively in the courts.”

It is to be noted that even if a court had punished an advocate for contempt, the Bar Council cannot be compelled to take disciplinary action against him. It is for the Bar Council to consider seriously whether it can rise to the occasion before it is too late. Certain High Courts through rules prohibit an advocate from practising if he is found guilty of contempt of court by virtue of Section 34(1) of the Advocates Act. By this provision, High Courts

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209. See Rule 11 of rules framed by High Court of Kerala under Section 34(1) of the Advocates Act. Rule 11 reads: No advocate who has been found guilty of contempt of court shall be permitted to appear, act or plead in any court unless he has purged himself of the contempt.” But there is no procedural provision in law to get purged of contempt by an order of an appropriate court.
still continue to have some power to control the legal profession. Even otherwise, High Court has the power not to allow a contemnor from practising before it under Article 142 and Article 129 of the Constitution. But in Supreme Court Bar Association’s case, it was held that the power of the Supreme Court to punish for contempt of court cannot be expanded to include the power to determine whether an advocate is also guilty of ‘professional misconduct’ in a summary manner giving a go by to the procedure prescribed under the Advocates Act. This power cannot be used to supplant substantive law applicable to the case. Article 142 even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly that cannot be achieved directly.

The reasoning of the Supreme Court in this case was not commanded to the aid of the court when it envisaged the situation of the Bar Council of India not taking any action on the report of contempt of court committed by an advocate. In such a case neither the Bar Council of India nor anyone else may like to be a party. The court responded to this issue stating that it can act under the appellate jurisdiction. But this is of no help when the High Court is confronted with it in a similar situation.

In Pravin C. Shah v. K.A. Mohammed Ali, it was held that it is open to the respondent advocate to purge himself of the contempt. But until that process is completed he cannot act or plead in any court situated within the domain of Kerala High Court, including the Subordinate Courts. At the

210. In re Vinay Chandra Mishra, (1995) 2 S.C.C. 584, the Supreme Court having found the contemnor, an advocate guilty of committing contempt sentenced him to simple imprisonment for a period of six weeks and suspended him from practicing as an advocate for a period of three years. The order of suspension was made invoking powers under Article 129 and 142 of the Constitution.

211. Supra n. 208.


same time, it is surprising to observe that he is not having any problem to practice in any courts outside Kerala as Rule 11 of the Kerala High Courts Rules has no binding effect on the Disciplinary Committee or any other organ of the Bar Council of India. Thus lawyers in different states are treated differently when they commit contempt of court. This itself causes confusion. It is submitted that an amendment may be made so as to provide a provision for taking mandatory disciplinary action against an advocate who was convicted for contempt of court.

**Strike and Boycott of Court by Lawyers**

Amongst the various duties required to be discharged by lawyers to the court, the important one is that an advocate shall maintain towards the court a respectful attitude bearing in mind that the dignity of the judicial office is essential for the survival of an independent judiciary. Lawyer’s profession cannot be equated with mere trade or business.

Protest is essential to a democracy. Like other forms of protest, the right to strike places pressure on those in power to recognise dissent and respond to just demands. It is difficult to concede a right to boycott courts to the lawyers on the analogy of conceding right to strike of employees. More over the right to strike work in India is admittedly not absolute. But, even if there is no fundamental right to strike, a strike is not *per se* illegal. In *Emperor v. Rajani Kanta Bose,* \(^{(214)}\) the Calcutta High Court opined that a pleader being an officer of the court is bound to submit to its authority. Thus he cannot join any action to boycott the court or a particular judge because of any grievance – real or alleged, whether touching the court or of political or other character. Taking the same view, the Supreme Court in *Lt. Col. S.J. Chaudhary v. Delhi Administration,* \(^{(215)}\) observed that absenting from courts on a particular day in pursuance of a concerted movement on the part of the lawyers to boycott a court amounts to professional misconduct. The court also observed

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that having accepted the brief, if the advocate abstains from attending the court then he will be committing a breach of his professional duty.

When lawyers go on strike, it is only the litigating party who suffers. During the strike, in the guise of taking urgent matters of injunction, bail etc., lawyers can remain monetarily very comfortable. They earn a well-paid rest. Similarly, the judges and Government are also not at a loss. Judges would get their pay without any deduction. So everybody is happy at the cost of the poor litigating man who has no alternative except to wait and wait for his case to be finally disposed off.

In *Ex-Captain Harish Uppal v. Union of India,* the Supreme Court held that lawyers have no right to go on strike or give a call for boycott, not even a token strike. The protest, if any is required, can only be by giving press statements, T.V. interviews, carrying out on court premises banners and or placards, wearing black or white or any colour arm bands, peaceful protest marches outside and away from court premise, going on *dharnas* or relay fasts etc.

Thus the court has recognised ‘the right to protest’ of lawyers but at the same time said that they do not have a right to strike or boycott. The right to protest of the lawyers should not be curtailed. Further, as our Constitutional system becomes more majoritarian, role of protest has increased. Wearing armbands are not effective methods of protest. Hence protest must be resorted to on a non-coercive basis as a last resort for a limited duration bearing in mind the workload of the courts and the effect of protest on the administration of justice. Indeed, it is the Bar that should come to the rescue of the Bench when the judicial power is under threat and judges pressurised. Browbeating lawyers may undermine judicial independence.

It is submitted that the members of the Bar thus have no right to boycott courts in view of the duties which they are required to discharge. It is true that under the Constitution of India, freedom of association is guaranteed as a
fundamental right, but this right is subject to reasonable restriction in the interest of public order and morality. A non-coercive call to join a strike falls within the domain of free speech and is not a professional misconduct. The prohibition against strikes by lawyers is inbuilt in the Advocates Act, 1961. The duties to the court and duties to the clients prescribed by the Bar Council Rules go to prove that strike or boycotting of courts is antithesis to practice in the court, and is a professional misconduct.

The Court rightly opined in Harish Uppal's case that in case any Bar Association calls for a strike or boycott the concerned State Bar Council and on their failure the Bar Council of India must immediately take action against the Advocates who give a call for strike.

It is submitted that the Bar Association should seriously discuss the issues involved in boycotting the courts, for the purpose of protecting the rights of the litigants and to carry out the objects underlying Articles 22 and 39–A of the Constitution of India and evolve other appropriate legal measures as an alternate to strike to seek redressal of grievances.

Other Misconducts

There are certain other conducts which are not expected from a lawyer. Following are some important judicial decisions, which point out certain other types of misconduct.

(a) Soliciting, Advertising and Touting

An Advocate is not expected to do or should be allowed to do on his behalf, anything for the purpose of soliciting clients for his professional services. The Bar Council Rules expressly prohibit a lawyer from soliciting, advertising and touting. In P.D. Khandekar v. Bar Council of Maharashtra, the

court held that touting or appointing touts is inconsistent with the rules framed under the Advocates Act and such practice would be considered as professional misconduct. The underlying principle behind prohibiting advertising and touting is that lawyer’s profession is entirely different from trade or business. It is the well-recognized rule of conduct that no attempt should be made to advertise oneself directly or indirectly. But in practice there are indirect advertising, like publishing the name of the advocate who appeared in a case through the media, websites created by lawyers, taking part in radio-television programmes, engaging legal aid programmes, and engagement in public activities etc.

The situation in India demands not a complete prohibition of advertising or touting\(^\text{220}\) by a lawyer but a regulation of the same. This is because the touts can play a significant role in assisting a client to seek legal aid where the majority of the people are unaware of their legal rights and remedies. Further there is no need to prohibit an advertisement that a legal practitioner is a specialist in a particular branch of law. Moreover, it is difficult to prove that the advertising was made on lawyer’s own initiative. The only necessary restriction in this regard seems to be the prohibition of unfair advertising.\(^\text{221}\) Therefore it is submitted that the present rules prohibiting advertisement by lawyers should be amended preventing only unfair advertisements.

(b) Restriction on Other Employment

An Advocate has a duty to stick on to the profession and elevate it. He is not expected to engage in other trade or profession or employment, which will bring down the standard of the profession. The Bar Council Rules expressly

\(^{220}\) The Law Commission in its 14\(^{th}\) Report recommended stringent measures against lawyers who sought the help of touts to get briefs. Further R. 292 of the Rules of The High Court of Kerala, 1971 prohibits the employment of any person who is a tout as advocate’s clerk.

\(^{221}\) In England, under the Code of Advertising and Publicity a barrister is permitted to write books or articles for publication, broadcast by radio or television, or participate in the making of a film subject to certain conditions. *Code of Conduct for the Bar of England and Wales* (4\(^{th}\) edn.-1989), para. 27.1.
places restriction on other employments. Thus the Supreme Court in Haniraj L. Chulani (Dr.) v. Bar Council of Maharashtra and Goa has observed that legal profession requires full time attention and would not countenance an advocate riding two horses or more at a time. The court further said that such a restriction is for ensuring the full time attention of law practitioners towards their profession and with a view to bringing out their best so that they can fulfil their role as an officer of the court and can give their best in the administration of justice.

Even though an advocate shall not be a full time salaried employee of any person, firm, corporation or concern, an advocate appointed during the period of service as a government pleader or public prosecutor or Attorney will be deemed to be a practicing advocate. But a public prosecutor appointed under the provisions of the Code of Criminal Procedure cannot be permitted to add the period of service as such to the period of standing at the Bar. An Advocate’s position as honorary director will not in any way militate against his being an advocate. In Satish Kumar Sharma v. Bar Council of H.P., it was held that where a Law Officer carries out work in addition to those of an advocate on behalf of his employer, there could be a conflict of duty and interest. The test is to determine whether he has been engaged to act or plead in a court of law as an advocate, and not whether he is engaged on salary basis or payment by remuneration.

It is true that to put forward a best performance as an advocate, he is required to give whole-hearted and full-time attention to his profession. Any flinching from such unstilted attention to his legal profession would certainly have an impact on his professional ability and expertise. This is the reason

222. Bar Council of India Rules, Part V, Rr. 40-44.
why other employment by lawyers is prohibited. But this rule has very bad effect on junior lawyers, because they get very low pay from their seniors. So the rule should not be a prohibitory one, rather it should be a regulatory one. The junior lawyers should be allowed to do part-time jobs so that they can earn sufficient money for their survival.

A charge of professional misconduct is in the nature of a quasi-criminal charge. Such a charge requires to be proved beyond reasonable doubt. The burden of proving the charge of misconduct is on the charging party. An examination on the disciplinary action taken by Court and Disciplinary Committees on the misconduct of lawyers shows that, the disciplinary authorities give greater punishments like removal from rolls and suspending the lawyer from practicing only in extreme cases where the misconduct is more serious in nature. In all other cases the punishment is lesser, i.e., either reprimanding or admonition.

The definition of the term misconduct is not an exhaustive one. There may be of course difference in degree between professional misconduct which would justify striking off names from the rolls or suspension, on the one hand and that which would justify some lesser punishment of reprimanding or admonition, on the other. Punishments in the form of requiring free compulsory legal aid to the poor seems to be advisable. But one cannot assure the quality of such forced legal aid.

Conclusions and Suggestions

The Advocates Act, 1961 is not free from infirmities. It contains some major defects and contradictory provisions, which require immediate amendment. For example, the Bar Council of India is given power to receive a complaint about an advocate whose name is not entered on any of the State rolls. But such a person is not an advocate as per section 2(1) (a) of the

231. Id., S. 2(1) (a) reads: "In this Act, unless the context otherwise requires, - advocate means an advocate entered in any roll under the provisions of this Act".
Act and is outside the disciplinary jurisdiction of the Bar Council. There are many other flaws in the Act as well as the Rules. The most important and surprising is that the term “guilty of professional or other misconduct” are nowhere defined nor any provision for framing of charge is made. Unless such definition of guilt is made, no suitable legal action could be taken under the Act. The definition of misconduct should be exhaustive and lawyers be punished only for the commission of such misconduct.

Sections 35 (4) and 40 (1) create contradictory positions in as much as when under Section 40 stay is granted by the appellate authorities it becomes infructuous because Section 40 (1) empowers appellate authority to grant stay while Section 35 (4) for want of wording “subject to the provisions of Section 40”, does not. As it stands this Section says though there is a stay order in force, an advocate during the period of suspension, be debarred from practicing in any Court. Hence to avoid conflict, Section 35 (4) should begin with the wording “subject to the provisions of Section 40.”

It is equally significant to note that while Section 35 refers to a complaint neither Section 35 nor Sections 36, 37 or 38 refers to a complainant and Section 35 does not provide for a notice (of inquiry) to the complainant or gives an opportunity of being heard. Further where a complainant wants to have an opportunity of explaining his complaint orally, there is no provision to interview him orally. The complainant will not be informed about the progress of the inquiry or the proceedings. Moreover, no reasons will be given when a complaint is rejected. It may be argued that a disciplinary proceeding against an advocate is not a lis between parties, i.e. the client and the advocate. Hence his role comes to an end with his bringing the case to the notice of the Bar Council and thereafter it is a matter entirely between the Advocate and the Bar Council and so he has no locus standi. But now the situations have changed a lot. Lawyer’s duty as well as his obligation to the community demands transparency in legal proceedings.

The Bar Council does not have power to investigate on the receipt of a complaint. The investigation of complaints and the institution of disciplinary proceedings is an extension of general power of supervision in the conduct of their practices. This function is separate from the hearing and determination of
proceedings on complaints against lawyers. Therefore, it is suggested that there should be an Investigation Board to enquire into the conduct of the lawyers and it should be accountable to the Disciplinary Committee of the Bar Council. Complaints of lack of care or competence, which would only give rise to a liability in civil proceedings for negligence but fall short of professional misconduct, should be subjected to such investigation by the Investigation Board. Complaints of serious nature should be heard by the Disciplinary Committee. Thus the Investigation Board and the Disciplinary Committee would be empowered to direct a lawyer to improve his performance as a lawyer and would be empowered to direct a lawyer to provide a remedy to a client whose work he has not done or done without proper care. This will help disciplinary jurisdiction to extend to cases of negligence and cases of deficient service.

Further the regulatory function of the Bar Council should also include any requirement for compulsory continuing legal education. This may be for the purpose of obtaining renewal of a practicing certificate or as a means of rehabilitation after misconduct or to achieve recognition as a specialist.

Section 36B of the Act compels the Disciplinary Committee of the State Bar Councils to dispose of a complaint of professional misconduct within a period of one year. But there is no such time limit in the case of disposal of appeal by the Bar Council of India. It is submitted that a time limit must be provided in the case of disposal of appeals by the Bar Council of India also.

The Disciplinary Committee is given the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908. If so, Section 44 offends Article 12 of the Limitation Act, 1963 and Rule 2 of the Supreme Court Rules, 1966 as they prescribe thirty days for review. Therefore, it is

233. Limitation Act, 1963, Article 12. For a review of judgment by a Court other than Supreme Court, period of limitation is thirty days.
234. Supreme Court Rules, 1966, R. 2 Part VIII, Order XL—Review: R. 2: An application for review shall be by a petition and shall be filed within thirty days from the date of the judgment or order sought to be reviewed.
submitted that in order to bring similarity the limitation period in Section 44
should be amended as thirty days in the place of sixty days. Consequently it
be also corrected as thirty days in place of sixty days in Rule 1, Part VII
Chapter II of Bar Council of India, Rules.

Professional ethics of lawyers may be found in the Bar Council of India
Rules. But they are vague, ambiguous and abstract. Certain conduct, which is
thought generally to be unbecoming of an Advocate, may also escape
punishment owing to such vague formulations. To avoid such hardships,
formulation of a Code of Conduct for lawyers is necessary.

India lacks a code of conduct, which specifically deals with the
professional conduct of lawyers. Codification of rules of legal ethics will furnish
an authoritative statement of ideals by which every lawyer, when in doubt,
may be guided. It will tend to raise and strengthen the standard of professional
honour. Such a Code based on ancient tradition will serve as guidance for
lawyers and will help in checking the growing tendency in the direction of
commercialising the vocation of the Bar. It will be helpful to the Bar Councils
and the Supreme Court in judging and censuring acts of the lawyer. So a
Code of Legal Ethics containing rules in a simple and readily accessible form
should exist to influence the conduct of the advocate from the very early days
of commencement of his career.

It is true that, it is rather difficult to formulate a code of legal ethics,
which will provide the lawyer with a specific rule to be followed in all the
varied relations of his professional life. So the maximum that can be done is to
state with as much particularities as possible and with due regard to custom
and tradition, those general principles which experience has taught must be
observed. The Bar Council of India Rules and previous decisions may be
used for formulating such a code. This will help the profession to maintain its
high place in the social structure and to fulfil the important and responsible
duties, which fall to its lot. It will help the public to know the nature of conduct
that is expected of lawyers and will be a safeguard to the clients from
harassment by the undesirable elements of the profession.
The regulatory system should be above criticism. No chance about a charge of victimization of advocate in disciplinary proceedings is to be given. So after the receipt of complaint there should be an investigation about the allegation. Further the members of the Bar Council shall not be made members of the Disciplinary Committee. They must be somebody from outside the Bar Council.

The conflict or tug of war between the Bench and Bar should be minimized. Even if there is a dispute between them or where there is a genuine allegation about the conduct of a Judge the Bar may complain to the appropriate forum. The members of the Bar Association have no right to boycott courts in view of the duties, which they are required to discharge. It is true that under the Constitution of India, freedom of association is guaranteed as a fundamental right, but this right is subject to reasonable restriction in the interest of public order or morality. The prohibition against strikes by lawyers is inbuilt in the Advocates Act, 1961. The duties to the court and duties to the clients prescribed by Bar Council of India go to prove that strike or boycotting of courts is antithesis to practice in the court, and is a professional misconduct. An advocate being an officer of the court is bound to submit to its authority and cannot join in an action to boycott the court. At the same time lawyer's right to protest should not be curtailed. An appropriate forum should be constituted to redress grievances of the advocates.

An organised Bar has the solemn duty to ensure that each and every member of its Bar behaves in a way conducive to the noble tradition of the profession. But one can see that even criminals are there among law graduates and once the period of two years after their release is over they get enrolled as advocates. So a proper screening of candidates is required before they enter into the profession. It is submitted that the Central Government should make necessary amendments in the Advocates Act to give State Bar Council and the Bar Council of India power to make proper checks at the entry level itself and to make rules for conducting examination so that only suitable candidates enter the profession.
The above discussions show that only when the profession is properly regulated, administration of justice is possible. Hence the Supreme Court rightly observed in *R.D. Saxena v. Balram Prasad Sharma*\(^{235}\):

"It is high time for the legal profession to join hands and evolve a code for themselves in addition to the Advocates Act and Rules made there under and the Rules made by the High Courts and the Supreme Court, for strengthening the belief of the common man in the institution of judiciary in general and in their profession in particular. Creation of such faith and confidence would not only strengthen the rule of law but also result in reaching excellence in the profession."

If the members of the profession do not follow the code of conduct and rules and regulations, then, every public-spirited person who is interested in the effective administration of justice has a legal right and moral responsibility to question their unethical practice and to demand legal action about their misconduct. The ignorance of the public regarding the duties of advocates and the indifference and fear of the clients have only contributed to taking the system further away from the people and to the deterioration of the standard of performance of the advocates. It is only when the public become aware of their legal rights and demand better performance from the advocates that we can even think of raising the standard of the legal profession and of transforming it into an instrument of justice. The public, the judges and the advocates should realize the importance of an independent and responsible Bar in upholding the high ideals of democracy, independence of judiciary and rule of law.