

SUBJECT: LEGAL ETHICS AND COURT CRAFT

PAPER CODE: 501

SEMESTER – NINTH

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Text books:

1. Dr. Kailash Rai - Legal Ethics – Accountancy for lawyers and bench and Bar relations
2. B.R. Aggarwala – Supreme Court Practice and Procedure

References:

1. P. Ramanatha Iyer- Legal and Professional Ethics
2. B.B. Mitra – The Limitation Act

Essential Case Law:

1. A.M. Mathur v. Pramod Kumar Gupta, 1990 (2) SCC 533
2. Bar Council of Maharashtra v. M.V. Dabhulkar 1976(1) SCR 306 also 1976 (2) SCR 48
3. Hanraj L. Chulani v. Bar Council of Maharashtra, 1996 (3) SCC 342
4. K. Daniel v. Hymavathy Amma, AIR 1985 Ker. 233
5. Advocate Genl Bihar v. Patna High Court, 1986 (2) SCC 577
6. P.D. Gupta v. Ram Murti, 1997(7) SCC 147 7. H.D. Srivastava v. G.N. Verma 1977(2) SCR 6011

Unit – I

TOPIC I: SUPREME COURT RULES, 1966

Supreme Court of India came into existence on 28th of January, 1950, two days after India became a Republic. The inauguration took place in the Chamber of Princes in the Parliament building which also housed India's Parliament, consisting of the Council of States and the House of the People. It was here, in this Chamber of Princes, that the Federal Court of India had sat for 12 years between 1937 and 1950. This was to be the home of the Supreme Court for years that were to follow until the Supreme Court acquired its own present premises.

Commencement of Work

After its inauguration on January 28, 1950, the Supreme Court commenced its sittings in a part of the Parliament House. The Court moved into the present building in 1958. The building is shaped to project the image of scales of justice. The Central Wing of the building is the Centre Beam of the Scales. In 1979, two New Wings - the East Wing and the West Wing - were added to the complex. In all there are 15 Court Rooms in the various wings of the building. The Chief Justice's Court is the largest of the Courts located in the Centre of the Central Wing.

Composition

The original Constitution of 1950 envisaged a Supreme Court with a Chief Justice and 7 puisne Judges - leaving it to Parliament to increase this number. In the early years, all the Judges of the Supreme Court sat together to hear the cases presented before them. As the work of the Court increased and arrears of cases began to cumulate, Parliament increased the number of Judges from 8 in 1950 to 11 in 1956, 14 in 1960, 18 in 1978 and 26 in 1986. As the number of the Judges has increased, they sit in smaller Benches of two and three - coming together in larger Benches of 5 and more only when required to do so or to settle a difference of opinion or controversy.

The Supreme Court of India comprises the Chief Justice of India and not more than 25 other Judges appointed by the President of India. Supreme Court Judges retire upon attaining the age of 65 years. In order to be appointed as a Judge of the Supreme Court, a person must be a citizen of India and must have been, for atleast five years, a Judge of a High Court or of two or more such Courts in succession, or an Advocate of a High Court or of two or more such Courts in succession for at least 10 years or he must be, in the opinion of the President of India, a distinguished jurist. Provisions exist for the appointment of a Judge of a High Court as an Ad-hoc Judge of the Supreme Court and for retired Judges of the Supreme Court or High Courts to sit and act as Judges of that Court.

The Constitution of India seeks to ensure the independence of Supreme Court Judges in various ways. A Judge of the Supreme Court cannot be removed from office except by an order of the President passed after an address in each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of members present and voting, and presented to the President in the same Session for such removal on the ground of proved misbehavior or incapacity. A person who has been a Judge of the Supreme Court is debarred from practising in any court of law or before any other authority in India.

The proceedings of the Supreme Court are conducted in English only. Supreme Court Rules, 1966 are framed under Article 145 of the Constitution of India to regulate the practice and procedure of the Supreme Court.

SUPREME COURT RULES, 1966 [AMENDMENT DATED 11-12-1974]

In exercise of the powers conferred by Article 145 of the Constitution, and all other powers enabling it in this behalf, the Supreme Court hereby makes, with the approval of the President, the following rules further to amend the Supreme Court Rules, 1966, namely :—

1. These rules may be called the Supreme Court (Amendment) Rules, 1974.
2. They shall come into force on the date of their publication in the Official Gazette.*
3. In the Supreme Court Rules, 1966—

(1) In Order IV, for Rule 5, the following rule shall be substituted, namely:—

"5. No advocate shall be qualified to be registered as an advocate on record unless—

(i) his name is, and has been borne on the roll of any State Bar Council for a period of not less than three years on the date of commencement of his training as provided hereinafter ;

(ii) he has undergone training for one year with an advocate on record approved by the Court, and has thereafter passed such tests as may be held by the Court for advocates who apply to be registered as advocates on record, particulars whereof shall be notified in the Official Gazette, from time to time, provided however that an attorney shall be exempted from such training and test ;

(iii) he has an office in Delhi within a radius of 16 Kilometers from the Court House and gives an undertaking to employ, within one month of his being registered as advocate on record, a registered clerk ; and

(iv) he pays a registration fee of twenty-five rupees."

(2) In Order XXXIX—

(i) for Rule 7, the following rule shall be substituted, namely:—

"7. A petition calling in question an election may be presented on one or more of the grounds specified in sub-section (1) of Section 18 and Section 19 of the Act, by any candidate at such election, or—

(i) in the case of Presidential election, by twenty or more electors joined together as petitioners ;

(ii) in the case of Vice-Presidential election, by ten or more electors joined together as petitioners." ;

(ii) in Rule 26, after the words "any other candidate or", the words "in the case of Presidential election, another twenty electors, and in the case of Vice-Presidential election", shall be inserted

(iii) in Rule 33, after the words "any candidate or", the words "in the case of Presidential election, twenty electors, and in the case of Vice-Presidential election", shall be inserted ;

(iv) after Rule 35, the following rules shall be inserted, namely:—

"35-A. Soon after the conclusion of the hearing of the petition, the Registrar shall submit a statement to the Court showing the court-fee and other expenses incurred by each party to the petition and the total number of days of hearing of the petition.

35-B. At the time of passing the final order under Rule 35, the Court shall also make an order fixing the total amount of costs payable and shall further direct by and to whom the said costs shall be paid." .

TOPIC II- HIGH COURT RULES

Introduction

Delhi High Court (Original Side) Rules, 1967 In exercise of powers conferred by Sections 122 and 129 of the Code of Civil Procedure, 1908 and Section 7 of the Delhi High Court Act, 1966 (Act 26 of 1966) and all other powers enabling it, the Delhi High Court hereby makes the following Rules, after previous publication with respect to practice and procedure for the exercise of its ordinary original civil jurisdiction. Ch. I, CHAPTER I General R. 1 1. Short title—These Rules may be called the “Delhi High Court (Original Side) Rules, 1967”. R. 2

1. Commencement

These Rules shall come into force with effect from such date as may be notified. R. 3 3. Application—All proceedings on the original side of the Court instituted or transferred pursuant to provisions of the Delhi High Court Act of 1966 or any other law shall unless otherwise ordered by the Court be governed by these Rules. R. 4 4. Definitions—In these Rules, unless the context otherwise requires: (a) „Advocate” means a person who is entitled to practice the profession of law under the Advocates Act, 1961 (Act No. 25 of 1961); (b) „Chief Justice” means the Chief Justice of the High Court and includes appointed under the Constitution to perform the duties of the Chief Justice; (c) „Code” means the Code of Civil Procedure, 1908 (V of 1908) as amended from time to time; (d) „Constitution” means the Constitution of India; (e) „The Court” or „This Court” means the Delhi High Court; (f) „First hearing” includes the hearing of a suit for settlement of issues and any adjournment thereof; (g) „Interlocutory application” means an application in any suit, appeal or proceeding, already instituted in the Court, not being a proceeding for execution of a decree or order;

(h) „Judge” means the Judge of the Court;

(i) „Registrar” means the Registrar of the Court and includes any other officer of the Court to whom the power and functions of the Registrar under these Rules may be delegated or assigned;

(j) „Registry” means the Registry of this Court;

(k) „Taxing Officer“ means the Taxing Officer appointed under Section 6 of the Court-fees Act and includes the Officer of the Court whose duty is to tax costs of proceedings in the Court;

(1) All other expressions used herein shall have the meaning ascribed to them by the Code or the General Clauses Act, 1897 (10 of 1897), as the case may be.

Rules of Delhi High Court

5. Steps to be taken in the Registry—Where by these rules or by any order of the Court, any step is required to be taken in connection with any suit, appeal or proceeding before the Court, that step shall unless the context otherwise requires be taken in the Registry.

6. Period how calculated—Where a particular number of days is prescribed by these Rules or by or under any other law or is fixed by the Court for doing any act, in computing the time, the day from which the said period is to be reckoned shall be excluded, and if the last day expires on a day when the office of the Court is closed, that day and any succeeding days on which the Court remains closed shall also be excluded.

7. Forms to be used—the forms set out in the Court with such modifications or variations as the circumstances of each case may require, shall be used for the purpose therein mentioned.

Where no form required for any purpose is prescribed, a form approved by the Registrar, may be used.

8. How decree, order, writ etc. to run—Every decree, order, writ-summons, warrant or other mandatory process shall in the name of the Chief Justice and shall be signed by the Registrar or any other officer specifically authorised in that behalf with the day, month and year of signing and shall be sealed with the seal of the Court.

9. Official Seal—The official seal to be used in the Court shall be such of the Chief Justice may from time to time direct and shall be kept in the custody of the Registrar.

10. Custody of the Records—The Registrar shall have the custody of the records of the Court and no record or document filed in any cause or matter shall be allowed to be taken out of the custody of the Court without the leave of the Court.

11. Hours of Sitting—Unless otherwise ordered by the Chief Justice, the Court shall hold its sittings on all working days from 10.00 A.M. to 1.00 P.M. and from 1.45 P.M. to 3.45 P.M.

12. Office Hours—The Offices of the Court shall remain open daily from 9.30 A.M. to 4.30 P.M. 2[Any urgent matter filed before 12 noon shall be put before the Court for hearing on the following working day. In exceptional cases, it may be received thereafter for hearing on the following day with the specific permission of the Hon“ble Judge-in-Charge (Original Side)].

13. Process and copying fee—In all proceedings on the Original Side of the Court process fee and copying fee shall be charged in accordance with the rules in force immediately before the appointed day fixed under Section 3 of the Delhi High Court Act of 1966.

14. Court’s power to dispense with Compliance with the Rules—The Court may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these Rules and may give such directions in matters of practice and procedure as it may consider just and expedient.

15. Application for the above purpose—An application to be executed from compliance with the requirements of any of the rules shall, in the first instance, be placed before the Registrar, who may without interfering or dispensing with any mandatory requirements of the rules, make appropriate order thereon, or, if in his opinion, it is desirable that the application should be dealt with the Court, direct the applicant, if the other party has entered appearance, to serve a copy thereof on the said party, and thereafter place the same before the Court on a convenient day for orders.

16. Courts power to enlarge or abridge time—The Court may enlarge or abridge the time appointed by these Rules or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms, if any as the justice of the case may require, and any enlargement

may be ordered, although the application therefor is not made until after the expiration of the time appointed or allowed.

17. The Court at any time, either of its own motion or on the application of any party, make such orders as may be necessary or reasonable in respect of any of the matters mentioned in Chapter XXI of these Rules.

18. Inherent power of the Court not affected—Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

19. Miscellaneous—Except to the extent otherwise provided in these rules, the provisions of the Civil Procedure Code shall apply to all proceedings on original side. COMMENTS Where a suit was filed by Bank on the Original Side at Delhi High Court for recovery of certain sums based on cash credit facilities and customer had deposited the title deeds in respect of House property situate at Mathura as collateral security. The suit was liable to be dismissed for want of jurisdiction, as the provisions of Section 16 CPC would apply. Rule 19 of the Original Side Rules specifically provides that wherever the Rules are silent, the CPC will apply. State Bank of India v. O. P. Gupta and others, AIR 1983 Delhi 214 : 1983 (4) DRJ 83 : 1983 (23) DLT 198. It is not correct to say that because by the application of Rule 19, the orders which are appealable are restricted to those mentioned in Order 43 Rule 1 of CPC. There is a conflict between Section 10(1) of Delhi High Court Act and Rule 19 of the Rules as the two provisions deal with different matters. Section 10(1) deals with the forum of appeal whereas Rule 19 of the Rules read with Order 43 Rule 1 of CPC indicates the orders which are appealable. Thus by the application of Rule 19 which in terms also applies the Code to the ordinary original civil jurisdiction of this Court, an appeal under Section 10(1) of the Act would be competent only if it falls within Section 104 or Order 43 Rule 1 of the Code.

1. Vide Notification No. F. Gen. 4(47) the Rules came into force w.e.f. 10-7-1967.

* Vide Notification No. 704/G/Gen.II/DHC dated 16-12-1981, the Court sitting hours were changed from 10.30 A.M. to 4 P.M. with lunch break from 1.15 P.M. to 1.45 P.M. (w.e.f. 4-1-1982).

2. Substituted for the words “Any urgent matter filed before 12.30 P.M. shall be put up before the Court on the following working day” by Notification No. 46/Rules/DHC dated 11.4.2002.

UNIT – II

TOPIC 1: LIMITATION ACT, 1963

The Limitation Act, 1963 – An Overview

- Applicable from 1.1.1964
- Applicable to whole of India except J&K.

Meaning: - Limitation means, the time at the end of which, no action at law or suit can be maintained. It is a restriction of the right of action to certain periods of time, after the accruing of cause of action, beyond which, except in certain specified cases, it will not be allowed. Legal remedy can be exercised only up to certain period and not subsequently.

1. Concerned Enactments

- (a) Arbitration Act 1940, effective up to 24-01-1996
- (b) Indian Contract Act 1872
- (c) Arbitration and conciliation Act, 1996,

Main Provisions

Description of Suits Period of Time from which Limitation period being to run For compensation for Three years when the time breach of a promise specified arrives to do anything at a specified time.

54. For specific performance Three years the date fixed for of a contract. Performance, or, if no such date is fixed when the plaintiff has noticed that performance is refused.

55. For compensation for the Three years When the contract breach of any contract, is broken express or implied not herein specifically provided for.

137. Any other application for Three Years when the right to which no period of limitation apply accrues is provided elsewhere.

Section 3 – Bar of Limitation

Every suit instituted, appeal, and application made after the prescribed period, shall be dismissed.

Section 4 – when court is closed:-

When prescribed period expires on a day when court is closed, application can be made on the date when the court reopens.

Section 5 – extension of Prescribed Period in Certain Cases:-

Prescribed Period can be extended if applicant satisfies the court with sufficient cause

Sufficient Cause:-

- Illness
- Bona-fide mistake
- Wrong proceedings
- Taken in good faith
- Proceedings in wrong court through bona-fide mistake
- Ignorance of facts
- Mistaken advice of layer
- Bona-fide mistake in calculation

Insufficient Grounds

- Ignorance of Law
- Poverty
- Negligence of pleader or clerk

Section – 6 – Legal Disability

If a person is having legal disability like Minor, Insane or Idiot, prescribed period is to be reckoned after the disability is ceased (over).

Section – 9 –Continuous running of time

Once time has began to run, no subsequent disability to institute a suit or make an application stop it.

Means once time has began to run, no subsequent disability will stop it.

e.g. on the date from which prescribed period is to be reckoned, a person was OK, time will start to run & if subsequently he becomes legally disabled, time will not stop.

Section 12 Exclusion of time in Legal Proceedings

- (i) The day from which such period is to be reckoned, shall be excluded.
- (ii) The time requisite for obtaining a copy of judgment shall be excluded.

Section 16–Effect of death on or before the accrual of the right to sue

The limitation period shall be computed from the day when there is a legal representative of deceased capable to sue.

Section -18 Effect of Acknowledgment in Writing

Before expiry of prescribed limitation period, if an acknowledgment of liability has been made in writing signed by the party against whom such property or right has been claimed, a fresh period of limitation shall be computed from the date of Acknowledgement. Time is reset a zero from the date of Acknowledgment. e.g. Post dated cheque is an acknowledgement.

Topic II: INDIAN REGISTRATION ACT, 1908

Introduction

The provisions relating to the registration of documents are now scattered about in seven enactments. This will make the law more easily ascertainable. It will further clear the Statute-book of three entire Acts and will enable two more Acts to be entirely removed from it on the coming into force of the Code of Civil Procedure, 1908, and of the Indian Limitation Bill, now before Council. The opportunity has been taken to incorporate alterations of a formal character intended merely to improve and simplify the language of the existing Act. The numbering of the sections of the Act of 1877 has been preserved. It has been found that the mere process of consolidation might result in the law being changed in some respects. To avoid this some few amendments appear to be necessary.

Purpose of the Act

The purpose of the Registration Act, amongst other things, is to provide a method of public registration of documents so as to give information to people regarding legal rights and obligations arising or affecting a particular property, and to perpetuate documents which may afterwards be of legal importance, and also to prevent fraud. Registration lends inviolability and importance to certain classes of documents.

Registration Procedure in The Act

The scheme of the Act is to consolidate the law relating to registration and to provide for the establishment of its registration. It lays down what documents require compulsory registration. S. 23 of the Act provides the time for presenting the documents for registration.

It provides limitation for getting a document registered. S.25 provides for condonation of delay in presenting documents for registration. S. 34 specifically provides for that enquiry, that can be held before the registration by the Registering Officer: Central Warehousing It is well settled that an instrument which creates a right or interest in the rents, profits, benefits and income from an

immovable property, is a document which is compulsorily registrable. Thus, a document creating an assignment of a debt will not require registration, but a document assigning rents will require registration. If the power of attorney in question is to be treated as creating an equitable assignment of rents, it will require registration and if not registered, will be void and unenforceable. The power of attorney does not create or recognize any right in or relating to any immovable property or benefit arising there from in favor of the bank. It merely authorizes the bank to act as the company's agent to perform the acts stated therein.

The question whether a machinery which is embedded in the earth is movable property or an immovable property, depends upon the facts and circumstances of each case; primarily, the Court will have to take into consideration the intention of the parties when it decided to embed the machinery whether such embedment was intended to be temporary or permanent (case under Stamp Act, 1899).

Provisions Regarding Lease Documentation

The rent note is an agreement to lease which falls under wider definition of lease under the Registration Act. The rent note or agreement to lease may be in counter-part signed by both the parties or it may be in correspondence or in acts or conduct. If there is no present demise, the agreement may be effected by an unregistered instrument or even orally. If there is present demise, the rent note operates as a transfer by way of lease and if the term does not exceed one year, registration is not necessary, but if the term exceeds one year, registration is necessary not under S. 107, T.P. Act but under the Registration Act. An instrument signed by either the lessor or lessee alone would operate as an agreement to lease or a rent note. A rent note signed by the lessee alone is not a lease but would be a lease under the Registration Act and the question of its registration has to be decided under that Act.

Conclusion

The registrations act illustrates about the procedure of registering, what documentations should be registered and how it should be done. The registration of Will documents, powers and duties of the registrations department. It also explains about the penalties and punishment for not

following the procedure and not completing things on time. This Acts brings a good administration system among government offices and the court system that everything should be managed with in time and in a proper procedure in order to avoid future confusions.

UNIT III: BENCH & BAR RELATIONS

1. RECIPROCIITY AS PARTNERS IN ADMINISTRATION OF JUSTICE

Introduction

The body of persons which operates the machinery through which justice is administered, composed mainly of the Judges and the Advocates who help them in discharging their difficult duties, has existed and functioned both in ancient and modern times. Its broad purpose throughout has been to realise all those goals which are labelled "Justice" according to the law which has to be administered in a society whether it is ancient or modern, capitalistic or socialistic, feudal or industrial. Concepts of justice, however, have changed vastly in the course of time. And, as between different States in modern times too, Justice, as embodied in the law, has different contents and connotations. Such differences as we find between different States as regards the functions of the Bench and Bar are, I suggest, mainly due to the some what differing basic concepts of justice found in the laws of different States. These concepts have been produced and moulded by the operations of complex and interconnected, constantly acting and counter-acting, sets of factors in the course of our histories

Indian Scenario

In this country, at any rate, there has been considerable hard thinking about the basic structure and the operations of our machinery for the administration of justice. Bench and Bar are the two arms of the same machinery and unless they work harmoniously, justice cannot be properly administered through the courts of law. But lapses occur from both' sides, which tend to stiffen their relationship. The lawyers in the discharge of their duties have sometimes to use expressions which may not be palatable to the court but they are never used either with the intention of offering any insult or causing any interruption to the proceedings of the court.

Duties of Bar Towards the Bench

It may be noted that good behaviour of lawyers goes a long way in their attempt to acquire justice from the court for their clients. Not only the scholarship of a lawyer plays an important role in achieving success in the court rather his good conduct also helps and plays effectively in this direction. The statements of the lawyers influences the court, so they are under moral and legal obligation to be sober, fair and cordial in their dealings with the court. It does not mean that the lawyers have to surrender to the improper behaviour of the judge. The lawyers have legal right to object the improper behaviour of the judge and they are entitled to enlighten their grievances to the higher authorities of the court. Thus, while the lawyers have to maintain the dignity and decorum of the court, they have not to do or behave as such, which may bring down the reputation of the court in the mind of the litigants as well as general public of the society. In this context, the Bar Council of India has framed certain rules for observance by the lawyers towards the court, their colleagues and clients.

Duties of Bench towards The Bar

On the other hand, the behaviour of the judge towards the lawyers also plays an important role in the due administration of justice. It is the behaviour of the judge with the lawyers, which makes the atmosphere of the court quite cordial and congenial. A judge has to be impartial in his dealings with advocates. The judge should not only be free from bias or interest in any case rather he should not be guided by the obstinacy and snobbery in his conduct with advocates. It is so because the life, liberty, reputation and property of the citizens are greatly influenced by the decision of the judge. The judge has to play a very temperate and sober role in the dispensation of justice to the society, which he can fulfil by observing sober, cordial and impartial behaviour, towards the lawyers at large.

Inter Relationship between Bench And Bar

It is pertinent to note that the relationship between the advocate and judge is quite delicate. On the one hand, it is important to allow an advocate to be firm and resolute in the pursuance of his case while on the other, the judge must maintain his authority in the court. Of course, an

advocate should avoid rule, insolent or insulting behaviour but a judge should not be over-sensitive to the remarks made against him.

The second important duty of a judge towards the Bar, is to respect and safeguard its privileges. The counsel has a right to insist for a courteous and patient hearing from a judge till he is respectfully and relevantly arguing his case before him. This right of the counsel deserves due respect from the Judge.

The third important duty which a judge owes to the counsel is patient hearing of the case. The judge has no business to form a forehand opinion before the case is heard by him.

The last but not the least duty which a judge owes to the counsels is to avoid confrontation with the lawyers in the process of argument and examination of witnesses. The judge should not interrupt the counsel till he is arguing relevantly and purposefully. Till the lawyer is presenting his case in an orderly way, there should be patient hearing and co-operation from the side of the judge, as otherwise it would lead to miscarriage of justice.

Case Laws Defining Relationship Between Bar and Bench

The opinion of our Supreme Court in the context of Bench- Bar Relations, has been clearly laid down in P.D. Gupta v. Ram Murti and Others (AIR 1998 SC 283) as follows:

"A lawyer owes a duty to be fair not only to his client but also to the court as well as to the opposite party in the conduct of the case. Administration of justice is a stream which has to be kept pure and clean. It has to be kept unpolluted. Administration of justice is not something which concerns the Bench only. It concerns the Bar as well. The Bar is the principal ground for recruiting judges. Nobody should be able to raise a finger about the conduct of a lawyer. Actually judges and lawyers are complementary to each other. The primary duty of the lawyer is to inform the court as to the law and facts of the case and to aid the court to do justice by arriving at the correct conclusions. Good and strong advocacy by the counsel is necessary for the good

administration of justice. Consequently, the counsel must have freedom to present his case fully and properly and should not be interrupted by the judges unless the interruption is necessary."

In *Mahant Hakumat Rai v. Emperor* (AIR 1943 Lahore 14.) the Lahore High Court had held that "Without failing in respect to Bench, it is the duty of the members of the Bar to assert their just rights to be heard by the tribunal before which they are practising. They should be fearless and independent in the discharge of their duties, and would be perfectly right in protesting against irregular procedure on the part of any judge; and if the advocate is improperly checked or found fault with, he should vindicate the independence of the Bar. He would be perfectly justified in insisting on getting a proper hearing and he would be perfectly right to object to any interruption with the course of his argument such as to disturb him in doing his duty to his client. Plenary powers vested in the Presiding Officer of the Court, apart from the fact that they have rarely been used against members of the legal profession so far, should only be used to vindicate the honour of the court or to satisfy the necessities of public justice and not as a matter of course." It may, however, be noted that the presence of professional etiquette coupled with recognition by judiciary of the importance of an independent Bar, will work together to minimise the possibility of confrontation between the Bench and the Bar.

Conclusion

A free and fearless Bar is not to be preferred to an independent judiciary, nor an independent judiciary to a free Bar. Neither has a primacy over the other. Both are indispensable to a free society. The freedom of the Bar presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. One of the potent means for assuring judges of their independence is responsible, well- behaved, cultured and, learned Bar. Finally, reciprocal adjustment of conduct by the Bench and the Bar is the keystone to the smooth functioning of courts in general interest of the society.

TOPIC II: PROFESSIONAL MISCONDUCT

Introduction

Advocacy is a noble profession and an advocate is the most accountable, privileged and erudite person of the society and his act are role model for the society, which are necessary to be regulated. Professional misconduct is the behaviour outside the bounds of what is considered acceptable or worthy of its membership by the governing body of a profession. Professional misconduct refers to disgraceful or dishonourable conduct not befitting an advocat. Chapter V of the Advocate Act, 1961, deals with the conduct of Advocates. It describes provisions relating to punishment for professional and other misconducts. Section 35(1) of the Advocate Act, 1961, says, where on receipt of a complaint or otherwise a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to it disciplinary committee. Generally legal profession is not a trade or business, it's a gracious, noble, and decontaminated profession of the society. Members belonging to this profession should not encourage deceitfulness and corruption, but they have to strive to secure justice to their clients. The credibility and reputation of the profession depends upon the manner in which the members of the profession conduct themselves. It's a symbol of healthy relationship between Bar and Bench.

The Advocates Act, 1961 as well Indian Bar Council are silent in providing exact definition for professional misconduct because of its wide scope, though under Advocates Act, 1961 to take disciplinary action punishments are prescribed when the credibility and reputation on the profession comes under a clout on account of acts of omission and commission by any member of the profession.

Meaning and Definition

Profession is a vocation requiring some significant body of knowledge that is applied with high degree of consistency in the service of some relevant segment of society, by Hodge and Johnson.

Noratanman Courasia v. M. R. Murali the Supreme Court explored the amplitude and extent of the words "professional misconduct" in Section 35 of the Advocates Act. The facts of the case involved an advocate (appearing as a litigant in the capacity of the respondent, and not an advocate in a rent control proceeding) assaulted and kicked the complainant and asked him to refrain from proceeding with the case. The main issue in this case was whether the act of the

advocate amounted to misconduct, the action against which could be initiated in the Bar Council, even though he was not acting in the capacity of an advocate. It was upheld by the Supreme Court that a lawyer is obliged to observe the norms of behavior expected of him, which make him worthy of the confidence of the community in him as an officer of the Court. Therefore, inspite of the fact that he was not acting in his capacity as an advocate, his behavior was unfit for an advocate, and the Bar Council was justified in proceeding with the disciplinary proceedings against him.

Provisions in Advocates act 1961

The advocates act 1961 is a comprehensive legislation that regulates the legal practice and legal education in India. It envisages for the establishment of Bar Council of India and State Bar Councils with various disciplinary committees to deal with misconduct of the advocates. It also provides for the provisions relating to the admission and enrolment of advocates and advocates right to practice. Chapter V containing sections 35 to 44 deals with the conduct of the advocates. It provides for punishment for advocates for professional and other misconduct and disciplinary powers of the Bar council of India. In order to attract the application of section 35 of the advocates act the misconduct need not be professional misconduct alone. The expression used in the section is Professional or other misconduct. So even conduct unconnected with the profession may account to a misconduct as for example, conviction for a crime, though the crime was not committed in the professional capacity. 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 in to 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.

Misconduct is of infinite variety, the expression professional or other misconduct must be understood in their plain and natural meaning and there is no justification in restricting their natural meaning. The term misconduct usually implies an act done willfully with a wrong intention and as applied to professional people it includes unprofessional acts even though such acts are not inherently wrongful.

The Code of Conduct Prescribed For Advocate

Section 49 of the advocate's act 1961 empowers the Bar Council of India to frame rules regulating standards of professional conduct. Accordingly various duties are prescribed for the advocates some of them are highlighted below.

No advertising or soliciting work, it is against an advocate's code of ethics to solicit or advertise work and amounts to a misconduct on the part of the advocate. Both direct and indirect advertising is prohibited. An advocate may not advertise his services through circulars, advertisements, touts, personal communication or interviews not warranted by personal relations. Similarly, the following forms of indirect advertising are prohibited:

(i) by issuing circulars or election manifestos by a lawyer with his name, profession and address printed on the manifestos, thereby appealing to the members of the profession practising in the lower courts who are in a position to recommend clients to counsel practising in the HC.

(ii) canvassing for votes by touring in the province or sending out his clerk or agents to the various districts, which must necessarily mean directly approaching advocates practicing in subordinate courts. Further, the signboard or nameplate displayed by an advocate should be of reasonable size. It should not refer to details of an affiliated by the advocate i.e. that he is or has been president or member of a bar council or of any association, or he has been a Judge or an Advocate-General, or that he specializes in a particular kind of work, or that he is or was associated with any person or organization or with any particular cause or matter.

Not to demand fees for training; An advocate is restrained from demanding any fees for imparting training to enable any person to qualify for enrolment.

Not use name/services for unauthorized practice; An advocate may not allow his professional services or his name to be associated with, or be used for any unauthorized practice of law by any lay agency.

Not to enter appearance without consent of the advocate already engaged: an advocate is prohibited from entering appearance in a case where there is already another advocate engaged for a party except with the consent of such advocate. However if such consent is not produced,

the advocate must state the reasons for not producing it, and may appear subsequently, only with the permission of the court.

Duty to opposite party:- While conducting a case, a lawyer has a duty to be fair not only to his client but also to the court, and to the opposite party. An advocate for a party must communicate or negotiate with the other parties regarding the subject matter of controversy, only through the opposite party's advocate. If an advocate has made any legitimate promises to the opposite party, he should fulfill the same, even if the promise was not reduced to writing or enforceable under the rules of the court.

Duties of an advocate towards his client: The relationship between a lawyer and a client is highly fiduciary and it is the duty of an advocate fearlessly to uphold the interests of the client by fair and honourable means without regard to any unpleasant consequences to himself or any other person.

The above are only few important code of conduct to be observed by an advocate practicing in India. According to Justice Abbot Parry, there are seven important qualities that a lawyer should possess, he call these qualities as seven lamps of advocacy, they are; Honesty, Courage, Industry, Wit, eloquence, Judgement, and Fellowship. Apart from that the panchsheel of the bar are Honesty, Industry, Justice, Service and Philisophy and Panchsheel of the bench according to Sri ram Kishore Rande are, Impartiality, Independence, Integrity and Industry, Judicial activism and Prayer. Among the various duties of the advocates like, duties to client, court, public, colleagues and self, selected points can be picked up and arranged according to the due and relative importance and are called as ten commandments of advocates they are;

a) Duties to client

1) Protection of the interest of the client

2) Proper estimation of the value of legal advices and services

b) Duties to court

3) Honesty and respect

- 4) Preparation of the case
- c) Duties to Public
- 5) Service
- 6) Loyalty to law and justice
- d) Duties to colleagues
- 7) Fellowship
- 8) Fairness
- e) Duties to self
- 9) Systematic study
- 10) Prudence and diligence

The rules laid down by the Bar Council of India forms the code of conduct for advocates and in broad sense any violation of such rules or code of conduct can be termed as professional misconduct. The scope of the term has been still widened by the Supreme Court in various decisions.

Instances of Misconduct

Legal Practitioners act 1879 has not defined the word Misconduct. The word Unprofessional conduct is used in the act. Even the Advocates Act 1961 has not defined the term misconduct because of the wide scope and application of the term. Hence to understand the instances of misconduct we have to rely on decided cases. Some of the instances of Professional misconduct are Dereliction of duty, Professional negligence, Misappropriation, Changing sides, etc.

Contempt of Court as Misconduct

In the recent case of B. M. Verma v. Uttrakhand Regulatory Commission court noted that, it was given the wide powers available with a Court exercising contempt jurisdiction. In the case of

Court of Its Own Motion v. State dealing with the contempt proceedings involving two senior advocates, observed that 'given the wide powers available with a Court exercising contempt jurisdiction, it cannot afford to be hypersensitive and therefore, a trivial misdemeanor would not warrant contempt action. Circumspection is all the more necessary because as observed by the SC in SC Bar Association v. Union of India the Court is in effect the jury, the judge and the hangman; while in M.R. Parashar H. L. Sehgal it was observed that the Court is also a prosecutor Anil Kumar Sarkar v. Hirak Ghosh, reiterates this.

Misbehavior as Misconduct

Vinay chandra mishra, in re; In this case a senior advocate in on being asked a question in the court started to shout at the judge and said that no question could have been put to him. He threatened to get the judge transferred or see that impeachment motion is brought against him in Parliament. He further said that he has turned up many Judges and created a good scene in the Court. He asked the judge to follow the practice of this Court. He wanted to convey that admission is as a course and no arguments are heard, at this stage. But this act was not only the question of insulting of a Judge of this institution but it is a matter of institution as a whole. In case dignity of Judiciary is not being maintained then where this institution will stand. The concerned judge wrote a letter informing the incident to the chief justice of India. A show cause notice was issued to him.

Whether the advocate had committed a professional misconduct? Is he guilty of the offence of the criminal contempt of the Court for having interfered with and obstructed the course of justice by trying to threaten, overawe and overbear the Court by using insulting, disrespectful and threatening language, and convict him of the said offence. Since the contemner is a senior member of the Bar and also adorns the high offices such as those of the Chairman of the Bar Council of India, the President of the U.P. HC Bar Association, Allahabad and others, his conduct is bound to infect the members of the Bar all over the country. We are, therefore, of the view that an exemplary punishment has to be meted out to him. Thus the contemner Vinay Chandra Mishra is hereby sentenced to undergo simple imprisonment for a period of six weeks and he shall stand suspended from practising as an advocate for a period of three years.

Strike As Misconduct

Ex-capt. Harish uppal V. Union of India, Several Petitions raise the question whether lawyers have a right to strike and/or give a call for boycotts of Court/s. The petitioners submitted that strike as a mean for collective bargaining is recognised only in industrial disputes. He submitted that lawyers who are officers of the Court cannot use strikes as a means to blackmail the Courts or the clients. He submitted that the Courts must take action against the Committee members for giving such calls on the basis that they have committed contempt of court. He submitted that the law is that a lawyer who has accepted a Vakalat on behalf of a client must attend Court and if he does not attend Court it would amount to professional misconduct and also contempt of court. He submitted that Court should now frame rules whereby the Courts regulate the right of lawyers to appear before the Court. He submitted that Courts should frame rules whereby any lawyer who mis-conducts himself and commits contempt of court by going on strike or boycotting a Court will not be allowed to practice in that Court. He further submitted that abstention from work for the redressal of a grievance should never be resorted to where other remedies for seeking redressal are available. He submitted that all attempts should be made to seek redressal from the concerned authorities. He submitted that where such redressal is not available or not forthcoming, the direction of the protest can be against that authority and should not be misdirected, e.g., in cases of alleged police brutalities Courts and litigants should not be targeted in respect of actions for which they are in no way responsible. He agreed that no force or coercion should be employed against lawyers who are not in agreement with the “strike call” and want to discharge their professional duties. Respondent submitted that lawyers had a right to go on strike or give a call for boycott. He further submitted that there are many occasions when lawyers require to go, on strike or gave a call for boycott. He submitted that this Court laying down that going on strike amounts to misconduct is of no consequence as the Bar Councils have been vested with the power to decide whether or not an Advocate has committed misconduct. He submitted that this Court cannot penalise any Advocate for misconduct as the power to discipline is now exclusively with the Bar Councils. He submitted that it is for the Bar Councils to decide whether strike should be resorted to or not. Petitioner further relied on the case of Lt. Col. S.J.

Chaudhary v. State (Delhi Administration, the HC had directed that a criminal trial go on from day to day. Before this Court it was urged that the Advocates were not willing to attend day to day as the trial was likely to be prolonged. It was held that it is the duty of every advocate who accepts a brief in a criminal case to attend the trial day to day. It was held that a lawyer would be committing breach of professional duties if he fails to so attend. In the case of K. John Koshy and Ors. v. Dr. Tarakeshwar Prasad Shaw, one of the questions was whether the Court should refuse to hear a matter and pass an Order when counsel for both the sides were absent because of a strike call by the Bar Association. This Court held that the Court could not refuse to hear the matter as otherwise it would tantamount to Court becoming a privy to the strike. Considering the sanctity of the legal profession the court had relied on words said in case of "In Indian Council of Legal Aid and Advice v. Bar Council of India, the SC observed thus : "It is generally believed that members of the legal profession have certain social obligations, e.g., to render "pro bono publico" service to the poor and the underprivileged. Since the duty of a lawyer is to assist the court in the administration of justice, the practice of law has a public utility flavour and, therefore, an advocate must strictly and scrupulously abide by the Code of Conduct behoving the noble profession and must not indulge in any activity which may tend to lower the image of the profession in society. That is why the functions of the Bar Council include the laying down of standards of professional conduct and etiquette which advocates must follow to maintain the dignity and purity of the profession." In Re: Sanjeev Datta, the SC has stated thus: "The legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it are its honourable members. 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 their exemplary conduct both in and outside the Court. The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of the civilised society. Both as a leading member of the intelligentsia of the society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his professional and in his private and public life. The society has a right to expect of him such ideal behavior. It must not be forgotten that the legal profession has always been held in high esteem and its members have played an enviable role in public life. The regard for the legal and judicial systems in this country is in no small measure

due to the tireless role played by the stalwarts in the profession to strengthen them. They took their profession seriously and practice it with dignity, deference and devotion. If the profession is to survive, the judicial system has to be vitalised. No service will be too small in making the system efficient, effective and credible.” In the case of SC Bar Association v. Union of India, it has been held that professional misconduct may also amount to Contempt of Court. It has further been held as follows: “An Advocate who is found guilty of contempt of court may also, as already noticed, be guilty of professional misconduct in a given case but it is for the Bar Council of the State or Bar Council of India to punish that advocate by either debarring him from practice or suspending his licence, as may be warranted, in the facts and circumstances of each case. The learned Solicitor General informed us that there have been cases where the Bar Council of India taking note of the contumacious and objectionable conduct of an advocate, had initiated disciplinary proceedings against him and even punished him for “professional misconduct”, on the basis of his having been found guilty of committing contempt of court.

Introduction-

The practice of the law is not a business open to all who wish to engage in it; it is a personal *right or privilege... it is in the nature of a franchise from the State....'*

Legal privilege is essentially a right that exists for the sole benefit of the client. It ensures full and frank communication between clients and lawyers without any fear of disclosure or incrimination. This privilege is fundamental to the justice system... The law is a complex web of interests, relationships and rules. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented. Every developed legal system provides special protection to communications between lawyers and their clients.¹ Such protection is generally not available to communications with other classes of professional adviser.² In English law this special protection is known as legal professional privilege, which extends to cover a broader range of communications and documents generated in the context of litigation.

1.1 Definition

There is no statutory definition of client-lawyer or legal professional privilege in India. From the wording of sections 126 and 129 of the Indian Evidence Act, 1872, which set out the main rules against disclosure,

1. the protection against disclosure by an Advocate¹ that is accorded to:

1 Only

a) all communications made by or on behalf of a client to his² Advocate and any advice given by the Advocate to his client in the course of and for the purpose of that Advocate's engagement³ and

b) the contents or condition of any document which an Advocate has become acquainted with in the course of and for the purpose of his engagement⁴,
and

2. the protection that is accorded to every person against being compelled to disclose any confidential communication with his legal professional adviser, save where that person voluntarily gives evidence as a witness and where the disclosure of confidential evidence is necessary to explain the evidence already given by him.⁵

The plain language of Sections 126 and 129 of The Evidence Act does not indicate that 'in-house lawyers' or 'salaried legal advisers' fall within their purview. Notably, the legislature has specifically used the words "barrister, attorney, pleader, or vakil" in Section 126 and not chosen to amend the same; and used a broader term "legal professional adviser" in Section 129.

The distinction between a "barrister", "vakil", "attorney" and a "pleader" no longer exists since Section 29 of the 1961 Act specifically provides that there shall be only one class of persons entitled to practise the profession of law, namely 'Advocates'.

However, on an interpretation of the Advocates Act and the Bar Council Rules, in-house counsel would not come within the definition of 'advocate' since and 'advocate under Section 2(1)(a) of the Advocates Act means an advocate entered in any roll under the provisions of the Advocates Act. The legal position in India with regard to practice of law currently is: (a) only an advocate is

exclusively entitled to practice the profession of law and (b) a person who is in full time employment of an employer ceases to be an advocate.

2. Sources

The law of India has for the most part its origin in English judgments and Indian Acts of Parliament that were enacted at a time when India was still a colony of Britain. The law relating to legal professional privilege is found mainly in Sections 126 – 129 of the Indian Evidence Act, enacted in 1872 (i.e. more than half a century before India gained her independence). It is based on a draft prepared by Sir James Fitz-James that sought to reduce the then prevailing English law of evidence into a code suitably modified to cater to circumstances in India. After Independence in 1947, English judgments remain of considerable persuasive authority and it is settled law that the courts in India may look to English decisions in matters concerning the interpretation of the Evidence Act⁶. The law in India relating to legal professional privilege will therefore seem instantaneously familiar in many respects to English and common law lawyers, but the similarities with English law are in fact more illusory than real.

The relevant provisions of the Evidence Act are:

Section 126: No barrister, attorney, pleader, or vakil⁷ shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney, or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted, in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure:

- (1) any 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.

Section 127: The provisions of section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys, and vakils.

Section 128: If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and, if any party to a suit or proceeding calls any such barrister, pleader, attorney, or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney, or vakil on matters which, but for such question, he would not be at liberty to disclose.

Section 129: No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communication as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no other.

The code of conduct applicable to Advocates is found in the **Bar Council of India Rules**, Part VI, Chapter II, Section II. At first sight, it appears surprisingly silent on any duty of confidentiality owed by Advocates to their clients. However, Paragraph 16 of this Section provides:

An Advocate shall not, directly or indirectly, commit a breach of the obligations imposed by section 126 of the Indian Evidence Act.

The Evidence Act applies to judicial proceedings in India but not to affidavits or arbitrations.⁸ It may therefore be thought from a literal reading of Paragraph 16 that disciplinary proceedings under the code of conduct would be attracted only where an Advocate breaches section 126 of the Evidence Act i.e. where the Evidence Act applies in the first place. However, from an Advocate's point of view, it would be safer to read Paragraph 16 as effectively reproducing the obligations in section 126 of the Evidence Act, so that the duty of confidentiality exists even when the Evidence Act does not strictly apply.

3. Scope/Limits

3.1 General observations

In determining the scope of legal professional privilege in India, it is important to treat the Advocate's position as separate from that of the client: The level of protection accorded to confidential information and material in India accordingly depends on whether that information or material is sought to be extracted from an Advocate or from his client.

Disclosure by an Advocate

The protection accorded by section 126 of the Evidence Act against disclosure by an Advocate extends only in respect of actions committed before the engagement of the Advocate. Accordingly, there is no such protection in respect of:

(a) any communication made in furtherance of any illegal purpose or

(b) any fact observed by the Advocate in the course of his engagement showing that any crime or fraud has been committed since the commencement of that engagement.

Communications must be made confidentially in the context of a Client – Advocate relationship and with a view to obtaining legal advice in order to obtain protection. A record of a client's appointment and time of attendance have been held not to be privileged.

The rule is: "Once privileged, always privileged." The privilege therefore extends after the lawyer's engagement has come to an end, but not to communications made or advice received thereafter.

The provisions of Section 126 of the Indian Evidence Act apply to interpreters and agents of the Advocate, who are under the same prohibition and are entitled to the same immunity as the Advocate engaged in the matter.⁹ The agents of the Advocate are effectively treated as one with the Advocate. Accordingly, privileged information coming into the hands of an Advocate's clerk does not amount to publication for the purpose of a suit in defamation.¹⁰

Privileged communications and information in the hands of the Advocate may be disclosed with the consent of the client. The consent has to be expressly given to the Advocate

Disclosure by the Client

However, where a client voluntarily gives evidence as a witness, he or she may be compelled to disclose any confidential communication with the Advocate which in the Court's opinion is necessary to explain the evidence that the client has already given but for no other purpose.¹

3.2 Between lawyers

Communications between lawyers are generally admissible and in practice are relied upon as evidence. An admission however is irrelevant if it was made either upon an express condition that evidence of it was not to be given or in circumstances that the court can infer that the parties agreed that evidence of it must not be given.

Section 23 provides:

In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

Explanation-Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under Section 126.

3.3 Third parties

Legal professional privilege in India is limited to communications, documents, and advice passing between client and Advocates (and their agents). Unlike the position in England, no privilege is available for communications made by parties or their Advocates and third parties for the specific purpose of pending or contemplated litigation.

4. In-House Lawyers

In-house lawyers may not practise as Advocates during the period of their employment.¹⁶ They would seem to clearly fall outside the ambit of Section 126, with its emphasis on a Client-Advocate relationship and the existence of communications, documents and advice made and given in the course of an Advocate's engagement and for the purpose of that engagement.

Section 126 of the Evidence Act refers only to (former) categories of professional, and not employed, lawyers and envisions protection from disclosure only in the context of a Client-Advocate relationship.

Rationale of Privilege

- Right to a client to obtain legal advice in confidence
- To encourage full and frank communication between attorneys and their clients.

Weaknesses of Indian Law

- Section 126: Does not include patent agent, while Section 129 the expression 'legal professional adviser' may not include a patent agent, and the provision restricts privilege to the client only.
- *Wilden Pump Engineering Co. v. Fusfield*:

Patent agent not regarded as a variety of lawyer, and held to be out of the common law privilege under English law – Civil Evidence Act S 15 and Patents Act S 104

- *Dormeuil Trademark*: Privilege does not extend to trade mark agents.

Weaknesses Continued

- Communications between clients-third parties and lawyer-third parties, such as technical experts and expert witnesses:
 - Not privileged if the communication came into existence for the purpose of obtaining advice from the lawyer (legal advice privilege)
 - Privileged if the communications occur subsequent to the decision to commence litigation (litigation privilege)
 - Indian law likely to adopt this distinction based on English common law.

Weaknesses Continued

- Foreign law privilege
 - Under English law of privilege, communications between clients and their foreign lawyers, or with their foreign clients, will be protected based on *lex fori* (*Re: Duncan*).
 - The new recognition is that privilege is not merely a right to refuse material at trial, but a fundamental right

- hence different principles might apply today.
- Difficult conflict of law issues arise.
- The position in India is unclear, although the use of ‘barrister’ [General Clauses Act Section 3 (4)] may provide a clue.

Weakness Continued

- In-house Counsel – under Part VI, Chapter II, Section VII, Rule 49 of the Bar Council of India Rules:
 - Advocate cannot be a full-salaried employee
- In-house counsel in *Municipal Corporation v. Vijay Metal Works*, Section 126 and 129 of the Evidence Act provided same protection on his legal advice as a barrister or attorney. Although, in the *Akzo Nobel* judgment, the ECJ appears to have taken a contrary view.

B. Classification

A single privilege It can now authoritatively be stated that legal professional privilege is a single integral privilege whose sub-heads are legal advice privilege and litigation privilege.

As is clear from the decisions of the House of Lords in *Waugh v British Railways Board*,⁴⁰ *Re L*,⁴¹ and *Three Rivers 6*,⁴² the relevant distinction is between:

- Legal advice privilege—communications between *lawyer and client* for the purpose of giving or receiving legal advice, in both the litigation and the non-litigation context.
- Litigation privilege—communications between a client or his lawyer and *third parties* for the purposes of litigation.

E. The Basic Features of Legal Professional Privilege

The essential prerequisites of a claim for legal professional privilege were summarized by Lord Scott in *Three Rivers 6* under the following heads-----

1. **Confidentiality**⁹⁸
2. **Absolute nature of the privilege**
- 3 the predominant public interest
- 4 **Substantive and procedural right**

Conclusion—

The rules relating to privilege in India are more than a century old and are clearly inadequate to provide the levels of protection that may ordinarily be expected in modern relationships with lawyers. The categories of lawyers expressly referred to in the Evidence Act are no longer relevant. The wording would clearly need to be changed if in-house lawyers were to properly fall within its ambit. The absence of any protection for communications with third parties and the impact that this has on the ability of clients and their Advocates to freely communicate with potential witnesses and experts in the preparation of a case is obvious.

- Certain categories of intellectual property advisers are not covered
- Third parties not covered
- Communications between clients and foreign advisers are not clearly protected
- The scope of 'client' not clear in the context of corporations
- Privilege should cover Technical and legal matters.

UNIT IV- LEGAL ETHICS

I. ETHICS IN PRESENT ERA

Introduction

Though federal in structure, the unitary character of India under its Constitution has influenced the country to have a unified bar. The pre-constitutional legal framework had to undergo a transformation in the backdrop of the struggle by the people of India to achieve its freedom from the colonial rulers and the eventual adoption of a democratic, republican Constitution.

The Indian legal profession is one of the largest in the world, with over 1.4 million enrolled advocates nationwide. The estimated total value of the Indian legal market as of 2010 was approximately USD 1.25 billion. The legal profession, evolving as it has done from colonial

India, has undergone a huge transformation since its independence. The efforts of the members of the bar to achieve excellence in all spheres of their practise through stiff competition is not only apparent in their every dealing with newer challenges due to technological and other developments, but also in the recognition earned by them in a globalized world. Historically, the members of the bar have provided leadership at a national as well as international level. The current potential is much higher.

Role Of Bar Council Of India and State Bar Councils

i. Rules on Professional Standards

The Bar Council of India lays down rules pertaining to standards of conduct and professional etiquette to be maintained by lawyers in court, with clients and opponents, and towards fellow advocates. Disciplinary proceedings against those who violate the rules are initiated by the Disciplinary Committee of State Bar Councils, and the Bar Council of India acts as an appellate authority for the same.

ii. Legal Education

The Bar Council of India is responsible for the promotion of legal education and lays down the standards of legal education in consultation with universities. The Bar Council approves centres of legal education, and also prescribes types and standards of courses of study, eligibility for admission, infrastructure requirements and course structures. The Bar Council also visits and inspects these centres of legal education as part of its statutory functions.

The Bar Council was also responsible for kick-starting the next level of evolution in legal education in the country through the founding of the first National Law School of India University in Bangalore. The establishment of this premier law school has brought about a paradigm shift in teaching of and research of law. Students from the National Law Schools set up in different parts of the country have shone at the international stage through winning prestigious moots such as the Philip C. Jessup International Law Moot Competition and the Willem C. Vis International Arbitration Moot Court Competition. Alumni of the National Law Schools have gone on to join top law firms in the world, and also important bodies such as the United Nations,

the Permanent Court of International Arbitration, the World Bank and the World Trade Organization, to name a few.

The Bar Council of India also initiated the All India Bar Examination from the year 2010, which is a compulsory examination for all law graduates seeking enrolment as advocates. This has been undertaken by the Bar Council to raise the standards of the bar, and encourage legal education

iii. The Bar Council of India Trust

The Bar Council of India Trust is a public charitable trust which aims to further legal research and education. The Trust publishes a quarterly journal known called the 'Indian Bar Review'. It also conducts a national moot court competition, and various seminars and workshops as part of its continuing Legal Education Programme. A Fellowship and Placement Scheme for junior lawyers to render financial assistance to the best candidates was initiated and is being continued by the Trust.

iv. Bar Associations

Apart from the Bar Council of India and the State Bar Councils, almost every court in the country has Bar Associations of advocates that operate at a less formal level. These bar associations look after the welfare of advocates, represent their interests, and conduct numerous social and cultural activities of the bar, or even different sections of the bar. The Supreme Court Bar Association and the Supreme Court Advocates-on-Record Association is an example of two of the associations that thrive side by side.

Classes Of Practitioners

(i) Individuals: Senior Advocates and Advocates

Advocates are divided into two classes – Senior advocates and other advocates. Lawyers can be designated as senior advocates by the Supreme Court or any of the 21 High Courts. Advocates are designated as Senior advocates with their consent, if the Supreme Court or High Court is of opinion that by virtue of their ability (standing at the Bar or special knowledge or experience in law) they are deserving of that distinction. Only 1% of the lawyers constitute this elite group of

senior lawyers who wield exemplary influence in the profession. Senior advocates enjoy priority of audience. A senior advocate designated by one court is recognized as a senior in other courts as well. It is only the Senior Advocates who have a combined seniority roll maintained by the Bar Council of India. Senior advocates have certain restrictions placed upon them by the Advocates Act, 1961 and the Bar Council of India. They cannot appear without a separate “briefing” advocate (or, in the Supreme Court, an Advocate on Record). Seniors are foreclosed from drafting pleadings and conveyances or taking evidence (Bar Council of India Rules 2009, Part 6, Ch. 1). A Senior advocate is not allowed to accept any brief directly from a client. The reasons for these restrictions are to enhance opportunities for the younger members of the bar, as well as enable the senior members of the bar to spend their time profitably on research and academia.

(ii) Law Firms – From a Solicitors Practise to the Modern Corporate Sector

Law firms were always present in India, but were restricted mainly to the Metropolitan cities of Bombay, Calcutta and Madras before India’s Independence in 1947. These cities had firms of solicitors, as well as attorneys. The dual-system of classification between solicitors and attorneys was abolished in 1970 with uniform enrolment as advocates, but in Bombay and Calcutta the system of dual license is still followed, and examinations are still conducted for persons who wish to qualify as solicitors, upon the completion of a three year training period in a solicitor’s office as an ‘article clerk’ and the passing of a solicitors’ exam.

With the opening up of the economy, there are law firms in almost every city in India. Major law firms have their presence in every State and city with a High Court, as well as in commercial centres throughout the country. The law firm segment has been the most touched by globalization and has seen tremendous growth, contributing heavily to transactional and litigation work. They also attract the best talent from law schools in India.

The impact of globalization necessitated recognition of Limited Liability Partnerships (LLPs) to enable the law firms to meet the new challenges. In 2008, the Limited Liability Partnerships Act was passed which recognizes law firms with more than 20 partners and enables them to limit their liability.

(iii) The Focus on Litigation Practice

Despite the emergence of the National Law Schools and rising standards in legal education, there are still not enough litigating lawyers to keep up with the demands of India's burgeoning population. There is a lot of potential for the further growth of the bar. The concentration of advocates and law firms is mostly in the big cities. In towns, urban areas and in villages the advocates are mostly involved in private practise. There are also some distinctive features of the Indian legal profession which perhaps are quite surprisingly similar to those of the pre-independence era and perhaps make it unique, which Marc Galanter finds in his article entitled 'The Indian Legal Profession in the Age of Globalization' (2012). These features form the core structure of the legal profession in India:

(a) Individualistic approach - Lawyers mostly practise by themselves i.e. they have their own chamber/office assisted by clerks and a few juniors depending upon their seniority. And in case of the law firms, most of them are not oriented towards litigation.

(b) Most of the lawyers are oriented towards courts. So if an advocate practises at Delhi High Court, most of his time will be dedicated to this particular court. Even though these days, some of the lawyers have started flocking to other courts, but such cases are restricted to a few lawyers only.

(c) Courtroom advocacy continues to remain the central point of the profession. More focus is laid on the oral arguments made before the court than written submissions. It reflects the dominance of the English barrister model in the Indian bar and, with the kind of prevalent remuneration structure, it only reinforces its dominance.

The Shift Away from Litigation to Corporate Law Firms

The trend in recent times has seen the law graduates from prestigious law schools gravitating towards the law firms and companies, rather than litigation. The reasons for this may be because young lawyers in litigation do not earn as much at the outset, as compared to their counterparts in law firms who are paid handsomely. Furthermore, the gestation period for a litigating lawyer is quite long when compared to careers at law firms and companies.

Ethics

In India the legal profession, to this date, is considered a noble profession and thereby still assessed by standards of legal ethics that may seem outdated in many other jurisdictions abroad, but are considered a very important part of the legal profession in India, despite the change in thinking that liberalisation has inevitably brought. The Bar Council of India still maintains strict standards with respect to the legal community. An example of this is Rule 36 of the Bar Council of India Rules whereby the Indian Law firms/ lawyers are not allowed to advertise their practise in the market. The judiciary has acknowledged the substance of this restriction in various cases. That is not to say that the Bar Council of India has been completely blind to the realities of liberalisation, as would be evident from its decision to amend Rule 36 and add a proviso allowing advocates to maintain websites about themselves or their law firms in order to disseminate information, in order to enable people to make informed choices.

The Bar Council of India is progressively reviewing the ethical standards with the demands of our time, in order to strike the best balance. Recently, the Bar Council in a seminar on 'Professional Ethics' considered whether to reform standards of ethics and professional conduct in India in order to better reflect the standards of the International Bar Association, of which it is a member, and standards under the UIA Rules. Champerty and contingency fee arrangements have always been illegal in India, and there is nothing to suggest that there is any reason for changing such thinking in the near future.

Foreign Law Firms

A seeming resistance to the entry of foreign law firms by the members of the bar is primarily founded on reciprocity. The Indian Bar is not insulated from the impact of globalization nor is it averse to competition. The expectation is only that the foreign law firms are welcome in India on a similar reciprocal recognition of Indian lawyers and law firms by other countries. The professional services sector in India has already opened its doors to the foreign accountancy

firms, engineering multinationals and architecture firms. The legal profession cannot remain too far away.

India being a signatory to the General Agreement on Trade in Services (GATS), which is an organ of the World Trade Organization (WTO), it is anticipated that it may soon appreciate its obligation to open up the services sector to Member Nations. Legal Services are included in the list of recognized services under GATS, which obligates India to open the markets to the foreign law firms and foreign lawyers. Many members such as the US, EU, Australia, Singapore, Japan, China, Switzerland, New Zealand and Brazil have requested that India show its commitment to its obligations under the GATS. These requests have also been reflected in the process of plurilateral requests which are mostly for FLC's in only corporate and international law. There is no such request to practice domestic law in Indian courts. These requests are only for their engagement in a consultative capacity. There are requests for commercial association between foreign and local lawyers and firms on certain terms and conditions.

Conclusion

The Indian legal profession has grown over a short period of less than 50 years to become the world's largest branch of the profession. Within India, it is one of the most influential professions having an involvement in the governance of the country. It sufficiently reflects the diversity of Indian society, its social hierarchies and realities, and yet performs efficiently in delivering justice to litigants through Courts, despite the massive pressures that Courts and legal institutions function, given how unimaginably overburdened they always are. The unitary structure of the Indian bar comes across as a boon in this regard.

Due to globalization, the effects of the world economy are being felt, with foreign law firms seeking entry into the Indian space and Indian law firms handling transactions with global implications. At the same time, the core practise of law still revolves around the courts in India, and the majority of the bar is involved in practise before the courts. This produces a melting pot of ideas and opinions, and the result is a bar which is evolving through reforms in legal education and ethics and at the same time, is fortified by traditions that have stood the test of time. It is inevitable that as the nature of legal services sought by the consumers of legal service change,

with the inevitabilities of liberalisation, the profession in India will evolve and rise to the challenges that they raise. Continuing Legal Education (CLE) initiatives will need to be fostered. There is no doubt that the legal profession in India will always work closely with all stakeholders concerned to improve access to justice for all and help realise our Constitutional ideals for people from all walks of life.

B. ETHICS AND STATUTORY SANCTIONS

“Ethics is basis of a civilized and organized society. Ethics is a system, a philosophy of conduct of principles practiced by a person or group of persons. Every profession has its code of conduct, pertaining to right and wrong in conduct based on the principles of morality.” The need and necessity of ethics in the legal profession, relevant theories explaining its value and relevance in legal profession will be the core issue of discussion under this module.

In addition, duties of lawyers towards his clients, court, public, his fellow attorneys, self, society, etc., will also be undertaken for discussion. Indian code of ethics will be discussed in comparison with that of American Code and other countries will be taken up for discussion.

An advocate should practice law for the purpose of administering justice and making a living afterwards. The module will also include role played by a lawyer in the administration of justice. The discussion will also cover issues like an advocate’s duty towards legal reform, duty to provide legal aid, etc.

Legal Profession Is Regulated By Advocates Act, 1961

The Advocates Act of 1961 amended and consolidated the law relating to legal practitioners and provided for the constitution of the State Bar Councils and an All-India Bar - the Bar Council of India as its apex body. The Bar Council of India is comprised of the Attorney General of India and the Solicitor General of India as its ex officio members, as well as one member elected from each of the State Bar Councils. The members of the State Bar Councils are elected for a period of five years. Some main functions of the Bar Council of India are:

(1) To lay down standards of professional conduct and etiquette for advocates;

- (2) To lay down the procedure to be followed by its disciplinary committee and the disciplinary committee of each State Bar Council;
- (3) To promote and support law reforms
- (4) To promote legal education and to lay down standards of such education in consultation with the Universities in India imparting such education and the State Bar Councils;
- (5) To organise legal aid to the poor in the prescribed manner;
- (6) To recognise on a reciprocal basis foreign qualifications in law obtained outside India for the purpose of admission as an advocate in India.

The Bar Council of India is led by a Chairman and a Vice-Chairman, who are elected from amongst the members of the Council for a period of two years.

Each of the States in India has a State Bar Council. Each of the State Bar Councils has a varying number of members depending upon the numerical strength of advocates on its rolls, who are elected to the membership of the State Bar Council in accordance with the system of proportional representation by means of a single transferable vote amongst advocates on the electoral roll of the respective State Bar Council. In the case of an electorate not exceeding five thousand members, the State Bar Council shall consist of 15 members, while in the case of an electorate exceeding five thousand but not more than ten thousand, the strength of the Council shall be twenty members. If the electorate exceeds ten thousand, the strength of the Council shall be twenty five members. Additionally, each of the State Bar Councils counts their respective Advocate Generals as ex officio members. Each State Bar Council is headed by a Chairman, who is assisted by a Vice-Chairman and Secretary.

C. ETHICS AND PROFESSIONAL DUTY

Legal ethics is a term used to describe a code of conduct governing proper professional behavior, which establishes the nature of obligations owed to individuals and to society. In order to maintain a license to practice law, attorneys agree to uphold the Rules of Professional Conduct, adopted by the American Bar Association (ABA) in 1983. The ABA's rules have been adopted by the bar associations of all U.S. states except California, which has a similar code but with a different format (see California Rules of Professional Conduct for details).

If your attorney has violated any of these rules, or you have reason to believe your attorney has not acted in a professional manner, you should consider filing a complaint with the corresponding state bar association. For more serious violations, particularly when poor counsel results in an unfavorable outcome for your case, you might consider filing a legal malpractice lawsuit.

Meaning

Commingling: Act of mingling funds of one's beneficiary, client, employer, or ward with his or her own funds; generally considered a breach of the attorney's fiduciary responsibility.

Fiduciary: One often in a position of authority who obligates himself to act on behalf of another (as in managing money or property) and assumes a duty to act in good faith and with care, candor, and loyalty in fulfilling the obligation.

Confidentiality: The relation between lawyer and client which guarantees any information shared by the client is treated as private and as such cannot be divulged to third parties without the client's consent.

Common Violations of Legal Ethics

The ABA's Rules of Professional Conduct are numerous, some less obvious than others. In fact, lawyers often violate some of these rules on accident (such as commingling funds). The following are some of the more common legal ethics breaches:

Neglect and Lack of Communication: Attorneys must respond to and remain in reasonable contact with their clients, keeping them properly informed and fully explaining matters that are crucial to their respective cases.

Commingling: Attorneys must keep their clients' trust accounts separate from their personal or other accounts. Violations of this sort usually are due to negligence or mismanagement.

Solicitation: Attorneys may not be misleading, fraudulent, or deceptive in their advertising (for instance, lawyers may not use statistics or client testimonials, and must refrain from guaranteeing specific outcomes for cases).

Malpractice: Although these claims are very difficult to prove, lawyers may be sued if no reasonable attorney would have made the same errors (and those errors caused injury)

TOPIC D: CONFLICTS BETWEEN INTEREST AND DUTY

As DINKER in his Legal Ethics observes,

“A lawyer will be constantly confronted with conflicting loyalties which he may have to reconcile. He is answerable not only to his client whose interests it is his primary duty to serve and promote, but also to the Court of which he is an officer and further to his colleagues at the Bar and to the traditions of the Profession.”

Conflict of interest occurs where the same lawyer is representing both sides in a lawsuit, or previously represented one side. It can also mean that the lawyer has material interest in the outcome of the matter he is pursuing and he may benefit if there is an adverse outcome for his client. Lawyers are encouraged to avoid such situations since in adversarial system of justice, a conflict of interest violates the right of the client to the undivided loyalty of his lawyer. Conflicts may also occur if the lawyer's ability to represent a client is materially limited by the lawyer's loyalty to another client, a personal relationship, or other reasons.

A conflict of interest is therefore, a compromising influence that is likely to negatively affect the advice which a lawyer would otherwise give to a particular client or the way in which he will

pursue the matter of his client. It is likely to affect adversely either the lawyer's judgement concerning a client or prospective client, or the lawyer's loyalty in respect of a client or prospective client, or the lawyer's safeguarding of interests of a client or prospective client. The reason why avoiding conflicts of interest is considered to be of utmost importance is that if this is not done, the lawyer's loyalty and independence of judgement as far as that client is concerned will be called into question, and this will undermine the very basis of their relationship, making effective representation impossible.

Conflict may arise with respect to the interests of the lawyer himself, or interests of another existing client. Apart from that, an advocate has an ethical duty not to accept any engagement in a trial in which he may have to give testimony, although there is no rule of evidence disqualifying counsel from giving evidence in a suit in which he is engaged.

Specific manifestation – duty in case of conflict of interest

A lawyer who finds himself in a position of conflict must inform the client of his conflicting duties, and either obtain from that client an agreement that he should not perform his full duties of disclosure or he may be recused of his duty to act for this client. It is of utmost importance that the position of conflict be explained to the client if the case is taken up at all.

An advocate who has at any time advised a party in connection with the institution of a suit, appeal or other matter or has acted for a party, must not act, appear or plead for the opposite party, unless the express consent given of all concerned is obtained, after full disclosure of facts. Thus, the only exception to the ethical ineligibility of a lawyer to represent clients due to conflicts of interest is created when the client himself/themselves grant their express consent to their continued representation by the concerned advocate. However, the client must necessarily be informed of all aspects of the conflict that can be disclosed without breaching confidentiality requirements.

Proposed Rule of Conflict in the Draft Code of Ethics proposed by Bar Council of India

Sections 38-48 of the draft code delineates conflict rules for advocates, banning lawyers acting for two or more conflicted parties unless they have the express permission.

Section 39 of the Draft Code of Ethics require that an advocate shall not advise or represent both sides of a dispute and, except after adequate disclosure to and with the consent of the clients, preferably after receiving an independent legal advice, shall not act or continue to act in a matter

when there is a conflicting interest, which gives rise to substantial risk that the advocate's representation of the client would be materially and adversely affected by the advocate's duties to another current client, a former client, or a third person including, but not limited to, the duties and loyalties of the advocate or a partner or professional associate of the advocate of the law firm in which such advocate is a partner or associate, to another client, whether involved in the particular matter or not, including the obligation to communicate information.

It is not clear here as to what is to be considered substantial risk of the advocate's representation of the client being materially and adversely affected.

Section 40 on the other hand, requires an advocate to inform the clients before accepting briefs from more than one client in the same matter that Before the advocate accepts a brief from more than one client in the same matter the exact nature of the conflict, and that no information received in connection with the matter from one can be treated as confidential so far as any of the others is concerned and that, if a dispute develops that cannot be resolved, the advocate cannot continue to act for both or all of them with respect to the matter and may have to withdraw completely.

According to Section 42, where a lawyer holds brief from two opposing parties, if a contentious issue arises between clients on a joint retainer, the advocate, although not necessarily precluded from advising them on other non-contentious matters, would be in breach of this Code if the advocate attempted to advise them on the contentious issue.

Exceptions under the Draft Code of Ethics

Section 43 specifies that an advocate may only act in a matter which is adverse to the interests of a current client if

- the matter is unrelated to any matter in which the advocate is acting for the current client; and
- no conflicting interest is present

Conclusion

The Draft Code of Ethics is a very important step in the direction of establishing clear and effective rules in Indian Bars with respect to conflict of interest and how advocates are expected to act in situations of conflict. Once this draft is approved and becomes operative, a long standing void will be filled.

TOPIC: E- DUTY TO COURT

RULES ON AN ADVOCATE'S DUTY TOWARDS THE COURT

1. Act in a dignified manner

During the presentation of his case and also while acting before a court, an advocate should act in a dignified manner. He should at all times conduct himself with self-respect. However, whenever there is proper ground for serious complaint against a judicial officer, the advocate has a right and duty to submit his grievance to proper authorities.

2. Respect the court

An advocate should always show respect towards the court. An advocate has to bear in mind that the dignity and respect maintained towards judicial office is essential for the survival of a free community.

3. Not communicate in private

An advocate should not communicate in private to a judge with regard to any matter pending before the judge or any other judge. An advocate should not influence the decision of a court in any matter using illegal or improper means such as coercion, bribe etc.

4. Refuse to act in an illegal manner towards the opposition

An advocate should refuse to act in an illegal or improper manner towards the opposing counsel or the opposing parties. He shall also use his best efforts to restrain and prevent his client from acting in any illegal, improper manner or use unfair practices in any matter towards the judiciary, opposing counsel or the opposing parties.

5. Refuse to represent clients who insist on unfair means

An advocate shall refuse to represent any client who insists on using unfair or improper means. An advocate shall exercise his own judgment in such matters. He shall not blindly follow the instructions of the client. He

shall be dignified in use of his language in correspondence and during arguments in court. He shall not scandalously damage the reputation of the parties on false grounds during pleadings. He shall not use unparliamentary language during arguments in the court.

6. Appear in proper dress code

An advocate should appear in court at all times only in the dress prescribed under the Bar Council of India Rules and his appearance should always be presentable.

7. Refuse to appear in front of relations

An advocate should not enter appearance, act, plead or practice in any way before a judicial authority if the sole or any member of the bench is related to the advocate as father, grandfather, son, grandson, uncle, brother, nephew, first cousin, husband, wife, mother, daughter, sister, aunt, niece, father-in-law, mother-in-law, son-in-law, brother-in-law daughter-in-law or sister-in-law.

8. Not to wear bands or gowns in public places

An advocate should not wear bands or gowns in public places other than in courts, except on such ceremonial occasions and at such places as the Bar Council of India or as the court may prescribe.

9. Not represent establishments of which he is a member

An advocate should not appear in or before any judicial authority, for or against any establishment if he is a member of the management of the establishment. This rule does not apply to a member appearing as “amicus curiae” or without a fee on behalf of the Bar Council, Incorporated Law Society or a Bar Association.

10. Not appear in matters of pecuniary interest

An advocate should not act or plead in any matter in which he has financial interests. For instance, he should not act in a bankruptcy petition when he is also a creditor of the bankrupt. He should also not accept a brief from a company of which he is a Director.

11. Not stand as surety for client

An advocate should not stand as a surety, or certify the soundness of a surety that his client requires for the purpose of any legal proceedings.

TOPIC : F- DUTY OF AN ADVOCATE'S DUTY TOWARDS THE CLIENT

1. Bound to accept briefs

An advocate is bound to accept any brief in the courts or tribunals or before any other authority in or before which he proposes to practise. He should levy fees which is at par with the fees collected by fellow advocates of his standing at the Bar and the nature of the case. Special circumstances may justify his refusal to accept a particular brief.

2. Not withdraw from service

An advocate should not ordinarily withdraw from serving a client once he has agreed to serve them. He can withdraw only if he has a sufficient cause and by giving reasonable and sufficient notice to the client. Upon withdrawal, he shall refund such part of the fee that has not accrued to the client.

3. Not appear in matters where he himself is a witness

An advocate should not accept a brief or appear in a case in which he himself is a witness. If he has a reason to believe that in due course of events he will be a witness, then he should not continue to appear for the client. He should retire from the case without jeopardising his client's interests.

4. Full and frank disclosure to client

An advocate should, at the commencement of his engagement and during the continuance thereof, make all such full and frank disclosure to his client relating to his connection with the parties and any interest in or about the controversy as are likely to affect his client's judgement in either engaging him or continuing the engagement.

5. Uphold interest of the client

It shall be the duty of an advocate fearlessly to uphold the interests of his client by all fair and honourable means. An advocate shall do so without regard to any unpleasant consequences to himself or any other. He shall defend a person accused of a crime regardless of his personal opinion as to the guilt of the accused. An advocate should always remember that his loyalty is to the law, which requires that no man should be punished without adequate evidence.

6. Not suppress material or evidence

An advocate appearing for the prosecution of a criminal trial should conduct the proceedings in a manner that it does not lead to conviction of the innocent. An advocate shall by no means suppress any material or evidence, which shall prove the innocence of the accused.

7. Not disclose the communications between client and himself

An advocate should not by any means, directly or indirectly, disclose the communications made by his client to him. He also shall not disclose the advice given by him in the proceedings. However, he is liable to disclose if it violates Section 126 of the Indian Evidence Act, 1872.

8. An advocate should not be a party to stir up or instigate litigation.

9. An advocate should not act on the instructions of any person other than his client or the client's authorised agent.

10. Not charge depending on success of matters

An advocate should not charge for his services depending on the success of the matter undertaken. He also shall not charge for his services as a percentage of the amount or property received after the success of the matter.

11. Not receive interest in actionable claim

An advocate should not trade or agree to receive any share or interest in any actionable claim. Nothing in this rule shall apply to stock, shares and debentures of government securities, or to any instruments, which are, for the time being, by law or custom, negotiable or to any mercantile document of title to goods.

12. Not bid or purchase property arising of legal proceeding

An advocate should not by any means bid for, or purchase, either in his own name or in any other name, for his own benefit or for the benefit of any other person, any property sold in any legal proceeding in which he was in any way professionally engaged. However, it does not prevent an advocate from bidding for or purchasing for his client any property on behalf of the client provided the Advocate is expressly authorised in writing in this behalf.

13. Not bid or transfer property arising of legal proceeding

An advocate should not by any means bid in court auction or acquire by way of sale, gift, exchange or any other mode of transfer (either in his own name or in any other name for his own benefit or for the benefit of any other person), any property which is the subject matter of any suit, appeal or other proceedings in which he is in any way professionally engaged.

14. Not adjust fees against personal liability

An advocate should not adjust fee payable to him by his client against his own personal liability to the client, which does not arise in the course of his employment as an advocate.

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

16. Keep proper accounts

An advocate should always keep accounts of the clients' money entrusted to him. The accounts should show the amounts received from the client or on his behalf. The account should show along with the expenses incurred for him and the deductions made on account of fees with respective dates and all other necessary particulars.

17. Divert money from accounts

An advocate should mention in his accounts whether any monies received by him from the client are on account of fees or expenses during the course of any proceeding or opinion. He shall not divert any part of the amounts received for expenses as fees without written instruction from the client.

18. Intimate the client on amounts

Where any amount is received or given to him on behalf of his client, the advocate must without any delay intimate the client of the fact of such receipt.

19. Adjust fees after termination of proceedings

An advocate shall after the termination of proceedings, be at liberty to adjust the fees due to him from the account of the client. The balance in the account can be the amount paid by the client or an amount that has

come in that proceeding. Any amount left after the deduction of the fees and expenses from the account must be returned to the client.

20. Provide copy of accounts

An advocate must provide the client with the copy of the client's account maintained by him on demand, provided that the necessary copying charge is paid.

21. An advocate shall not enter into arrangements whereby funds in his hands are converted into loans.

22. Not lend money to his client

An advocate shall not lend money to his client for the purpose of any action or legal proceedings in which he is engaged by such client. An advocate cannot be held guilty for a breach of this rule, if in the course of a pending suit or proceeding, and without any arrangement with the client in respect of the same, the advocate feels compelled by reason of the rule of the Court to make a payment to the Court on account of the client for the progress of the suit or proceeding.

23. Not appear for opposite parties

An advocate who has advised a party in connection with the institution of a suit, appeal or other matter or has drawn pleadings, or acted for a party, shall not act, appear or plead for the opposite party in the same matter.

TOPIC: G- DUTY OF ADVOCATE'S DUTY TO OPPONENTS

1. Not to negotiate directly with opposing party

An advocate shall not in any way communicate or negotiate or call for settlement upon the subject matter of controversy with any party represented by an advocate except through the advocate representing the parties.

2. Carry out legitimate promises made

An advocate shall do his best to carry out all legitimate promises made to the opposite party even though not reduced to writing or enforceable under the rules of the Court.

RULES ON AN ADVOCATE'S DUTY TOWARDS FELLOW ADVOCATES

1. Not advertise or solicit work

An advocate shall not solicit work or advertise in any manner. He shall not promote himself by circulars, advertisements, touts, personal communications, interviews other than through personal relations, furnishing or inspiring newspaper comments or producing his photographs to be published in connection with cases in which he has been engaged or concerned.

2. Sign-board and Name-plate

An advocate's sign-board or name-plate should be of a reasonable size. The sign-board or name-plate or stationery should not indicate that he is or has been President or Member of a Bar Council or of any Association or that he has been associated with any person or organisation or with any particular cause or matter or that he specialises in any particular type of work or that he has been a Judge or an Advocate General.

3. Not promote unauthorized practice of law

An advocate shall not permit his professional services or his name to be used for promoting or starting any unauthorised practice of law.

4. An advocate shall not accept a fee less than the fee, which can be taxed under rules when the client is able to pay more.

5. Consent of fellow advocate to appear

An advocate should not appear in any matter where another advocate has filed a vakalt or memo for the same party. However, the advocate can take the consent of the other advocate for appearing.

In case, an advocate is not able to present the consent of the advocate who has filed the matter for the same party, then he should apply to the court for appearance. He shall in such application mention the reason as to why he could not obtain such consent. He shall appear only after obtaining the permission of the Court.

TOPIC : H-DUTY TOWARDS COLLEAGUE

Gone are the days when legal profession used to be socially considered as a noble profession. The image attached to the legal profession, once held high in the eyes of the people, is now under increasing attack, mostly by the lawyers themselves. Common men used to look up to the lawyers as an expert of law as well as a social engineer, standing for the cause of humanity and voicing against various social, political and economic injustice. Social image of the lawyers was

thus to be equated with those of a real hero, who would always be on toe for guarding mass conscience. Lawyers were seen as successful vocal leaders of many social movements against exploitation, social, economic and political. People's confidence and respect for the legal profession was so high that a lawyer in a family would surely add to its social reputation. However, the social image of lawyers is very much in crisis these days and that should alarm not only the profession but also the society, at large.

Duty towards the Colleagues : Lawyers have certain professional responsibilities towards his colleagues, no matter whether they are associates, senior or junior, or lawyers of the opposite litigating party. Lawyers should always be respectful to each other and should maintain a healthy working environment both in the chamber and in the court premises. It is against professional ethics to criticize the efficiency of other colleague lawyers or to speak ill about them in public.

It must be stated that it is not an easy job for lawyers to perform all four categories of duties equally efficiently at the same time. However, a good professional lawyer would know how to strike a balance among various kinds of duties. Each category of the duties is important for lawyers and failure to perform any one of them would surely erode social trust on the legal profession. Therefore, it is crucial that lawyers should be in continuous vigilance of their own behaviour to protect the social image of the legal profession, as a whole.

TOPIC : I DUTY TOWARDS SOCIETY AND OBLIGATION TO RENDER LEGAL AID

The preamble of the Constitution of India assures justice, social economic and political to all citizens of the country. The Articles 14 & 16 of the Constitution of India impose an implicit responsibility on the State to ensure that none is deprived of legal assistance for reasons of economic or other disabilities so that equal justice is provided to all citizens of the country. Article 39-A mandates that the State shall provide free legal aid by suitable legislation or schemes or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

The principle contained in Article 39-A are fundamental and cast duty on the State to secure that the operation of the legal system promotes justice to all citizens and particularly the poor and the marginalized. However, despite this Constitutional mandate, poor remain deprived of appropriate legal assistance for a long time after independence. The Supreme Court in Hussainara Kathoon vs Home Secretary, State of Bihar (AIR 1979 SC 1369) commented on the sad plight of poor in the following words:

"We may also take this opportunity of impressing upon the Government of India as also the State Governments, the urgent necessity of introducing a dynamic and comprehensive legal service programme with a view to reaching justice to the common man. Today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them. The poor in their contact with legal system have always been on the wrong side of the law. They have always come across 'law for the poor' rather than 'law of the poor'.

The law is regarded by them as something mysterious and forbidding - always taking something away from them and not as a positive and constructive social device for changing the socio-economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker sections of the community. It is, therefore, necessary that we should inject equal justice into legality and that can be done only by dynamic and activist scheme of legal services. We may remind the government of the famous words of Mr. Justice Brennan - "Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us was not to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness.

The Supreme Court in this case strongly recommended that the Government of India and the State Governments should devise and introduced a comprehensive legal service programme in the country which is not only a mandate of equal justice implicit in Article 14 and the Right of Life and Liberty conferred by Article 21 but also the compulsion of the constitutional directive embodied in Article 39-A.

Enactment of an Act for providing free legal aid

In pursuant to the aforesaid Constitutional mandate and directions of the Supreme Court, the Legal Services Authorities Act, 1987 was enacted for providing free legal aid in deserving cases. The Act in Section 12 prescribes a criteria for giving legal service. The legal service is defined by Section 2 (c) of the Act to include the rendering of any service in the conduct of any case or other legal proceedings before any Court or other Authority of Tribunal and the giving of advice on any legal matter. The Act further creates various authorities at national state and district levels for promoting the cause of legal services to the poor and for providing legal services to persons who satisfy the criteria laid down under the Act as also to undertake preventive and strategic legal aid programmes. The legal services has manifold facets and is required at various stages, for obtaining guidance, for resolving disputes in Courts, Tribunals or other judicial columns.

Role of Advocates

Legal profession is monopolistic in character and this monopoly itself inheres certain high traditions, which its members are expected to upkeep and uphold. Law is an Hon'ble profession and an Advocate is an Officer of justice and friend of the Court. He is an integral part for the administration of justice. From the ancient times, the legal obligations of the Advocates to conduct the case of a poor litigant without reward when so required by the Court has been recognized not only in our country and in England but also in US and other Countries. However, in practice, Counsels have been assigned only in criminal cases of serious nature and a few civil cases.

The critical position enjoyed by an Advocate in administration of justice in fact imposes a responsibility upon him to ensure that justice is made available to all. Rule 46 of Bar Council of India Rules in part-VI relating to a standard professional conduct and etiquette reminds Advocates of the obligation they owe to the society.

The Rule reads as under:

"Every Advocate shall in the practice of the profession of law bear in mind that any one genuinely in need of a lawyer is entitled to legal assistance even though he cannot pay for it fully or adequately and that within the limits of an Advocate's economic condition, free legal assistance to the indigent and oppressed is one of the highest obligations an Advocate owes to society."

To ensure justice to poor and marginalized sections of the society, an Advocate is required to provide them legal assistance even when they are not in position either to pay him at all or adequately pay him for his services. In fact the least duty expected of an Advocate is to play his role sincerely in implementing the various legal aid schemes available under the Legal Services Authorities Act, 1987 - be it legal aid to poor and other marginalized sections of the society or promotion of legal literacy or facilitating resolution of disputes through Lok Adalats. The role of the Advocates in implementation of these schemes becomes pivotal due to the fact that legal profession being monopolistic, the various schemes of legal aid under the Act can only be put into operation through Advocates.

Assignment of a competent Advocate to take up the case of a poor litigant is the most crucial component in providing effective and purposeful legal aid to the weaker sections of the society.

The Advocate is paid by the concerned Legal Services Authority but this payment is generally quite low as compared to the normal fee charged by the Advocate. As such, well established Advocates are generally reluctant to undertake assignment as an Advocate under the scheme of legal aid under the Legal Services Authorities Act. The result is that newly enrolled Advocates or

Advocates, who do not have enough cases with them alone opt for taking up such cases with the result that the poor and marginalized person get only substandard legal assistance, which is a serious handicap in successfully implementing the legal aid scheme for weaker sections of the society. The reluctance of senior Advocates in doing service to the community is becoming a serious constraint in the success of the legal aid scheme in India. The Supreme Court in the case of Kishore Chand vs State of H.P. (AIR 1990 SC 2140) commented on this situation as under:-

"Though Article 39-A of the Constitution provides fundamental rights to equal justice and free legal aid and though the State provides amicus curiae to defend the indigent accused, he would be meted out with unequal defence if, as is common knowledge the youngster from the Bar who has either a little experience or no experience is assigned to defend him. It is high time that senior counsel practicing in the Court concerned, volunteer to defend such indigent accused as a part of their professional duty."

The situation in India is in contrast to the situation existing in Britain. Michael Zander, who studied the legal system of Britain to suggest law reforms records with satisfaction in his book "A Master of Justice" that in Britain, a large number of competent senior Barristers are busy in acting as amicus curiae in courts and in providing legal aid to the poor for which they are paid by the State.

The Advocates in India need to take a lesson from their British counterparts in this respect and need to inculcate the spirit of dedication to the cause of justice and for community service so that legal aid movement could succeed in India. Indeed, failure to make justice available to poor may threaten the very existence of the democracy and the rule of law. The members of the legal profession would do well to bear in mind the famous words said by Leeman Abbot years ago in relation to affluent America-

"If ever a time shall come when in this city only the rich can enjoy law as a doubtful luxury, when the poor who need it most cannot have it, when only a golden key will unlock the door to the court-room, the seeds of revolution will be sown' the fire-brand of revolution will be lighted and put into the hands of men and they will almost be justified in the revolution which will follow".

There have been many instances where Advocates in India have taken the causes of poor and downtrodden without any reward and have ensured justice to them. Unfortunately, there have also been instances where lawyers assigned by public funds have not faithfully played their role

in implementation of the legal aid schemes which has cast a serious doubt on the very credibility of a scheme of legal aid available to weaker sections of society in India. The dark side of the legal aid scheme and how the lawyers are swindling the unsuspecting and ever gullible poor litigants as well as petty criminals and first time convicts, most of whom are so because of compelling circumstances, was reported by the Indian Express in a news item under the caption "Free Legal Aid for a Fee". The paper reported how Advocates were abusing the scheme and funds of free legal aid. The modus operandi reported was that the lawyers engaged by the Legal Aid Committee were fleecing money from the parties on whose behalf they had been engaged and holding their cases to ransom by delaying tactics. In the process, many innocent persons were also being compelled to pay large amounts to the lawyers, who are supposed to get their fee from the Legal Aid Committee and to be giving a service for the cause of justice. The phenomenon is not new and has been in existence since the establishment of the institution of free legal aid and has been flourishing since then. Lawyers can always be innovative as any other professionals, in fact much more than that. After all they provide escape routes in people of any hue in trouble. They know how to break laws and get away with it.

Free legal aid undoubtedly is beneficial to poor people and has been instituted with noble purpose. Yet it has become a good ground for breeding corruption. Free legal aid for a fee is common practice. Once a lawyer is engaged through legal aid, obviously the party or his men would come to the lawyer for consultations and it is then that they are asked to fish out some money which they naturally cannot refuse. One factor that may be contributing to this is that the remuneration paid to lawyers by Legal Aid Committee is very low and sometimes even does not meet the incidental expenses what to speak of compensating the labour put in by the lawyer. Beyond that the greed to pocket some easy money out of the helplessness of the victim is always there. But what speaks worst about the system is the fact that entrustment of the cases to Advocates under the scheme has become a case of distribution of largesse amongst the favourites, which is guided by factors other than the capacity of the lawyer to deliver the results. In the circumstances, the quality of legal service provided to poor and downtrodden sections of the society is seriously compromised to the detriment of justice to them. The result is that whole purpose of the scheme gets defeated.

Considering that Administration of Justice is a central function of Advocates, it is incumbent upon them to play a purposeful role in implementation of various legal aid schemes provided under the Legal Services Authorities Act, 1987. The Advocates, as a class and senior Advocates in particular have a solemn duty to ensure justice to all citizens and particularly to poor and marginalized sections of the society and they should rise up to meet the challenge effectively and

successfully. The consequences of failure of legal aid schemes are too serious to be ignored. There is no doubt that legal community in India will rise to the occasion and meet the challenge successfully and effectively. Justice to poor alone is the lasting guarantee of continued existence of Rule of Law and democracy in the country.