

Lecture regarding Professional ethics
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1. Keep the following in mind:

- That a democratically elected body of people will legislate, draw policies and implement them in accordance with constitutional scheme. This is fundamental to rule of law. In political dialogue we may call it an open society where governance is transparent and rights are protected.
- There is an increasing perception that the legal profession now stands in danger of losing soul.[Anthony Kronman, *The Lost Lawyer* (Cambridge, M.A. Harvard University Press, 1993), p.1]. That the feature of the professionalism is uncertain. [Andrew Boon and Jennifer Levin, *The Ethics and Conduct of Lawyers in England and Wales*, 2nd edn. (Oxford: Hart Publishing 2008, p. 56).
- That there is an increasing commercialization of work of lawyers as the legal profession is tending to sell its services rather than rendering services. [“I have heard Indian friends of my own, themselves distinguished lawyers, deplore in no uncertain terms this lowering of standards; and it seems clear that once cause of it at least is the great overcrowding of the

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profession and the struggle for existence among its less fortunate members, since the weaker brethren are thereby exposed to temptation which they are not always able to resist. This is a matter which affects the public as well as the profession itself: for diminution in the respect felt for lawyers as a whole must affect prejudicially the whole administration of justice. “Maurice Gwyer – 1944 Foreword to 2nd edn Professional Conduct and Advocacy – K. Krishnaswami Aiyar].

- The twin element of Rule of law, i.e., an independent judiciary and an independent legal profession which will aid and assist the judicial institution.

*In view of the above imagine that the government initiates the proposal to amend the Advocate Act to the following effect:

- i) That the legal profession will be declared a public service;
 - ii) The entry into the profession will be subject to evaluation of standards by any independent body;
 - iii) The choice of the place of practice will be regulated through regulations;
 - iv) The fee structure will be determined under the law;
- Dedicated cadre of public defenders will be selected and nominated to service classes of litigants i.e., the social and economically deprived.

2. Will such an initiative by the Government be in order, justifiable and constitutionally correct?

Judicial independence is both an end in itself and a means to impartial administration of justice. This impartiality generates public trust. Any perception that administration of justice suffers due to lack of integrity or corruption, or is tainted because of external influences, destroys public trust. The role of the judiciary in maintaining public trust is to follow and adhere to certain principles. Superior Court Judges take oath under the Constitution which is all comprehensive. Does the legal profession have any role in maintaining public trust. The Bar Council of India Rules in aid of maintaining such trust.

3. The standard conception of the role of lawyers is stated in the following: neutrality, partisanship and non-accountability.

Is there a social role for lawyers and if so whether the standard conception of role of lawyers is consistent with the social role. Neutrality and partisanship projects lawyers as manipulators of legal rules. When governments, corporate entities or that public authority are involved or other scandals, lawyers are criticised for complicity.

Whether the standard conception of the Lawyers role which is a model developed on interpretation of American Bar Association Model Code, case law from Common Wealth Countries, does not require any change? Can we say that lawyers in India should have ethical decisions.[Tamanaha (n 22) ; WB Wendel, Lawyers and Fidelity to Law (Princeton and Oxford, Princeton University Press, 2010);

Hazard and Dondi (n 20) at 173; MJ Osiel, 'Lawyers as Monopolists, Aristocrats and Entrepreneurs' (1990) 103 Harward Law Review 2009, at 2016; L. Sheinman, 'Looking for Legal Ethics' (1997) 4 International Journal of the Legal Profession 139; T. Dare, 'Mere Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers' (2004) 7(1) Legal Ethics 24]. Whether lawyer should have discretion to adhere to partisan ship when partisanship produces immoral consequences?

4. Duties of the lawyer laid in the Bar Council of India Rules, seem to be in conflict with each other. We need to examine these duties and notice the contradictions.
5. The adversarial system is the predominant system or structure for resolving conflicting claims, interests, or rights. The role of the lawyer is said to be of a "hired gun" admitting of no ethical or moral autonomy for the lawyer.

Adversarial system implies a central role for lawyers; the defining role is partisan ship which means that the lawyer must work resolutely to secure the client's interests.

Adversary system associated controls, with competition rather than Government limited power of the State:

- a) Party initiated action i.e., party autonomy.
- b) Neutral decision makers. Who do not direct or control investigations or enquiries.
- c) Party autonomy in production and presentation of evidence.

Inquisitorial:

- a) Reliance on judges to be in control and direction of investigation;
- b) Discovery of truth, not left in the hands of parties; some element of mergers of these features have taken place; There are other mixed models. In many such settings, the focus will be on what best resolution will serve the community values and re-establish relationship between the parties rather than on who is right or wrong with reference to past events.

Adversarial system has ignored “fairness”, “parties needs”, etc., and presumes that fact finders must choose “one solution or result” even if the real truth may be something else, or at a different point altogether. In contemporary litigation, judges like lawyers serve a variety of roles, including mediator, rule enforcer, deliberation, law finder and goals pursuit.

The extent to which “Zealous representation and client confidentiality thwart other values of justice system. Whether “Zealous advocacy within the bounds of law” is not an indeterminate rule? Exaggerated claims on either side – outcome are distorted, alternative outcome party satisfaction, collaboration and sharing, reparation, reformation, empathy as against punishment or compensation etc.

6. Advocacy is not a mere craft but a calling. “The spirit amongst counsel is one of generous emulation and not the spirit of embittered and petty rivalry amongst lawyers. How would we cultivate a culture of advocacy? The Bar Council of India Rules in regard to court room conduct and judgments of the Supreme Court call for more regulation?”

7. Conflict between the following statements:

“A lawyer is under obligation to do nothing that shall detract from the dignity of the court, of which he is himself a sworn officer and assistance.

“An over-subservient Bar would be one of the greatest misfortunes that could happen to the administration of justice.”

Can we say independence of the legal profession, freedom of speech and expression, the noble role of assisting the court – amalgamation of all these.

The nature of the law of confidence between a lawyer and the client and continuation of the duty towards confidence after determination of the engagement of the lawyer?

8. Section 35(1) of Advocates Act reads thus:-

“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 its disciplinary committee.”

Misconduct.

Misconduct is a wide expression. Any conduct which is likely to hamper or embarrass the administration of justice or which renders the person unfit to practice. M V Dabolkar (1976) 2 SCR 48 : (1976) 2 SCC 291 probity and professional life style, not trade briefs not merchandise – M. Veerabadra Rao, 1984 Supp.(1) SCC 571; Sudha v. Chennai Advocate Association, (2010) 14 SCC 114.

Seen from the lens of propriety, decency and worthy living. (U. Dakshinamoorthy v. Comm. Of Eng., AIR 1980 Mad 89). It includes unprofessional acts even though they may not be inherently wrongful.(Mahbut Ali Khan – AIR 1958 AP 116)

Clause (f) of Section 13 of the Legal Practitioners Act: “any other reasonable cause”

Is it ejusdem generis with clauses (a) to (e) of unprofessional conduct?

Old view was it was ejusdem generis.

Later view is that Clause (f) need not be read so, and it is not confined to acts done in a professional capacity.

[ILR 29 Cal. 890; AIR 1932 Cal. 370; ILR 139 Mad 1045; ILR 34 Mad. 29; AIR 1922 PC 351]

Reason stated thus:

“If extra professional offences do not constitute reasonable cause for dismissal, persons of the worst and vilest livelihood may, once admitted into the profession, be irremovable”(Le Mesurier v. Wajid, ILR 29 Cal. 890)

Bombay Pleaders Act, 1920.

S. 24 action against pleader convicted of criminal offence.

Bar Councils Act used the word misconduct. Section 10 yet it must cover all cases of misconduct – professional or otherwise (Jamshed v. Kaikhushru – AIR 1935 Bom 1) [in the matter of N. an Advocate – AIR 1936 Cal. 158; In re a pleader AIR 1943 Mad. 130: Slogan shouting in Court.]

Principles applied in the matter of D. an Advocate – (1955) 2 SCR 1006 – Conviction under the Bombay Prohibition Act.

10. Section 24[A] of the Advocates Act, 1961 which provides for disqualification for enrolment.

The wisdom of the proviso to Sub-Section (1) of Section 24[A]. The comparison with Representation of Peoples Act, 1951.

PROFESSIONAL PRIVILEGE

In *Coco v. A.N. Clark (Engineers) Ltd* Megarry J. said:

“The equitable jurisdiction in cases of breach of confidence is ancient; confidence is the cousin of trust. The Statute of Uses, 1535, is framed in terms of ‘use, confidence or trust’; and a coupler, attributable to Sir Thomas More, Lord Chancellor avers that –

‘Three things are to be in Conscience: Fraud, Accident and things of Confidence.’

The obligation of confidence owed by a lawyer to his client is described as “the oldest of the privileges known to the common law [*Upjohn Company v. U.S.* 449 U.S 383 (1981)

“The first duty of an attorney is to keep the secrets of his client. Authority is not wanted to establish that proposition” *Taylor v. Blacklow* [1836] 3 Bing (N.C.) 235.

Privileged communications are immune from compulsory disclosure (see *Comfort Hotels vs. Wembley Stadium* [1988] 1 WLR 872.

Legal professional privilege“is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice(*R (Morgan Grenfell & Co., Ltd v. Special Commissioner)* [2003] 1 AC 563 para 7).....

Although legal professional privilege used to be regarded as no more than a rule of evidence, (Parry – Jones v. Law Society, (1969) 1 Ch. 1) it is now also regarded as a substantive right of considerable importance in English Law. (R. v. Derby Magistrates Court, (1996) 1 AC 487)

Does it conflict with the following :

“It has been said that ‘no obligation of honour, duties of non-disclosure arising from the name of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box’. “[McGuinness v. A-G (1940) 63 CLR 73, 102-3(per Dixon J)]

“legal professional privilege can now generally be asserted in answer to any demand for documents by a public or other authority; it is not limited to a right which may be asserted only in the context of civil or criminal proceedings. Previously, the courts did not require a great deal of persuasion that Parliament had intended to override legal professional privilege.[R. v. Inland Revenue Commissioners, ex p Lorimer (2000) STC 751] That is no long the case.[R (Morgan Grenfell Ltd) vs. Special Commissioner (2003) 1 AC 563]..... For example, statutory powers requiring the production of documents would be deemed to exclude the right to demand documents which are subject to legal professional privilege. Any exception to this rule would have to be explicitly supported by primary legislation.[R (Morgan Grenfell Ltd) vs. Special Commissioner (2003) 1 AC 563 para 8] Any curtailment of privilege could only be to the extent reasonably necessary to meet the ends which justify the curtailment. If established, the privilege is absolute and cannot be overridden by the demands of any particular situation.other common law

jurisdictions, which share the same common law origins as England, have similar, although not identical approaches to legal professional privilege. But legal professional privilege is also recognized by the jurisprudence of both the European Court of Justice and European Court of Human Rights, which have very different intellectual and procedural roots to English law. [R (Morgan Grenfell Ltd) vs. Special Commissioner (2003) 1 AC 563 para 7]

Legal advice privilege And Litigation privilege

In England client's communication with the lawyer will attract protection under Article 8 of the European Convention v. United Kingdom (2001) E. Lt. RR 627.

See AIR 1961 AP 105 & AIR 1966 Mad 344

The privilege will extend to all confidential information obtained during the period of retainer-ship.

Uncertainty as to the nature and scope of action for breach of confidence : Professor Gareth Jones:

“A cursory study of the cases, where the plaintiff's confidence has been breached, reveals great conceptual confusion. Property, contract, bailment, trust, fiduciary relationship, good faith, unjust enrichment, have all been claimed, at one time or another, as the basis of judicial intervention. Indeed some judges have indiscriminately intermingled all these concepts. The result is that the answer to many fundamental question remains speculative.” (1970) 86 L.Q.R. 463.

The jurisprudential basis of a duty of confidence arising from a confidential relationship may be contractual or

equitable (Saltman Engineering v. Campbell – 1948) 65 RPC 203.=(1963) 3 ALL E R 413

In the Spy Catcher case (1990) I AC 109 at 281 mere notice of confidential information protected.

The shift in focus. Campbell v. MGN Ltd [2004]UKHL 22; [2004] 2 A.C. 457, PARA 51.

“The result has been a shift in the centre of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information..... Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control dissemination of information about one’s private life and the right to the esteem and respect of other people.”

Whether information is property?

Fraser v. Evans (1969) 1 QB 349

“The jurisdiction is based not so much property or on contract as on the duty to be of good faith. No person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so”

“.....that equity intervenes to preserve the confidentiality of information not because information is susceptible of a *proprietary* claim but because its use in the hands of the defendant is unconscionable.” [*Israel Law Review* (1989) 23(4) 407]

The lawyers duty of confidentiality survives the end of his retainer-

“In such a case it is not sufficient to say that the cause is at an end; the mouth of such a person is shut for ever”[1999] 2 A.C. 222.

Communication in furtherance of a Criminal purpose does not come into the ordinary scope of professional employment and the protection of such communication cannot possibly be otherwise than injurious to the interests of justice.[R. v. Cox and Railton (1884) 14 QBD 153 at 167.

The privilege cannot apply if the law is consulted to cover up or stifle a fraud. *Finers v. Miro* – (1991) 1 WLR 35.

Disclosure required by law. *Parey Jones v. Law Society* (1969) 1 Ch. 1 at 9.

Privilege can be overridden by statute, *R (Morgan Grenfell Ltd) vs. Special Commissioner* (2003) 1 AC 563 para 7., but intention must be expressly stated.

Failure on the part of the client to claim privilege, does not make a difference.

Mandesan v. State of Kerala (1885) Cr.L.J. 61;

Deposition by Advocate

AIR 1950 Mad. 537; AIR 1954 Mad 741; AIR 1970 Mys. 341.

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LAWYER ADVERTISING VERSUS IMPROPER SOLICITATION

(R. Venkataramani, Senior Advocate, Supreme Court of India)

Fear is a primordial human instinct. Equally so is the will to be an adventurer. Adventurers have always made history. The little blemishes of their character are eclipsed by the new vistas opened by adventurers. All societal attempts at regulations arise out of the fear instinct of something unmanageable letting itself loose upon people. A bleak or a cynical view of human nature is part of this. The whole enterprise of law and punishment is a curious mixture of these instincts and the great hope that regulations and punishments bring about justice.

Regulation is always seen as a fertile tool, to deal with both adventures and misadventures. We always debate about the pitfalls of regulations versus advantages of well-meaning regulations; the dragging effects of regulations on human freedom, creativity and the great virtues of contributions to the public good by being free. When somebody opines that freedom of speech and expression,

namely, that commercial speech does not include or comprehend the ability of the legal profession to advertise itself, we are indeed engaging in a certain mode of looking at the issue of regulations.

Two important statements made in the context of American Lawyers can be a good starting point:-

- (i) “The long and arduous task of constructing a profession has been filled with setbacks and reversals. This history helps explain why American lawyers are still struggling to reconcile the tension between their search for professional identity and their pursuit of economic success. It illuminates their deep-seated and enduring status anxiety: the soul-searching visible in the constant writing and rewriting of ethical rules, the acerbic self-criticism by some of their own most prominent members (such as Warren Burger, former Chief Justice of the U.S. Supreme Court, and Derek Bok, President of Harvard University and former Dean of Harvard Law School), and repeated (if fruitless) efforts by professional associations to improve their public image. American lawyers appear deeply insecure about their entitlement to the extraordinary wealth and power they enjoy today.”
- (ii) “Contrasting the situation of the American legal profession during its formative years in the last third of the nineteenth century with its present circumstances a

hundred years later can give us some appreciation of the incredible distance the profession has traveled, its continuing dilemmas, barriers to entry, rates of growth, the composition of the profession, restrictions on competition, self-regulation, structures of practice, stratification and other internal divisions.”²

The assumed nobility of the profession do not necessarily demand manufacture of reasons either from history or from certain general universal principles which are part of the whole enterprise of law and justice. We need not have to be apologetic about the nobility of the profession nor unduly deny or negate it. Tireless repetition of statements eulogizing the nobility of legal profession need not necessarily mean that the noble and regardful elements of the legal profession are mere clichés.

The debate on the changing nature of legal profession and the innumerable facets of legal education and societal demands are not however answered by simplistic reiteration of the noble dimension of the profession. Sir Alladi Krishnaswamy Iyer, a great name of the Madras Bar said in the 1940s, “The days when lawyers could content themselves with working at their own cases and earning money are over, and the lawyer of today should – if he would take his place in society and not become a back number, enlarge his mental outlook and realize his duties to society – equip himself of

² Richard L. Abel : American Lawyers, Oxford, 1991.

the purpose and make his contribution to the social and economic welfare of society.”

Sir Morris Gwyer writing in 1944 his foreword to ‘Lecture on Professional Conduct and Advocacy’ by K.V. Krishnaswami Aiyar said, “I have heard Indian friends of my own, themselves distinguished lawyers, deplore in no uncertain terms this lowering of standards; and it seems clear that one cause of it at least is the great overcrowding of the profession and the struggle for existence among its less fortunate members, since the weaker brethren are thereby exposed to temptations which they are not always able to resist. This is a matter which affects the public as well as the profession itself: for any diminution in the respect felt for lawyers as a whole must affect prejudicially the whole administration of justice.”

We need to look these statements and observations not in the abstract, unmindful of the emerging roles of law and lawyering in free, open and democratic societies. Any debate on advertising by members of the legal profession cannot therefore revolve within perspectives or notions based on mere traditions and the past.

The debate on advertising will not be complete by merely discussing as to what is right or wrong in advertising. Perhaps the very use of the word advertising is inappropriate having regard to significant changes in the nature of legal education, legal demands, constitutional governance, democracy etc.

The Legal Services Authorities Act, obliges the State to provide strategic legal services. Who will volunteer to provide these services to the poorer sections of the community? Those with visions of an egalitarian social order, and commitments to equality and good governance, may like to use law in furtherance of these goals. Articulation of balancing principles and strategies within an open and free society, to realize such goals, - freedom and equality - means service through law. Will volunteering to provide such services amount to advertising?

Legal education is no longer and thankfully so confined merely to consideration and resolutions of private law disputes. A wide range of human conduct and activity, in the production of economic wealth, welfare and other services are driven by science and technology. The activities relating to patenting or international customs, mining, exploitation of natural resources, pharmaceutical industry and healthcare, advances in information technology and communication, all revolve around science and technology. Questions as to economic or other resource investments are answered better by an informed mind, informed in law, science, technology, public interest and social concerns in the context of environment etc. Legal education has rightly begun to expand into all these areas. Of what uses and relevance, would such legal education be, if the ultimate consumer is not able to make choices regarding the best and competent advisors. What sensible and

agreeable method of lawyer acquaintance would ensure freedom of consumer choice while frowning at debasement of the nature of such services by unruly client seeking, client advancement and client exploitation?

At such times when lawyer in court, was the symbol of advancement and administration of justice, it made sense to ensure that the unwary consumer of justice is not bewildered by lawyers standing up with placards about themselves. Obviously excessive and unhealthy statements about one's own competence and relevance would have made no sense of the role of lawyers in the administration of justice.

See how one reacts to lawyer advertising³ :-

“The strong language many plaintiffs’ lawyers use to criticize those using aggressive techniques is meant to label them as miscreants or outsiders to be shunned.” “I don’t seem them’ I don’t interact with them; I don’t touch them; I don’t fool with them..... I know some of them send us cases [refer cases with the expectation of a fee] when I don’t know they’re aggressive advertisers if I find out, I send the case back. I justthere’s something about that I find repulsive.”

“Trying desperately to find ways of staying in business without resorting to advertising or other forms of direct solicitation for

³ Lawyers in Practice, edited by Leslie C. Levin & Lynn Nather, The University of Chicago Press, 2012.

clients, the East Texas lawyer above has depleted his retirement savings to keep his practice afloat. Nonetheless, he cannot bring himself to advertise. He finds it, especially television, abhorrent. As he put it : A guy come home from work, gets his beer, sits in front of the TV and hears this lawyer, this smarmy looking lawyers telling him, “if you get hurt, I’ll make you rich.” And I know how I personally respond to lawyer advertising in a very negative way you know, when somebody looks at that, the average person, they see graft. They see fraud. They see corruption.”

Dean Roscoe Pound defined professionalism – “...defined professionalism as “a group of men pursuing a learned art as a common calling in the spirit of public service.”

This concern about the public service dimension, deepened after the US Supreme Court decision in *Bates v. State Bar of Arizona*, in 1977. The *Bates* judgment struck down long standing ban on lawyers advertising and as one commentator pointed– “In the blink of eye, lawyers has a right to advertising, a right that has suppressed for several years.”⁴ One can also not close one’s eye to the competition between the elite and fortunate classes who used to monopolize the profession and the entry of less fortunate sections in the legal profession. Perhaps it is not possible to declare that the issue of advertisement was a pure ethical issue and therefore

⁴ Hornby, William, 2005. “Clashes of Class and Cash : Battles from the 150 Years War to Govern Client Development.” *Arizona State Law Journal* 37:255-305.

deserves to be so treated regardless of any changes whatsoever in the nature of demand and supply of legal services.

By contrast, the clash between professionalism, public services and economic interest, is sought to be reconciled. For instance, by the statement of objectives of a very respected Texas Law Firm:-

“First, to earn a good living for its members and staff;

Second, to make that living representing unions and working people, if possible; and

Third, to use those resources, produced above the need to serve the first two objectives, in advancing liberal political processes in government and society. (Mullinax 1986, 1)”

We need not have to call lawyer advertising as an ‘either’, ‘or’ debate. The challenge before the legal profession however, is to redefine to frontiers of objective and healthy information being made available to the benefit of consumers of justice at appropriate levels and at the same time ensuring that this information provision process does not degenerate into ambulance chasing and media advertising.

We can profitably look at the following information⁵:

⁵ American Lawyers, supra.

“Lawyers initially were not much more enthusiastic about individual advertising. Two years after the Supreme Court decision only 3 percent engaged in any; after four years, national expenditures were just \$6 million. Yet by 1983 about one lawyer in seven was advertising. ABA surveys found that the proportion had risen to 24 percent by 1986. A 1982 study of Wyoming lawyers found that 29 percent advertised. The 20 largest television advertisers increased their budget from \$81,000 in 1977 to \$38.3 million in 1985 and spent \$21.8 million in the first half of 1986, but just two legal clinics accounted for a fifth of the 1984 total.”

“.....Even larger firms are turning to advertising. Forty of them now employ non-lawyers in-house marketing directors, and many others hire public relations firms to produce brochures and newsletters. A 250-lawyer Pittsburgh firm has aggressively promoted its Techlex Group to high-tech clients. And an international trade firm in Chicago has persuaded the state to publish and distributed its guide to doing business in Illinois, which has been translated into Chinese and Japanese. Personal injury lawyers have taken the next step, cooperating with unions in offering free medical tests to those exposed to asbestos, who may have claims against manufacturers and employers.”

“The use of firm websites by Texas Plaintiffs’ lawyers has continued to grow since the time of that survey. Of the 196 respondents who did not have a firm website in 2006, 181 were still in private practice in Texas in April 2011. Internet searches and

State Bar of Texas information show that over half (96) of those lawyers did have a firm website in April 2011. Thus, in just five years, advertising by firm websites increased from 57% to 78% by the original 460 respondents to the 2006 survey.”⁶

That there exist a system of touting and agency in the field of accidental compensation claims and to some extent in consumer or real estate litigation cannot be denied. Insurance companies, police personnel, and other resourceful people merely act as agents despite several well-meaning efforts undertaken in the field of accidental compensation claims to prevent exploitation. These areas where lawyers virtually procure clientele or client development through exploitative means are undoubtedly areas of concern and regulation. What is involved there is not advertising, as we understand and see in some countries abroad, notably the U.S.A.

Because we thought advertisement was bad, soliciting clients became inappropriate. That again was always and in the context of litigation lawyering. If advertisement is bad, so equally soliciting is and there is no further question of improper soliciting. It is absurd to talk about soliciting as against improper soliciting. All forms and all means used for client development only with a view to promote the economic interests of the lawyer, or the law firm, can receive no approbation. The word soliciting has greater pejorative content. We must understand all of this, given the wide disparities in the legal profession. Conference organizing is a legal services promotion

⁶ Lawyers in Practice, *supra*.

project, but desperate search for clientele by hand to mouth bail lawyers is taboo. Who decides to give what meaning to soliciting? We must acknowledge that those who thrive by and create conditions of inequality, also set meanings and measuring rods. Therefore the taboo on advertising deserves radical but responsible rethinking.

However, these general concerns regarding the conduct of a litigation lawyer or even law firms involved in litigation services, need not necessarily be extended to the provision and availability of all other forms of legal services. Problem has arisen because of not opening our eyes to current realities. As was observed earlier, the concept of advertisement of legal services will have to be narrowed down to prohibition or condemning certain excessive indulgences towards client development.

I began with reference to the fear element. It is rightly felt that any small opening can be exploited by unscrupulous elements. Monitoring and supervising ban can become a difficult exercise. We may think of a body such as the Broadcasting Regulatory authority to ensure flexibility but with certainty and clear deterrence. We must also notice the problems before bright young talents entering legal education institutions and who spend valuable qualitative time in acquiring quality legal education. They need to know how to balance the best productive outcome of their knowledge and skills and the social, economic and other public services contribution to be made by such productive involvement of their knowledge and skills. Blanket ban on identity promotion and acquaintance development, will make no sense to them. The scientist and technologist lawyer as well as the egalitarian social order lawyer

need to be known about in an orderly, dignified and respectable manner.
We need to develop an indigenous model away from the Bates declaration
by the US Supreme Court.

Dimensions of Professional Ethics – Contempt of Court and the Bar-Bench Relationship*

(R. Venkatarmani, Senior Advocate, Supreme Court of India)

1. The author of a recent Book titled, 'The Lawyer Bubble' says the following in his introduction (which is a voice from USA) :-

“The unlikely prospect of amassing great wealth wasn't what attracted me to the law. Rather, I saw it as a prestigious profession whose practitioners enjoyed personally satisfying careers in which they provided others with counsel, advice, judgment, and a unique set of skills. Mentors at my first and only law firm taught me to focus on a single result: high-quality work for clients. If I accomplished that goal, everything else would take care of itself.

Today, the business of law focuses school deans and practitioners in big law firms on something else: maximizing immediate profits for their institutions. That has muddied the profession's mission and, even worse, set it on a course to become yet another object lesson in the perils of short-term thinking. Like the dot-com, real estate, and financial bubbles that preceded it, the lawyer bubble won't end well, either. But now is the time to consider its causes, stop its growth, and take steps that might soften the impact when it bursts.”

2. Roughly author of a set of these lectures makes an important observation which call upon our intellect to be constantly alive to the commenting between ethics and morals:-

“The words 'ethics' and 'morals', once synonymous, began to acquire meanings complementary to each other. 'Ethics' is the

science of morals and 'morals' are the practice of ethics. To illustrate: a man's ethics may be sound, but his morals may be bad." "Maurice Gwyer – 1944 Foreword to 2nd edn Professional Conduct and Advocacy – K. Krishnaswami Aiyar]

**Lecture delivered at Symbiosis Law School, Pune on 14th March, 2017*

3. Drawing on the connection between ethics and morals, the learned advocate quotes for various person in the field of law and justice and more importantly he quotes Sir Walter Scott :-

“In a profession where unbounded trust is necessarily imposed, there is nothing surprising that fools should neglect it in their stupidity and tricksters abuse it in their knavery. But it is more to the honour of those, and I will vouch for many, who unite integrity with skill and attention and walk honorably upright where there are so many pitfalls and stumbling-blocks for those of a different character. To such men their fellow-citizens may safely entrust the care of protecting their patrimonial rights and their country the more sacred charge of her laws and privileges.”

4. I think that it is worthwhile to extract few more brilliant quotes made by the learned advocate:

“(i) G.W. Warvelle writes: ‘Because of the magnitude of the interests placed in the hands of its members, the responsibilities which they assume and the confidence with which they are entrusted, there is demanded of them in the exercise of their duties, an exemplification of the highest qualities of moral excellence.’

(ii) John Stuart Blackie says: 'A man may be as brilliant, as clever, as strong and as broad as you please and with all these, if he is not good, he may be a paltry fellow; and even the sublime which he seeks to reach in his most splendid achievements, is only a brilliant sort of badness.' He quotes the scriptural text, 'One thing is needful', and adds: 'Money is not needful; power is not needful; liberty is not needful; even health is not the one thing needful; but character alone – a thoroughly cultivated will – is that which can truly save us.'

5. Ethics is an all encompassing idea and conception. One can go to a religious text or community tradition, ancient epics and even observed convention of behavior to collect our basket of ethics. Why is it not good enough to say that this general conception of ethics is complete and can be conveniently drawn as a reservoir for professional and behavior? Do we still need special set of rules and regulation specific to legal profession? If so, is it merely a question answered by utilitarian concerns, namely, the most productive outcome for those who seek the assistance of the lawyer? Are these not other aspects of rule of law, action of justice, the idea of a constitution, and the consequent promise that each one of us has given to ourselves to evolve into a community where liberty, autonomy, fairness and all those hold old values, let us say, encompasses in the concept of dharmas? I suppose any inquiry into professional ethic and responsibility will have to necessarily address these questions and perhaps may arise questions as well.

6. The Bar Council of India Rules like the codes of conduct of the legal profession elsewhere is an excellent compendium of Do's and Don'ts.

They seem to contribute the ten commandments of the profession. A close analysis of the rules of the Bar Council may even tell us that the rules seem to be dealing with many of the above said questions and providing some or the other guidance.

7. These rules obviously talks about a wide range of duties of the lawyer ranging from the duty to the court, duty to the client, duty to the opponent, duty to the public and the State, besides matters such as excellence, commitment, concentration and unyielding engagement with the cause of justice. So one may legitimately ask as to what more is needed of a student of law then merely to know and comprehend somewhat the Bar Council Rules. One can memorize these rules and know them by heart without much difficulty. Why is that we are called upon not to halt our engagements with professional ethics and responsibilities with the last of the Bar Council Rules.

8. Just as the study of law and human nature tells us that it is the breach of law, the failure of law become of its letter and the deficiency of the letter of law and perennially because of the deficiencies of human nature in acting in violation or breach of the law, there is a constant need to know more of these failures and deficiencies. One can observe with a certain amount of certainty that the bulging volumes of cases, stores, judgments, revisions of rules, etc., are proofs enough of the above need.

9. It is therefore appropriate to say that the general concept of ethics, would be a good resource, which still need specific set of rules and observation, to guide the legal mind, while engaged in its association

with administration of justice. As we noticed while looking at some other question framed above the canvass of ethics and responsibility is far more different and far more wide than what it has been at any time in the past and with any legal and justice system. Two important observations need to be made here. One is that in contemporary times, peoples and countries have moved towards a system of governance by constitutional rules. The idea of constitution with all its rich meanings and dimensions has become an intrinsic part of human thinking as some of the knowledge and understanding which you have gained through science and inquiry.

10. Peace and order, guarantee of realization of individual potential and meaningful human relationship are perceived to be guaranteed by the idea of a constitution. Regardless of the fact that we still witness great defects and deficiencies in the working of the idea of a constitution, no country and no people would give themselves up to be ruled by unlimited, unstrained, coercive powers. An open society and constitutional rule are now thus part of human psyche.

11. The second aspect is the process of law making and the processes of administration of justice have become far more complex. The role of a lawyer is not merely therefore that of a person called upon to use mere forensic skills in court rooms and moderate the outcome of adjudication and litigation. From this twin aspect, one can see that the role of a person equipped with the study of law becomes an activity of social evolution.

12. What is being said above is not merely to say something far removed from the daily bread and butter issue of professional ethics. What is being suggested is that any narrow understanding or comprehension of the role of law and lawyers can be a matter of stunted growth of Bar itself.

13. At this point of time, I would like to bring in focus yet another aspect namely, the distinction between professional values and professional virtues but both of which are fundamental to the legal profession. Professional values can be broadly stated as under:-

“Values are standards influencing choices between courses of action.¹ They tend to fall into one of three groups: moral values such as fairness, justice and truth; pragmatic values such as thrifts, efficiency and health; and aesthetic values such as beauty, softness and warmth. A value system is a collection of consistent and coherent values ranked according to importance. Professional value systems include a mixture of moral pragmatic values.” (N. Rescher, *Introduction to Value Theory* (New Jersey, Prentice Hall, 1969) at 2)

14. Professional virtues can be set down in the following words:-

“Whereas values are standards set by a society or individual, virtues are aspirational qualities for individuals. Professionals aspire to ‘an ideal defining a standard of good conduct, virtuous character, and a commitment, therefore, to excellence going beyond the norm of morality ordinarily governing relations among persons’ (A. Flores, *What Kind of Person Should a professional Be?* in a Flores (ed), *Professional Ideals* (1988) (n 13) at 1.)

15. Before going ahead I would like to make an observation that the driving engine behind both professional values and professional virtues can be said to be a empathy and concern for all living beings and perhaps concern for all creations and fearlessness and courage. The empathy has been identified as one of the five domains of emotional intelligence and people express the hope that one day, “empathy will hold as valued a place in the curriculum of algebra”. Simply stated, empathy is that wonderful capacity all of us have to be able to assess the internal life of another person and equally fearlessness and courage, not the power of the bully but the power of a cultivated mind which fears nothing beyond its conscience.

16. This brings to a connected question as to what connection professional conduct may have and what responsibility it should have, with respect to the institutional of justice. The contempt of courts law has its ancient origins. The story of this law is both informative, sometimes assuring, sometimes disturbing by reasons of the excessive exercise of power. Oswald’s Contempt of Court in its introductory chapter is worth reading to know what a contempt of court could be and need not be. As far as we are concerned, we have Articles 129 and 215 constitutionally providing in respect of contempt. The Contempt of Court Act, 1971 is directed generally at all citizens. It aims to ensure that both those who take reasons to institution of justice and those who stand outside to evaluate it, are subject to this sweep. Obviously all parties to the adjudicatory processes are to abide by the discipline of contempt of courts Act. The need to ensure the dignity and solemnity of the institution of justice is understood to be fundamental values. That is

why undue criticism and necessitated remarks and statements about the institution of justice or judges, is said to be a matter which will undermine the importance of the court and the judge and erode confidence in administration of justice. The duty to the court rule of the Bar Council directly relates to this general duty more particularly to the specific duty of the lawyer to act in promotion of the dignity and value of the court and the judge. Thus both as a practitioner for inside and a critique and evaluator from outside, the lawyer have a role to play. The digest of case laws and contempt by advocates gives as varied lessons and how one as a lawyer is called upon to conduct oneself. We have examples of contempt action against Mahatma Gandhi and other, lesser mortals such as Mr. V.C Mishra or recently as an ex-member of legislative assembly from Kerala namely Mr. Jayarajan who happened to be an advocate as well, (2015) 4 SCC 81.

17. From Mahatma Gandhi to Jayarajan draws canvass, freedom of expression on one hand as valuable as oxygen we breathe, equally valuable for ensuring judicial accountability and institutional health and survival equally important for ensuring rule of law in democracy are very sensitive matters which call for extreme devotion to the balancing exercise. The judgments of the Supreme Court in V.C. Mishra as well as Jayarajan provide valuable examples for inhaling this balancing exercise.

18. While we talk about this balancing exercise, we certainly hear about free-wheeling discussions and statements made about judicially improprieties and corruption. There is needless to say that these are matters of extreme concern and call for institutional reforms of fundamental character. Judicial accountability and corruption should

not be left to be handled merely by story voices being fearlessly raised. When such issue are left to be handled by story voices, there is every danger of collaboration and cooperation of the dark forces of corruption to stifle every possible honest statements and discussions. What is sought to be emphasized that everyone of us are given responsibility to be practice with courage and conviction; but this responsibility is not, to be reduced to that of a street corner bully carrying country made weapons.

19. The judgment of the Supreme Court in Supreme Court Bar Association v. B.D. Kaushik is also an example of an associated bullying. Bar Associations cannot by mere strength of numbers convert themselves into bodies beyond accountability.

20. Conduct of the lawyer outside the precinct of the court is also not a matter free from regulations or supervision. Conduct and becoming of the lawyer can range from acting disrespectfully to a fellow lady advocate. (Amit Chanchal Jha v. Registrar, High Court of Delhi, (2015) 13 SCC 288) as well as mater of personal morality.

21. I would like to quote Krishnaswamy Iyer in this context of Bench Bar relationship. He says:-

“The Judge and the practitioner discharge complementary functions in building up the edifice of justice; their division of duties is merely to secure economy of labour and efficiency of result.....The efficient administration of justice calls for a full recognition of this identity of vocation.”

22. Surveys and scholarships has pointed at the implication of stratified constitution of the rules of the bar difference in the meeting in enforcement of ethical quotes for different segments of Bar. The multiple ways in which personal identity intersects with professionalism and the limitations of single set of professional rules to deal with multi-dimensional aspects of the profession. It is said that the Bar rules are extremely general and evenly understand and influenced and sometime at odds with in realistic of legal practice. Perhaps it is appropriate to agree with the following statement:-

“Legal professionalism exists not as a fixed unitary set of values but instead as multiple vision of what constitutes proper behavior by larger”.
(Nelson, Robert L., and David M. Trubek. 1992. “Arenas of professionalism: The Professional Ideologies of Lawyers in Context.” In Lawyers Ideals/Lawyers Practices: Transformations in the American Legal Profession, edited by Robert L. Nelson, David M. Trubek, and Ryman L. Solomon, 177-214. Ithaca, NY: Cornell University Press.)

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