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Lawyers and Justice: An Ethical Study—A 60s Vision of Lawyering

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Lawyers and Justice: An Ethical Study—A 60s Vision of Lawyering

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I. INTRODUCTION

David Luban's book, *Lawyers and Justice: An Ethical Study*, supports a vision of lawyering that attempts to alleviate the inequities of wealth and power in American society. Luban makes three principal points. First, he argues for a professional ethic of moral activism, in which the lawyer persuades her client to pursue only moral ends with moral means. If this persuasion fails, the lawyer should resign, or, if she continues to represent the client, as she often must, she should do so only with moral methods. More generally, moral activism exhorts the lawyer to restrain herself in assisting the rich and empowers her to fight dirtier to help the poor. Second, he establishes the moral legitimacy of legal aid, and he calls for the deregulation of routine legal services and for mandatory pro bono work. Third, he writes a defense, consistent with democratic theory, of progressive public interest lawyers.

The political sentiments of the book reflect a 60s vision of society and lawyers. There are inequities in America and in the face of these, the lawyer's role is not to be neutral. The lawyer should play an active role in making society better. This book, however, is not a political and moral tract. It is a carefully constructed philosophic argument. Even if it does not persuade the reader, it will help her see objectively the political and moral assumptions which constitute the lawyer's role.

Luban takes care to challenge and to defend his assumptions. He frankly concedes weak points in his argument. He writes well, and he

* Margaret R. Larson Professor of Legal Ethics, University of Nebraska College of Law; B.A., 1964; J.D., 1967; L.L.M., 1974, Harvard University.

regularly reminds the reader of the argument's structure. This careful approach is helpful to the reader unfamiliar with philosophic argument. Moreover, Luban is familiar with the legal profession's need for specific examples, and he regularly supplies concreteness to anchor his argument.

His principal focus is his claim for moral activism. I will review this argument. The argument leads to a lawyer's role which Luban believes will promote the public good. He arrives at this conclusion by focusing on the individual lawyer. Can each lawyer, as an autonomous person, morally justify what she does in law practice? In answering this question, Luban concludes that moral activism is an appropriate role conception. Not only does it respect each lawyer's personal autonomy, but it also enhances the public welfare.

II. SOME EXAMPLES

To make my description of Luban's argument clearer, I will use four of Luban's brief and familiar case descriptions, and then discuss his argument in the context of these cases. Each of these cases focuses on whether the lawyer, while continuing to represent her client, ought to disclose a client's secret.

Case 1: Robert Garrow, who was accused of murdering a student camping near Lake Pleasant, New York, told his lawyer of two other murders he had committed. The lawyer found and photographed the bodies. Later the father of one of the missing girls asked the lawyer if he knew anything about his daughter. Should Garrow's lawyer tell the father what he knows?¹

Case 2: Plaintiff Spaulding had been badly injured in an automobile accident. He sued the defendant. The defendant's lawyer had a doctor examine Spaulding; the doctor discovered a life-threatening aortic aneurism, apparently caused by the accident, that Spaulding's doctor had not found. Should the defendant's lawyer tell Spaulding about the aneurism?²

Case 3: In a Ford Pinto case, the lawyers in Ford's legal department, who reviewed the cost-benefit and crash-test documents related to the Pinto, knew that the car was unsafe. Should Ford's lawyers reveal this information to anyone outside the company hierarchy?³

Case 4: Assume that in one of the early suits against Ford for Pinto-related damages, plaintiff Grimshaw told his attorney that he had been careless at the time of the accident. Assume further that

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1. D. LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 53-54, 149-50 (1988). I will cite the pages in Luban's book, rather than the cases, for I am concerned with his use of the examples rather than the accuracy of his report.
 2. *Id.* at 149-50.
 3. *Id.* at 210 n.9.

Ford's attorneys did not discover the information. Should Grimshaw's lawyer disclose this information to the Ford negotiators during the settlement negotiations, or should she keep the secret in an effort to extract a higher settlement?⁴

III. THE ARGUMENT

Luban's argument begins by discussing a concept of ordinary morality which focuses on particular acts of specific persons. What would an ordinary person do with the information in these four cases? Competing considerations, such as the wish to keep a secret, to help a person, to avoid an injury, to remain loyal to superiors, or to see justice done, would inform each person. In each case, the individual must decide if the particular act is a moral one. Luban apparently posits that in each of these examples the person of ordinary morality would disclose the information to the father, to Spaulding, to the public, and to the Ford negotiators, respectively.⁵

Would lawyers act in the same way? Luban claims that they would not. Each will keep her secret. Moreover, none of these lawyers will believe that it is wrong to keep the secret. The role of lawyer requires that secrets be kept. Lawyers believe they are morally justified in playing this role as the role is reflected in the professional folkways and the codified professional norms. Adherence to the role provides social regularity, promotes efficiency in moral work, and dispenses with a dubious metaphysics of self.⁶

Luban describes this accepted and partisan role as the standard conception. It dictates that although the lawyer can try and persuade her client to disclose the information, if the client wishes the information kept secret, the lawyer must either resign⁷ or assist the client without disclosing the information.⁸ The standard conception of lawyering requires each lawyer (who does not or cannot resign) to engage in conduct (i.e., not disclosing the information while assisting the client) which would be immoral under common morality standards. The lawyer's moral justification does not focus on the common morality of the particular act. Instead, the reasoning focuses on the policies defining the role, e.g., the standard conception, and then expects the lawyer

4. *Id.* at 206. I have elaborated this case to make certain points.

5. Luban explicitly addresses Cases 1, 2, and 3. Since he does not explicitly address Case 4, I have extrapolated from his argument what he would have decided.

6. D. LUBAN, *supra* note 1, at 121.

7. See my discussion of this point in Part IV, below.

8. Luban does not thoroughly discuss the issue of whether the lawyer should keep a secret after resignation. His tone suggests that in many instances he believes the lawyer would act morally in disclosing the information. However, there is ambiguity in his answer. What does seem clear is that he believes a lawyer should not be required (in the situations in which resignation is unavailable) both (1) to assist a client and (2) immorally to keep a secret. D. LUBAN, *supra* note 1, at 202-05.

to behave consistently with this role. In other words, since the standard role requires such partisan behavior, each lawyer is morally nonculpable and nonaccountable for engaging in it.

Luban does not recommend either the approach dictated by common morality or that dictated by the standard conception. He develops a scheme of moral justification, the Fourfold Root of Sufficient Reasoning, which merges the two approaches. Its claimed novelty rests in its rejection of the centrality of the question: whether to focus on the particular act or the policies constituting the role.⁹

By using this approach, Luban concludes that Garrow's and Grimshaw's lawyers (Cases 1 and 4) should continue to represent their clients without disclosing their secrets and that the defense attorney in Spaulding's case and Ford's lawyers should have either resigned or, if this were not feasible, should have continued to represent their clients *and* disclosed their secrets (Cases 2 and 3). How does he get to this result?

The Fourfold Root is a complicated system. It appears objective and mathematical, but it truly requires constant critical judgment and the balancing of competing values and interests. Luban argues that if the act required by the role (i.e., keeping the secret) is justified, it is so because the system of which the role is a part is also justified. Conversely, an act required by a role which is part of an unjust system is not morally justified. For example, an SS trooper could not justify his brutal behavior by reference to a role which was part of the unjust institution of Jewish genocide.

In the context of lawyering, the chain of moral justification is as follows: (1) is the adversary system (i.e., the institution) justified; (2) if so, is the concept of partisan lawyer (i.e., the role) justified by the adversary system; (3) if so, is the nondisclosure of information (i.e., the role obligation) justified by the role; (4) and finally, if so, is the actual nondisclosure justified by the obligation.

Luban begins his analysis with an examination of the adversary system. He argues that there is at least some justification for the system which will support, in many instances, the standard and partisan

9. Luban states:

"Which is the logical subject of evaluation: the act or the rule (the policy)?" . . . pos[es] a false dichotomy. Unlike a policies over acts approach—rule-utilitarianism, for example—the fourfold root does not eschew the moral assessment of individual acts because it concludes by weighing the arguments favoring the performance of this particular role act against the objections to this particular role act arising from common morality. Unlike an acts over policies approach—act-utilitarianism, for example—the fourfold root takes the moral assessment of general rules, policies, and institutions very seriously, for all these must be brought to bear on the question of whether a morally dissonant role act might nevertheless be required by us.

Id. at 138.

conception of lawyering. The force of the justification, however, varies in different circumstances. On the one hand, in the ordinary civil arena, Luban criticizes common arguments for the adversary system. He argues that the system does not ferret out the truth, it does not defend litigants's legal rights, and it does not safeguard against excesses. He also argues that it is not intrinsically valuable, it does not honor human dignity, and is not so deeply woven into the fabric of American society that it would be unjust to tinker with it. Nevertheless, the adversary system is justified because it is no worse than any other available system for resolving disputes. Luban calls this a weak pragmatic justification.

On the other hand, the adversary system is strongly justified in the criminal law context. Luban finds that proper respect for individuals and a political bias which favors the individual against the powerful state (i.e., the classical liberal argument) strongly justify the system.

Luban examines the moral justification of the first three steps in the Fourfold Root in a similar vein. The standard role conception (and its features of partisanship and nonaccountability) is thereby justified, at least initially, for all lawyers. Luban argues, however, that when the role dictates behavior in conflict with ordinary morality, the lawyer must apply a Cumulative Weight Test in order to justify the actual act in question (Step 4 in the Fourfold Root). This is a complicated concept, but it is the heart of Luban's position. If one can proceed through Steps 1, 2, and 3 with only weak justifications (as in the civil law paradigm), then this weakness must be taken into account in justifying the final act. The end result is that when the individual lawyer finally justifies the role act, "[a]ll of the components of our deliberation [(the cumulative weight of all the steps)] are collapsed into one weighting that bears equally on each role act required by the role obligation or rule."¹⁰

By applying the Cumulative Weight Test to the role act, Luban concludes that Garrow's lawyer, in Case 1, properly adopted the partisan standard conception of lawyering. Since it was a criminal law case, the adversary system and its concomitant roles have such strong justifications that they outweigh all competing moral considerations. Garrow's lawyer could therefore continue to represent Garrow and keep the secret.

In civil cases, the Cumulative Weight Test mandates that principles of ordinary morality displace the standard conception and its principles of partisanship and nonaccountability. The adversary system is only weakly and pragmatically justified, and therefore an appeal to its requirements is of little consequence when weighed against the elements of ordinary morality. Luban therefore concludes that the de-

10. *Id.* at 137.

fense lawyer in Case 2 and Ford's lawyers in Case 3 should either have resigned or, if they continued the representation, they should have disclosed what they knew.

What about Case 4? Luban suggests that the criminal law paradigm is applicable to more than the pure criminal law case in what he calls the progressive correction of classical liberalism. This correction notes that individuals need protection not only from the state, but also from other powerful private persons. The large private corporation can injure the small person as readily as the public state. Thus, Luban includes in the criminal law paradigm "the preservation of the proper relation between powerful institutions and those over whom they are able to exercise their power."¹¹ In these circumstances, as in the criminal law paradigm, the Cumulative Weight Test allows the standard conception automatically to govern the lawyer's acts. Grimshaw's lawyer acts appropriately in continuing her representation while not disclosing the secret.

Luban concedes that his approach leads to two shocking conclusions. First, it describes a vision of lawyering very different from the standard conception. It is a concept of moral activism. The lawyer does not unthinkingly pursue her client's interests as the client sees them. The lawyer discusses with the client the rightness or wrongness of the client's projects. The lawyer may persuade the client, the client may persuade the lawyer, or they may reach some agreeable accommodation. If, however, there is no common ground, the lawyer's resignation is not the only answer. The moral activist conception "allow[s] lawyers to forego immoral tactics or the pursuit of unjust ends without withdrawing, even if their clients insist that they use these tactics or pursue these ends."¹² Luban does not flinch from the implications of this recommendation. He frankly concedes that the moral activist lawyer will betray his client's projects.¹³

Second, an implication of Luban's view is that the lawyer for the little guy can borrow his justification for partisan advocacy from the strong criminal law paradigm, while other lawyers may only justify their actions by an appeal to common morality. Luban states that "lawyers representing individuals in confrontations with powerful organizations can fight dirtier than their adversaries' lawyers can fight back."¹⁴

11. *Id.* at 66.

12. *Id.* at 159.

13. There may be a "betrayal by the lawyer of a client's projects." *Id.* at 174. The lawyer "may find herself compelled to initiate action that the client will view as betrayal." *Id.* at xxii. Although some might believe that Luban wants the lawyer to engage in acts without disclosing what she is doing, I believe that Luban does not recommend such duplicity.

14. *Id.* at 156-57.

IV. SOME CRITICISMS

First, I will briefly examine (1) the Fourfold Root of Sufficient Reasoning, as a method which claims to focus on both the morality of the particular act and the general policy of the role and (2) the belief that a lawyer's resignation will not solve the lawyer's moral problem when her client insists on immoral means or ends. Second, I will suggest that Luban raises very fundamental questions about the rule of law and each lawyer's role in upholding it. His vision of moral activism leads him to recommend either civil disobedience or a new code of professional ethics which is, in my opinion, unduly indulgent of the lawyer's common morality.

First, Luban suggests that his approach, the Fourfold Root of Sufficient Reasoning, fairly focuses on both the particular act and the policies supporting the role. How his approach does this is, however, confusing. One interpretation of his methodology leaves us with little more than a method for focusing on the morality of the particular act. Luban recognizes that the concept of the Cumulative Weight Test is only a metaphor.¹⁵ How and what the lawyer will weigh is uncertain and indefinite. From another perspective, Luban's method suggests that in many instances there will be no need for the lawyer to balance the morality of the act against the role requirements. He argues that the standard partisan conception should *always* prevail except when both of the following conditions are met: (1) the case falls within the civil law paradigm and (2) the lawyer's common morality dictates that she not engage in the immoral behavior. If these two conditions are met, the moral activist conception should *always* prevail. In other words, Luban does not develop a system which in each case delicately balances the appeal to role and the force of common morality. Instead, he simply divides the legal world into two spheres, the criminal and the civil. If the case falls in the former, the standard conception always prevails. If the case falls in the latter, common morality should inform the lawyer's judgment exactly as it would if she were not a lawyer.

Luban is, moreover, unwilling to concede that a lawyer's resignation¹⁶ can solve the problem. He argues in Appendix I that in many instances the standard conception does not permit resignation. He also believes that, because of the economics of law practice, "it is too much to expect that lawyers will often withdraw instead of caving in to their clients in such cases."¹⁷

There are two troublesome features of this argument. He admits that his argument that resignation is frequently unavailable "is not

15. *Id.* at 134-35.

16. This is the standard conception's solution to each lawyer's moral dilemma.

17. D. LUBAN, *supra* note 1, at 397.

widely accepted."¹⁸ If he is wrong on this point, then there is rarely a need for a lawyer ever to betray a client. She can simply resign. Luban is also unduly understanding of the lawyer who "won't" resign. It would be possible to insist that the lawyer who does not choose to assist a client by using immoral methods bear the costs (e.g., loss of revenue, malpractice, even disbarment) of her principled refusal. Luban, however, believes this asks too much of the lawyer. He wants the lawyer to have the best of both worlds—the freedom to continue her representation and the freedom to use only moral means on her client's behalf. Luban hopes that if lawyers had this freedom and power, they would coerce their clients to act more justly.

Second, if the standard conception of lawyering is an accurate description of the present role, Luban's insistence that lawyers should nevertheless follow the dictates of common morality is civil disobedience. Although Luban suggests that conflicts between the standard conception and common morality will not occur that often, when they do, he admits that "the lawyer must become a civil disobedient."¹⁹ This is a dangerous conclusion.

I believe, as Luban does, that law is, and ought to be, a moral force in American society. There ought to be a presumption in favor of law-abiding. Of course, there will be a time for civil disobedience, but these times should be limited exceptions to the rule. I also believe that lawyers, as representatives of the legal system, have a special obligation to be exemplars of law-abiding citizens. This is not to say that they can never exercise civil disobedience. It only means that they should be reluctant to find exceptions to the rule of law. Lawyers, of course, will recognize that laws may be unfair or unjust, but they should use lawful processes to remedy these situations. This may encourage others to evince a proper respect for our legal institutions.

If this is true, it follows that lawyers ought to be equally law-abiding in their professional roles. They ought to be reluctant to reject in particular cases the dictates of the standard conception role. If this standard conception needs change, then lawyers ought to use lawful processes to change it.

Luban recognizes the problem of civil disobedience. He suggests that the professional code of ethics ought to incorporate the moral activist conception. He suggests "rules be redrafted to allow lawyers to forego immoral tactics or the pursuit of unjust ends without withdrawing, even if their clients insist that they use these tactics or pursue these ends."²⁰ No doubt this will preserve the lawyer's autonomy. Moreover, by noncooperation, she may be able to convince (or coerce) some clients to accept her vision of morality. Luban states "the law-

18. *Id.* at 397 n.2.

19. *Id.* at 156.

20. *Id.* at 159.

yer's autonomy allows the lawyer to exercise the 'Lysistratian prerogative'—to withhold services from those of whose projects she disapproves, to decide not to go to bed with clients who want to inflict damage on others."²¹

If only the lawyer's soul were at stake, I might endorse this view. Luban and I agree that whatever the profession and the public define as the proper role concept, it ought to contribute to a fairer and more just society. Luban apparently believes that the concept of moral activism, and the freedom it gives lawyers to dominate and betray clients, will achieve this result. I am less certain. Who gave lawyers such moral insight? Moreover, moral activism may result in a worse world. For every lawyer who will fight harder for the powerless individual, I fear that there are many who will perceive society's problems in traditional ways. For example, one lawyer may see her client, the indigent tenant, as a disadvantaged person in need of the basic human right of decent housing. Many more may perceive this client as a person infringing on a landowner's legitimate property rights. From this latter perspective, the morally active lawyer may be tempted to betray the tenant.

I am ambivalent about this. I was educated and began law practice in the 60s. I share Luban's political values. Certainly lawyers deserve freedom and autonomy, and certainly some lawyers, if granted this freedom and power, will use it wisely. If Luban's moral activism becomes the lawyers' accepted role, I too would hope that lawyers would use their power to make society conform to my vision of a just society.

In conclusion, even if we reluctantly reject Luban's vision of moral activism, he nevertheless demonstrates the power of clear thinking and rational exposition. In rejecting moral activism, we at least have come to understand the standard conception better.

21. *Id.* at 169.

Advocate Act, 1961 and Legal Professional Ethics

Prepared by¹

In the word of Cadozo, 'a lawyer's life is no life of cloistered ease to which you dedicate your powers. This is a life that touches your fellow men, of every angle of tier being, a life that you must live in the crowd, and yet apart from it, man of the world and philosopher by turns'.

The Supreme Court in *DP Chadha Vs. Triyugi Narain Mishra* observed that an advocate owes a duty to his client, to his opponent, to the court, to the society at large, and to himself. The Supreme Court has even gone to the extent of saying that the advocate is duty bound to state the correct position of law, when it is undisputed, even if it does not favour his client. While an advocate is free to try to the best of his ability, to use wit, to persuade the court to a view of the law which best serves his client, he cannot mislead the court a settled position of law.

The Supreme Court further observe that society and public are interested in due administration of justice and hence a lawyer owes a duty to the society and court and he is not supposed to encourage dishonesty and corruption.

There must be something which can fairly be described as misconduct; otherwise there can be no reasonable cause for taking disciplinary action. 'Misconduct' itself is a sufficiently wide expression; it is not necessary for instance that it should invoke moral turpitude. The court has right to expect a higher standard of loyalty to the court under co-operation from those who practice professional of law. Any conduct, which in any way, renders a man unfit for the exercise of his profession or is 'likely to hamper or embarrass the administration of justice by the High Court or any of the courts subordinate thereto' may be considered to be misconduct calling or disciplinary action. What court has to consider in all these case is the conduct of the advocate (attorney) as it affects his position as an advocate (attorney) and his relations

¹ Mr. R. Venkataramani, Senior Advocate, Supreme Court.

to the court. *Mahendra Pratap Singh Vs. Padam Kumari Devi* AIR 1993 ALL 143 at p. 154, 1993 civil CC 544. *In re Tulsidas Amarlal Karnanmi* AIR 1941 Bom 228, ILR 1941 Bom 548, 195 IC 359, 43 BLR 250. Justice Iyer said in *The Bar Council of Maharashtra Vs. MV Dabholkar* that the vital role of the lawyer depends upon his probity and professional life-style. The central function of the legal is to promote the administration of justice. As monopoly to legal profession has been statutorily granted by the nation, it obligates the lawyer to observe scrupulously those norms which make him worthy of confidence of community in him as a vehicle of social justice. 'Law is not trade briefs - no merchandise.' Legal profession is monopolistic in character and the monopoly itself inheres certain high traditions which its members are expected to upkeep and uphold. *M. Veerabhadra Rao Vs. Tek Chand* AIR 1985 SC 28 at p.38, 1984 Supp (1) SCC 571, See also *Sudha Vs. Chennai Advocates Association, Chennai* (2010) 14 SCC 114, para 40 (2010) 13 Jt 599. As misconduct has not been defined, meaning in common parlance would guide its meaning. The term has to be examined with the lens of property, decency and worthy living and the fitness of the person to be on the rolls of an advocate *U. Dakshinamoorthy Vs. Commission of Enquiry* AIR 1980 Mad 89 at p. 95, (1979) 92 Mad LW 688, (1980) 1 MLJ 121 (FB).

Justice Darling defined the expression 'professional misconduct' *'in re A Solicitor ex-parte the Law society* (1912) 1 KB 302, 105 LT 847, 28 TLR 50, LJKB 245, in these terms:

'If it is shown that an advocate in the pursuit of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonorable by his professional brethren of good repute and competency, then it is open to say that he is guilty of professional misconduct'

Professional misconduct may consist in betraying the confidence of a client; in attempting by any means to practice a fraud or empower on or deceive the court or the adverse party or his counsel and in fact in any conduct which tends to bring reproach on the legal profession or to alienate the favourable

opinion which the public should entertain concerning it.' *Corpus Juris Secundum*, Vol. 7, p. 740.

The words 'any other reasonable cause' are not restricted to reasonable cause of the same class or description referred to in the preceding sub-section, 18 but embrace all cases which may afford reasonable grounds for a suspension or dismissal. The reason is pointed out by Mr. Justice Hill *Le Mesurier Vs. Wajid Hussain ILR 29 Cal 890 (FB)*; *In the matter of Barrister -at-law AIR 1934 Lah 251, 1934 Cr. C 479*.

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

But the fact that the Legislature has chosen to use the word 'misconduct' in the Indian Bar Councils Act rather than the more indefinite phrase, 'reasonable cause', is no reason for restricting the natural meaning of the word *As has been held by a full Bench of the Bombay High Court in Court in Jamshed Byramji Kanga Vs. Kaikhushru Bomanji Bharucha AIR 1935 Bom 1, (1934) 36 BLR 1136*.

A lawyer is no doubt subordinate to the courts in so far as he is subject to the disciplinary authority of the courts but all the same he cannot be characterized as a subordinate officer of the court. In the words of Warelle:

"In the hurry and rush of modern life, and in view of the vast volume of litigation passing through the courts, it is essential to the dual administration of justice that persons shall act as aids and advisors to the court, presenting in turn each aspect of the case investigating and applying the principles that should govern it; collating and explaining the authorities which bear upon it, and suggesting the distinctions and analogies which must be regarded in arriving at a decision. This is the province of counsel, and it is largely through the labours of counsel that judges are enabled to dispatch the business of the court.

An advocate's duty is as important as that of a judge. The advocates have a large responsibility towards the society. A client's relationship with his / her advocate is underlined by utmost trust.

An advocate should be dignified in his dealings to the court, to his fellow lawyers and to the litigants. He should have integrity in abundance and should never do anything that erodes his credibility.

Mahant Hakumat Rai v Emperor AIR 1943 Lah 14, ILR 1943 Lah 791, 44 PLR 511, 44 Cr LJ 181. Oswald's Contempt of Court, third edn., p.54. "An over-subservient Bar would be one of the greatest misfortunes that could happen to the administration of justice."

"A self respecting independence in the discharge of professional duty, with denial or the diminution of the courtesy and respect due to the judge's station is the only proper foundation for cordial personal and official relations between the Bench and the Bar." *Mahant Hukumat Rai Vs. Emperor AIR 1943 Lah 14, ILR 1943 Lah 791, 44 PLR 511, 44 Cr. LJ 181.*

An advocate is not merely an agent of the client but he is an officer of the court and his conduct should be unexceptionable and if he tends to impede, obstruct, prevent the administration of law it destroys the confidence of the people. *Radha Mohan Lal Vs. Rajasthan High Court (2003) 3 SCC 427, AIR 2003 SC 1467, 2003 Cr LJ 1207, See also My Shareef Vs. Judges of Nagpur High Court AIR 1955 SC 19, (1955) 1 SCR 757, 1995 Cr LJ 133, Shasher Singh Bedi Vs. High Court Punjab and Haryana (1996) 7 SCC 99, AIR 1995 SC 1974, 1995 Cr LJ 3627: MB Sanghi Advocate Vs. High Court Punjab and Haryana (1991) 3 SCC 600, AIR 1991 SC 1834, (1991) 3 JT 318.*

There is a difference of judicial opinion as to whether a professional conduct involves moral turpitude. According to Bombay High Court, the term 'misconduct' is a sufficiently wide expression. It is not necessary that it should involve moral turpitude. Any conduct which in any way renders a man unfit for the exercise of his profession or is likely to hamper or embarrass the

administration of justice by the High Court or any of the courts subordinate thereto may be considered to be misconduct *In re U Sein Pe, a lower grade pleader CJ Robert, said:*

Proper professional conduct is not a mere matter of compliance with technical rules. It is one of which everyone who appears to be called a gentleman should have an instructive appreciation. Therefore, professional misconduct is conduct which may reasonably be regarded as disgraceful by legal practitioners of good repute and competency. It has been held by the Bombay High Court that the English cases provide no justification for narrowing down the meaning of the 'professional or other misconduct'. *In the matter of SP, a Pleader, AIR 1934 Pat 352.*

In re Pran Narain, Advocate, Agra, AIR 1940 All 289, 41 Cr LJ 620, ILR (1940) All 386.

Jamshed Byramji Kanga Vs. Kaikhusru Bomanji Barucha AIR 1935 Bom 1, 36 BLR 57 (FB)

A solicitor has been held guilty of unprofessional conduct in procuring from a client's wife in her husband's presence a sworn confession of adultery. Betraying the confidence of his client, defrauding him, or obtaining money or property from him by extortion, or by false representation relating to matters entrusted to him as an attorney, warrants suspension or disbarment. The same is true of defrauding a client by means of false and misleading statements, by knowingly giving false advice, by inducing or making a settlement to the disadvantage of a client, or by trading a number of releases for a lump sum to be distributed to clients as the attorney thinks best. So also the abandonment of his client's interests after receipt of a fee, as by failure to protect the rights of the client on writ of error or appeal, or by withdrawing a motion for a new trial without the knowledge or authority of his client, have been held ground for disciplinary action.

19. *In re Hahn* 94 All 953, 84 NJ Eq 523, motion denied 96 All 589, 85 NJ Eq 510, Ann Cas 1918 Bom 830.
21. *Ark Maloney v State* 32 SW (2d) 423, 182 Ark 510.
22. *In re Aydelotte* 200 NYS 637, 206 App Div 93.
23. *People ex rel Chicago Bar Association v Kwasigroch* 192 NE 221, 357 Ill 302.
24. *Marsh v State Bar of California* 291 Pat 583, 210 Cal 303; *In re Hittson* 185 Pat 308, 43 Cal App 462.
25. *In re Alexander*, 184 All 77, 321 Pat 125-6 CJ., Pot 590.
26. *People v Sullivan* 117 NE 134, 279 Ill 634, LRA 1918 All 1136.
27. *In re Glucksman* 243 NYS 1,230 App Div 185.
28. *In re Steierman* 262 NYS 121, 237 App Div 584; *In re Marcus*, 203 NYS 417, 208 App Div 300.
29. *Ariz—Tovar v State* 8 Pat (2d) 247, 39 Ariz 528.
30. *State of Bd. of law Examiners Vs. De la Motle* 142 NW 929, 123 Minn 54.

An advocate is not absolutely privileged and a suit is maintainable for damages against him by reason of his uttering or making defamatory statements outside his office of advocate and with no reference to the subject matter before court. *Rahim Buksh v Bachcha Lal* AIR 1929 All 214, 115 IC 458, 1929 ALJ 303, ILR 51 All 509.

An error of law committed by a lawyer cannot be treated as a professional misconduct. Where circumstances are sufficient to justify the insertion in an affidavit of a paragraph in a qualified manner and it is inserted by the Solicitor in an unqualified manner, it is merely an error of judgment on the part of the

Solicitor, to omit an express statement of the limitation to which that deponent's assertion is necessary subject and no moral blame can be imputed to the Solicitor for the omission.

29. *In the matter of Sarat Chandra Gupta* 4 CWN 663; *In re Puranchandra Addy* 43 Cal 685.

30. *Jonathan Collins Zizer v Judges of the Supreme Court, Nigeria* AIR 1929 PC 33, 116 IC 387, 29 MLW 111, 1929 ALJ 53 (PC); *Ghoriram Goenka v Haribuc Goverdhandas* AIR 1932 Cal 231, 54 CLJ 558, 35 CWN 674, 136 IC 535, (1932) ILR Cal 31.

In Panduranga Dattathreya Khandekar Vs. Bar Council of Maharashtra, AIR 1984 Sc 110, (1984) 2 SCC 556, (1984) 1 SCR 414, the Supreme Court held that improper legal advice may amount to professional misconduct but not wrong legal advice. The Supreme Court followed *Re an Advocate* and the Allahabad High Court in the matter of an Advocate of Agra. The view appears to be that the wrong advice may be mistaken but is honestly given.

Improper legal advice may amount to professional misconduct but not wrong legal advice. *PD Khandekar Vs. Bar Council of Maharashtra* AIR 1984 SC 110, (1984) 2 SCC 556, (1983) 2 SCALE 495.

The carrying on of a trade or business is ordinarily inconsistent with practice of the profession of an advocate. Therefore, the conduct of a practicing lawyer in forming as a partner in a firm constitutes professional misconduct. *S Asghar Husain v Har Prasad Sand* AIR 1936 Oudh 18, ILR 11, Luck 477, 158 IC 278, 1936 OWN 1029, *In the matter of B, an Advocate* AIR 1935 All 1023, 159 IC 561, 1935 AWR 1929, Cr. LJ 117, 1936 ALI 379.

A legal practitioner who carries on the business of money – lender is amenable to the disciplinary jurisdiction of the High Court. *In the matter of*

Bhairo Dutt Bhandari, an advocate, Ranikhet ILR 1940 All 60, 185 IC 611, AIR 1940 All 1, 41 Cr LJ 211, 1939 AWR 828, 1939 ALJ 957.

The Bar Council is not concerned with the political opinion of the members of the legal profession unless the expression of them involves the commission of an offence or constitutes conduct improper on the part of a legal practitioner who is the part of the machinery for the administration of justice. A legal practitioner has a right to entertain political opinions in the same manner as any other person which may or may not be acceptable to the authorities. *In the matter of Pleader. Madura AIR 1943 Mad 475 Cr LJ 748, 56 LW 320, ILR 1944 Mad 8, 208 IC 222, (1943) 1 MLJ 396; In the matter of a second grader Pleader, Ramchandarapur 75 IC 977, 25 Cr LJ 65, AIR 1924 Mad, 45 MLJ 684, 18 MLW 689, 23 MLT 98, 1923 MWN 768 (FB).*

In case of *Emperor v Babus Rajni Kanta Bose AIR 1922 Cal 515, 71 IC 81* a Special Bench of the Calcutta High Court held that it is inconsistent with the duties of a pleader to join in a hartal to boycott the court, his duty being to cooperate with the court in the orderly and pure administration of justice. In the circumstances of the case and regard being had to the case being of the kind the court dealt with the pleaders leniently and gave them a warning.

'In the case of the Government Pleader, High Court, Bombay Vs. Jagannath Maheshwar, the pleader presided at a public meeting held for the purpose of expressing sorrow for a sympathy with Mr. Tilak who was convicted at a trial at the criminal sessions. One of the resolutions passed at the meeting reflected upon and denounced the conduct of the Judge who presided over the trial. The Pleader was suspended for six months and directed to deliver up the *sanad*, with liberty to apply for it again six months after. *In re Jivanlal Varajaray Desai 54 IC 679, (1920) 44 Bom 418.*

Mere negligence unaccompanied by any moral delinquency does not amount to professional misconduct. An advocate in exercise of his profession is bound to exercise reasonable skill and prudence but he is not expected to be infallible. Hence, it has been repeatedly held that mere negligence on the part

of a legal practitioner does not found a petition for professional misconduct means conduct which would reasonably be regarded as disgraceful or dishonorable by legal practitioners of good repute and efficiency. Mere negligence, even of a serious character will not suffice to found a charge of professional misconduct. But if counsel, by his acts or omission causes the interest of the party, engaging him in any legal proceedings to be prejudicially affected, he does so at his peril and the party is entitled to compensation from his own counsel.

68. *PD Khandekar Vs. Bar Council of Maharashtra* AIR 1984 SC 110, (1984) 2 SCC 556, (1983) 2 SCALE 495.

69. *Swa Hla Pru v SS Halkar* ILR 9 Rang 575, AIR 1932 Rang 1, 135 IC 648.

71. *In re Gondika Satyanaryan Murthy, a Pleader* 40 Cr LJ 160 (1), 178 IC 917, AIR 1938 Mad 965, 48 LW 650, 1938 MWN 961, (1938) 2 MLJ 661; *In re Pran Narain, Advocate, Agra* ILR 1940 All 386, AIR 1940 All 289, 188 IC 527, 1940 AWR 260, 41 Cr LJ 620, 1940 ALJ 306; *In the matter of an Advocate* ILR 62 Cal 158, 157 IC374 36 CR LJ 1130, AIR 1935 Cal 484; *B Munuswajani Naidu* ILR 49 Mad 568, 50 MLJ 399, 1926 MWN 412.

72. *Manjit kaur V. Deol Bus service* AIR 1989 P & H at p. 185 (1989) 95 PLR 479, ILR (1989), P & H 370.

But the negligent management of his office by a practitioner and permitting his clerks to cheat the clients, and mislead them as to the progress of the case and to inform the client that the case has been dismissed when as a matter of fact it was dismissed owing to the pleader's neglect, amounts to professional misconduct. 76. *In re Vakil* 35 Mad 543 (PC).

An omission on the part of a legal practitioner to examine the record before making an application for stay of execution and to verify the statement of the

party who comes and makes the statement, would at the most be an act of carelessness and is not sufficient to justify any disciplinary proceedings being adopted. A legal practitioner withdrawing money from a court under instructions of a relation of the client who was surety for the guardianship of the client and paying the money of the relation on the strength of two previous withdrawals and payments to the relation is negligent of his duty to the court and his client. But he cannot be guilty of grossly improper conduct in the discharge of his professional duty. Whereas legal practitioner neglects and throws away the interest of an unimportant client in favour of the interest of an important client, he commits an offence deserving of the most serious censure.

79. In the matter N, a Pleader AIR 1929 Pat. 153, PLT 364, 116 IC 764.

In Uppal's case, the Supreme Court said that lawyers going on strike are laible for contempt because a strike impedes the administration of justice. In C Ravichandra Iyer Vs. Justice AM Bhattacharjee, the Supreme Court went to the extent of saying that Bar should not pass any resolution condemning the conduct of a judge and seek his resignation and such conduct amounts to contempt of court.

In the case of Rajiv K Garg Vs. Shanti Bhushan, the Court observed that a committee of lawyers formed with the object of achieving purity in the administration of justice should adopt legal and constitutional means.

Statements unnecessarily made by lawyers in open court containing imputations against the fairness and impartiality of the court without any foundation, amount to professional misconduct. Lawyers owe a duty not only towards their clients but also towards courts in which they practice and it is part of their duty to cooperate with the court in the orderly and pure administration of justice.

67. In re Mahendra Lal Roy AIR 1922 Cal. 550, 24 Cr. LJ 209, 71 IC 673, 27 CWN 88.

If a person commits contempt of court in his personnel capacity only, for instance, as a suitor, and not in his professional capacity or character, he may be punished only for that contempt; he cannot be dealt with for professional misconduct.

80. In the matter of Tj Wallace 36 LJPC 9, 15 WR 533 (PC); In the matter of an Advocate of Benares 1932 ALJ 773, AIR 1932 All 492.

Brazenness is not outspokenness and arrogance is not fearlessness. Use of intemperate language is not assertion of right nor is a threat an argument. Humility is not servility and courtesy and politeness are not lack of dignity, self-restraint and respectful attitude towards the court, presenting of correct facts and law with a balanced mind and without overstatement, suppression, distortion or embellishment are requisites of good advocacy.

In M. Veerabhadra Rao v. Tekchand, AIR 1985 SC 28: 1985 (1) SCR 1003: 1985(1) CCC 221, it was held that the rules contain Canons of Conduct and Etiquette adopted as general guides; yet the specific mention thereof shall not be construed as a denial of the existence of others equally imperative though not specifically mentioned.

Punishment of removal from the rolls of a Bar Council should be ordered where the misconduct of an advocate is such that he must be regarded as unworthy to remain a member of the honourable profession and unfit to be entrusted with the responsible duties of the profession, *N, an advocate, AIR 1936 Cal 158: 1937 Cr LJ 534; P, an Advocate, AIR 1934 Rang 33.*

In Vijay Singh Rathore v. Murarilal, AIR 1979 SC 1719: 1979 (4) SCC 758: 1980 SCC (Cr) 20: 1980 (1) SCR 205, it was held that punishment must be geared to a social goal, at once deterrent and reformatory.

A barrister who was entrusted a case by another barrister on the promise of the fee, extracted more fee disproportionate to the amount of work, it was

held to be clear professional misconduct, *William Edward v. Judge of Supreme Court*, Air 1928 PC 264.

Among the different types of misconduct envisaged for a legal practitioner misappropriation of the client's money must be regarded as one of the gravest. *Harish Chandra Tiwari v. Baiju*, Air 2002 SC 545: 2002 (2) Alt 10 (SC).

The appellant failed to pay back a considerable sum of money belonging to his client when demanded. Besides, he also put forward a false defense and tried to sustain it by suborning witnesses. The High Court ordered striking off the name of the appellant from the role of advocates, which is erring on the side of leniency. Hence there is no justification for the request made on behalf of the appellant to reduce the same. *P.J. Ratnam Vs. D. Kanikaram* AIR 1964 Sc 244: 1964 (1) Cr. LJ 146: 1964 (3) SCR 1.

When the Bar Council of India gave a finding of misappropriation, the proper punishment for that is the name of the Advocate must be struck off the rolls. *J. S. Jadhav Vs. Mustafa Haji Mohamad Yusuf*, AIR 1993 SC 1535: 1995 (2) SCC 562: 1993 (2) SCR 1006.

There must be element of moral delinquency in the negligence as negligence by itself is not professional misconduct. It means a conduct which would reasonably be regarded as disgraceful or dishonorable by solicitors of good repute and competence. The members of the legal professional should stand free from suspicious. Gross negligence in the discharge of duties partakes of shades of delinquency and would undoubtedly amount to professional misconduct. Similarly, conduct, which amounts to dereliction of duty by an advocate towards his client or towards his case, would amount to professional misconduct. But negligence without moral turpitude or delinquency may not amount to professional misconduct. *V.P. Kundravelu Vs. Bar Council of India*, AIR 1997 SC 1014: 1997 (4) SCC 266.

If a lawyer repudiates the agreement with his client after receiving fees, it amounts to fraudulent conduct. *Muni Reddi Vs. Venkat Rao*, AIR 1914 Mad 512: 13 Cr. LJ 800 (FB).

Refusal to attend unless further fees is paid is professional misconduct. *First Grade Pleader, In re*, AIR 1915 LB 29: 1916 Cr. LJ 707.

It cannot be said that the case papers entrusted by the client to his Counsel are goods in his hand upon which he can claim a relating lien till his fee or other charges incurred are paid. *Per P. SETHI J.R. D. Saxena Vs. Balram Prasad Sharma*, 2000 (5) ALT 1 (SC).

It is true that mere negligence or error of judgment on the part of the advocate would not amount to professional misconduct. But difference considerations arise where the negligence of the advocate is gross. Then the question to examine is whether such gross negligence involves moral turpitude or delinquency which should not receive a narrow construction. Wherever conduct proved against an advocate is contrary to honesty, or opposed to good morals, or unethical, it may be safely held that it involves moral turpitude. *P. an Advocate In re*, AIR 1963 SC 1313: 1963 (2) Cr. LJ 341.

Professional Ethics Lecture

For AOR Exam 2019

❖ Prepared by¹

***Relationship between Morality and Ethics:**

1. In everyday conversation, the terms sometimes carry different connotations. When we call lawyers or other professionals “unethical”, we usually mean that they have been somehow dishonest- that they lied, cheated, or become involved in a conflict of interest. By contrast, calling a person “immoral” may conjure up an image of depravity- of cruelty, sexual misconduct, or otherwise illicit behavior. Moral philosophers, however, do not generally use the words “ethics” and “morality” in these restrictive senses, and this book uses them interchangeably.

2. This is not to imply that the terms have been interchangeable. Some theorist, including the prominent nineteenth century German philosopher Hegel, have reserved the word “ethics” to refer to the customary norms within a specific society- the society’s ethos. The term “morality”, on the other hand, is often used to refer to philosophical systems involving abstract universal norms of right and wrong. Immanuel Kant’s famous “categorical imperative” – “act so that you treat humanity... always as an end, and never as a means only”- is an example of such a universal moral principle. The categorical imperative, Kant believed, is valid at all times and in all cultures, and he offered a general argument for its truth.

3. This distinction between theory-based morality and custom-based ethics suggests a sharp separation between everyday judgments and philosophical theories.

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4. There is, however, an important difference between accepting customary ethical beliefs on faith and subjecting them to critical reflection. Positive morality refers to the dominant moral traditions in a particular society. Critical morality involves a systematic examination of those traditions to determine whether they should be obeyed, modified, or abandoned.

5. Given full information and an opportunity for dispassionate and disinterested judgment, individuals appear likely to agree about certain essential values, such as honesty, loyalty, benevolence, and avoidance of unnecessary harm, (Alan Wolfe, *Moral Freedom* 168 (2001)). Some biologists and neuroscientists believe that certain moral convictions have been adaptive for survival and are now hard wired into the brain.

6. Disagreements often arise about how to apply broadly shared values or resolve conflicts between them in particular cases. However, much of controversy surrounding moral issues involves disputes about facts, not principles. The same is true of most hotly contested questions of legal ethics. Lawyers disagree about the duty of confidentiality not because they disagree about the values that are important but because they disagree about what rules would best serve those values. Would requiring lawyers to disclose certain confidential information to protect third parties significantly erode client trust and candor? In the long run, would imposing greater disclosure obligations put lawyers in a position to prevent more or less harm?

7. A basic understanding of the primary frameworks of moral philosophy can sometimes be helpful in addressing the ethical issues that arise in legal practice. That inquiry has given rise to three basic approaches: those that focus on the consequences of the action; those emphasize the action itself; and those that center on the character of the actor.

8. Consequentialism judges the rightness or wrongness of actions based on their consequences. The most familiar consequentialist theory is utilitarianism, primarily as developed by Jeremy Bentham, John Stuart Mill, and Henry Sidgwick, (Jeremy Bentham, *An Introduction to the Principles of*

Morals and Legislation (1789); John Stuart, *Utilitarianism* (Mary Warnock ed., 1962); Henry Sidgwick, *Methods of Ethics* (7th ed., 1962)). From this prospective, an individual's moral obligation is to maximize utility.

9. However, consequentialist theories need not limit the relevant consequences to pleasure and pain, which are, after all, hard to measure with any precision. Some economists treat total social wealth as the "good" to be maximized, and judge actions or policies according to their economic effects.

10. The most prominent of those other theories are act-centered rather than consequence-centered. They are usually labeled deontological, a term, derived from the Greek word for duty. Some actions may be right or wrong, permitted or forbidden, regardless of their consequences.

11. A third group of theories are generally lumped together under the label virtue ethics. These theories focus on the character of the actor, rather than on the nature of the act or on its consequences. Aristotle's *Ethics* offered the first systematic expression of this approach. He focused on character and stressed the importance of certain key virtues, such as honesty, courage, temperance and the most importantly, practical wisdom. For Aristotle, virtues enable us to desire good ends, and practical wisdom guides us in actions that will achieve those ends.

12. Even a virtuous lawyer can be perplexed about how to strike the right balance between competing issues. Nor is a unified concept of character consistent with much contemporary research in psychology, neuroscience, and organizational behavior, which documents the situational nature of moral conduct and the extent to which contextual pressures can undermine individual's ethical commitments (See research summarized in Kwame Anthony Appiah, *Experiments in Ethics* 39-55 (2007); John Doris, *Lack of Character* 22-47 (2002); David Luban, *Integrity: Its Causes and Cures*, 72 *Fordham L. Rev.* 279 (2003); Deborah L. Rhode, *If Integrity is the Answer, What is the Question?*, 72 *Fordham L. Rev.* 333 (2003)).

*(Extract from:- Legal Ethics, Seventh Edition by Deborah L. Rhode, David Luban, Scott L. Cummings, Nora Freeman Engstrom, Published by Foundation Press)

13. The subject of Legal or Professional Ethics is fairly old. Since we inherited the English Common Law system and particularly the adversarial system, we keep talking about professional ethics with reference to English Law and Practice. The subject is perennial so much so that one William of Drogheda an Oxford priest is said to have written a book in the year 1239. An ironical statement attributed to the author is "Get your money while the patient is ill."
14. Lawyers practicing before ecclesiastical institutions in England were usually clerics. Besides several obligations such as charging moderate fees, honest dealing with clients, dropping cases discovered without foundation, avoiding "playing on both hands" etc they were also required to swear the oath of "calumny" during the course of proceedings vouching that their clients are acting with good faith. How about imposing such a requirement in an appropriate form on all legal practitioners? Or pleading and affidavits, we file are often are found to be lacking in bonafides.
15. Chapter 29 of the statute of West Minister, the early attempt at the regulation of the legal profession, provided for imprisonment for a year, if a pleader was found to be in deceit or collusion. Between the thirteenth and the sixteenth century series of attempts were made towards regulation of legal profession. It is said that these interventions were in response to public complaints about incompetence and misconduct by lawyers. In re G. Mayor Cooke 1889 (5) TLR 407, the English Court considered professional misconduct, as the conduct of a lawyer who does something which is "dishonourable to him as a man and dishonourable in his profession". When what is honourable conduct was perhaps easier to identify compared to the complexities of the practice of law today, such simple approach was adequate. It is doubtful whether such a simple approach is adequate?

16. With the expansion of human activities and with the emergence of wide range of professions people are beginning to write about professional ethics, touching virtually upon every profession. Several branches of science and technology, public services, economic and social activities, seem to invite principles or codes of regulation. What distinctions can be made between legal profession and other professions such as medical profession, engineering, chartered accountants etc?

Concept of negligence is a ground for **liability** in these professions (see Phipson on negligence). How about negligence in its widest meaning as misconduct for lawyers?

17. It is said that every profession is a job and every professional makes a living by doing what she or he does. But not every job is a profession and not every job is a way of life (Anthony T. Kromnan). How do you explain this?

18. The practice of law is identified to have four characteristics:

- a. Law is a public calling which involves a duty to serve the good of the community as a whole.
- b. Despite the special branches of law the profession remains the craft of a generalist. Lawyers perform a wide range of tasks counseling clients, drafting documents, litigating, which involves moving around different areas of law.
- c. The capacity of a lawyer for a judgment which means not only intellectual skills but also development of perceptual and emotional powers. The clever lawyer, who possess a huge stockpile of technical information about the law and is adept at its manipulation, but who lacks the ability to distinguish between what is important and what is not and cannot sympathetically imagine how things look and feel from his adversary's point of view, is not a good lawyer.

The faculty for judgment means the full complement of emotional, perceptual and intellectual powers needed for a good judgment.

- d. The study and practice of law looks both backwards and forwards. What we study is the study of the past and the efforts of the present and the march towards the future.

19. The study of professional ethics is therefore not merely a matter of concern for those who practice law, but for the very practice of law itself and the community.
20. What is the standard conception of a lawyer? Is it what Lord Brougham called the “hired gun” namely, that the lawyer knows only the person of the client and none else. This means that the interest of the client, wrong, dubious, weak, immoral and indefensible or otherwise unsupportable, will govern the conduct of the lawyer, and there is no room for moral activism. Is this standard conception right? Can lawyers sit on judgment of their client’s causes and decline illegal or immoral claims?
21. The adversarial system of administration of justice is said to be one formidable reason for the prevalence of the standard conception of a lawyer. How far this is true and to what extent the adversarial dimension has pervaded all aspects and dimensions of administration of justice is a matter for debate. While this may be true of the trial courts, how do you look at it in the case of Constitutional Courts? Can we identify any distinction between trial courts and constitutional courts as regard adversarial system? The critiques of adversarial system often focus on the trial process.
22. When we talk of administration of justice we are not merely talking about the trial and appellate court litigation, not even civil and criminal court processes. The bulk of litigation which takes place in the High Courts and the Tribunals involves adversarial dimensions. The practice of law in Supreme Court in a way captures all the finer elements of professional ethics. The commitment to public good, moral values, community relevance, avoidance of frivolous litigation, promotion of strengthening the discipline of law and Rule of Law, enhancing the value and relevance of the Supreme Court as the ultimate, constitutional legal and social arbiter, are indispensable dimensions of ethics.
23. Few facets of current professional ethics issues need to be studied. The emergence of technology driven methods of communication, the internet,

social media, etc have thrown open several opportunities for crossing the Lakshman Rekhas of high ethical professional conduct. Today's wrong doers and criminals, unrepentant law breakers, will not mind the use of lavish professional services. New fields of litigation and areas of social wrongs are also fertile grounds for highly priced legal services. Education, real estate, corporate crimes, political misdemeanors, environment wrongs are few such examples. How can we connect the Bar Council Rules to these matters? Are the Rules adequate enough? Can the comparison with the Codes of American Bar Association help?

24. Is there a room for exploration of constitutional and community obligations which will inform the practice of law? What about lawyers fidelity to law and the constitution? Whether W. Wendel's thesis that the foremost allegiance of lawyers is to law and say Rule of Law is exhaustive of the role of lawyers? What about lawyer's need to earn a decent living?

25. The Advocate's Act is said to be far behind its time. Just as legal education, its quality and output has been seriously compromised by the role of the Bar Council of India, the matters of professional or other misconduct deserve some radical thinking. Professional misconduct and other misconduct are treated on the same footing which means that unacceptable private conduct may also invite adverse action. Is there a need to closely consider the connection between professional and other misconduct? While the long history of cases relating to professional misconduct will be useful and continued to be relevant, given the tension between law and social change on the one hand and the tendency of social attitudes, beliefs, and conduct resisting such changes from the other hand call for new debates on professional ethics. Whether section 35A of the Act needs any rethinking?

26. The skills of advocacy involves learning, maturity, understanding, balancing, respecting and regarding multiple points of view and does not merely rest upon brazen and bulldozing tactics. The institution of justice, its reputation and integrity must be served at all cost.

- 27.If character is relevant for any public appointment, why not for the legal profession? What about a character and fitness test for admission to the practice of law, on the same lines as a fitness test for an appointment to judicial services? Why not a periodical testing of the continuation in the bar?
- 28.Another area of concern is the exercise the freedom of speech and expression vis-a-vis the matters pending in courts. The ease with which the members of legal profession resort to public speaking, media attention, or online writing without adherence to some norms of discipline, also calls for a debate. While Article 19 (1)(a) is fundamental, how do we deal with the subjudice principle, media trial and the temptation to influence or bear upon the outcomes of hugely controversial, social, political and religious issues. What is the principle of substantial risk of prejudice to the administration of justice. Can we say the U.S, the English and the Indian situation are different?
- 29.The powers of the Supreme Court under Article 129 for initiation of proceedings for contempt as distinct from their disciplinary powers under section 35 of the Advocate's Act, in this context and the legality of the Supreme Court to remove the name of an Advocate-On-Record from the register of the advocates maintained by the Court vis-à-vis the Advocate Act?