A STUDY ON “PROFESSIONAL MISCONDUCT MATTERS” (WITH SUPPORTING CASE LAWS) ON: BREACH OF TRUST, TAKING UNDUE ADVANTAGE OF ONE’S POSITION & CONTINGENT FEE

- Rahul K. Chopra

# Introduction

Advocates in India constitute a privileged class that enjoys the exclusive right to practice law. As officers of the Court as well as agents of the client, the advocate has to adhere to a standard of conduct which is befitting of his status and responsibility.[[1]](#footnote-1) It may be noted that under the Advocates Act, the concerned State Bar Council can take disciplinary action against any advocate who is found to be guilty of professional or other misconduct. The use of the word ‘other’ clearly indicates that misconduct does not merely refer to professional misconduct – it could refer to any misconduct, whether in the professional capacity or otherwise.[[2]](#footnote-2)

To understand the scope and implication of the term ‘misconduct’, the context of the role and responsibility of an advocate should be kept in mind. Misconduct is a sufficiently wide expression, and need not necessarily imply the involvement of moral turpitude. ‘Misconduct’ per se has been defined in the Black’s Law Dictionary to be “any transgression of some established and definite rule of action, a forbidden act, unlawful or improper behavior, willful in character, a dereliction of duty.”[[3]](#footnote-3)

In a different context, the Supreme Court has opined that the word “misconduct” has no precise meaning, and its scope and ambit has to be construed with reference to the subject matter and context wherein the term occurs. In the context of misconduct of an advocate, any conduct that in any way renders an advocate unfit for the exercise of his profession, or is likely to hamper or embarrass the administration of justice may be considered to amount to misconduct, for which disciplinary action may be initiated.

## **Breach of Trust**

### Misappropriating The Asset Of Client: **Harish Chandra Tiwari v. Baiju**[[4]](#footnote-4)

Appellant Harish Chandra Tiwari was enrolled as an advocate with the Bar Council of the State of UP in May 1982 and has been practicing since then, mainly in the courts at Lakhimpur Kheri District in UP. Respondent Baiju engaged the delinquent advocate in a land acquisition case in which the respondent was a claimant for compensation. The Disciplinary Committee has described the respondent as “an old, helpless, poor illiterate person.”

Compensation of Rs. 8118/- for the acquisition of the land of the said Baiju was deposited by the State in the court. Appellant applied for releasing the amount and as per orders of the court he withdrew the said amount on 2.9.1987. But he did not return it to the client to whom it was payable nor did he inform the client about the receipt of the amount. Long thereafter, when the client came to know of it and after failing to get the amount returned by the advocate, compliant was lodged by him with the Bar Council of the State for initiating suitable disciplinary action against the appellant.

Held: Court held that 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. In this professional capacity the legal practitioner has to collect money from the client towards expenses of the litigation, or withdraw money from the court payable to the client or take money of the client to be deposited in court. In all such cases, when the money of the client reaches his hand it is a trust.

If a public servant misappropriates money he is liable to be punished under the present Prevention of Corruption Act, with imprisonment which shall not be less than one year. He is certain to be dismissed from service. But if an advocate misappropriates money of the client there is no justification in de-escalating the gravity of the misdemeanor. Perhaps the dimension of the gravity of such breach of trust would be mitigated when the misappropriation remained only for a temporary period. There may be justification to award a lesser punishment in a case where the delinquent advocate returned the money before commencing the disciplinary proceedings.

### **Informing About Bribe:** Shambhu Ram Yadav v. Hanuman Das Khatry[[5]](#footnote-5)

The Court upheld the order of bar council of India dated 31st July 1999, which held that the appellant has served as advocated for 50 years and it was not expected of him to indulge in such a practice of corrupting the judiciary or offering bribe to the judge and he admittedly demanded Rs.10,000/- from his client and he orally stated that subsequently order was passed in his client’s favour. This was enough to make him totally unfit to be a lawyer by writing the letter in question.

Held: The Court said that they cannot impose any lesser punishment than debarring him permanently from the practice. His name was struck off from, the roll of advocates maintained by the Bar Council of Rajasthan. Thereafter the appellant did not have any right to appear in any Court of Law, Tribunal or any authority. Court imposed a cost of Rs. 5,000/- to the appellant towards the Bar Council of India.

### Bar Council Of Andhra Pradesh V. K. Satyanarayana[[6]](#footnote-6)

The question involved in this case was Whether or not retaining client’s money case amounts by an advocate amounts to professional misconduct.

Held: It was laid that it was neither pleaded nor shown that the advocate was in dire financial difficulty which promoted him to utilize the decretal amount for his treatment which was with him in trust. This is an act of breach of trust. It said that “we are firmly of the view that such types of excuses cannot be entertained being frivolous and unsustainable”.

The Bench comprising Justice V. N. Khare and Justice Ashok Bhan said “adherence to correct professional conduct in the discharge of one’s duties as an advocate is the backbone of legal system. Any laxity while judging the misconduct which is not bona fide and dishonest advocate would undermine the confidence of the litigant public resulting in the collapse of legal system.[[7]](#footnote-7)

The Supreme Court referred to the case of Harish Chandra TiwariBaiju*[[8]](#footnote-8)*, in which it was held that “Amongst the various types of misconduct envisaged for a legal practitioner the misappropriation of the client’s money must be regarded as one of the gravest.” In his professional capacity, the legal practitioner has to collect money from the client towards expenses of the litigation or withdraw money from the Court payable to the client or take money of the Client to be deposited in Court. In all such cases, when the money of the client reaches his hand it is a trust.

Perhaps the gravity of such breach of trust would be mitigated when the misappropriation remained only for temporary period. There may be a justification to award a lesser punishment in a case where the delinquent advocate the money before commencing the disciplinary proceedings.”

It was observed by the Hon’ble Supreme Court that this is an act of breach of trust. Advocate is the backbone of legal system. Any laxity while judging the misconduct which is not bona fide and dishonest advocate would undermine the confidence of the litigant public resulting in the collapse of legal system.

The Supreme Court also reiterated the principle that Misappropriation of client’s money is an act of grave misconduct.[[9]](#footnote-9)

## Statutory Provision

Part-VI, Chapter- II of the Bar Council of India Rules provide Standards of Professional Conduct and Etiquette for advocates. Rule 24 of the aforesaid Chapter provides that an advocate shall not do anything whereby he abuses or takes advantage of the confidence reposed in him by his client and then Rule 25 says that an advocate should keep accounts of the client’s money entrusted to him.

Further Rule 27 provides that where any amount is received or given to him on behalf of his client, the fact of such receipt must be intimated to the client, as early as possible.[[10]](#footnote-10)

## professional misconduct in taking undue advantage of one’s position

### Confidentiality

The duty of confidence which a lawyer owes to a client can be based on various principles of law. It can be regarded as an implied term of the retainer or contract, or it can be based in tort as part of the duty owed by the lawyer to the client, or it may arise in equity.[[11]](#footnote-11)

Apart from these legal principles, the duty of confidence also gives rise to an ethical obligation and thus a breach of client confidentiality[[12]](#footnote-12) would be grounds for disciplinary action. There are exceptions, such as where the client consents, or where the lawyer is compelled by law to disclose, or where the wider public interest requires disclosure.[[13]](#footnote-13) This last exception is still inadequately defined. Furthermore, there remains the issue as to whether the disclosure of a client confidence to the lawyer's spouse or partner should invoke either a common law remedy or the disciplinary machinery for breach of a professional rule.

Confidentiality involves a sense of ‘expressed’ or ‘implied’ basis of an independent equitable principle of confidence. Privacy is the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others. Right to privacy is more of an implied obligation. It is the ‘right to let alone.’[[14]](#footnote-14)

Discloser of confidential information may be done under any sphere; it may be in the Medical Profession, Legal Profession and discloser of security of state or military information. Sensitive Personal Data of any individual can be disclosed which may lead to his defamation or some kind of loss in his business etc. This information may be conveyed orally or in writing, it would also include information that is not in military form; i.e. Plans and ideas discussed in informal meetings between the parties.[[15]](#footnote-15)

## non filing of the case or filing of the case with nominal court fees

## 

## *Allahabad Bank v. Girish Prasad Verma[[16]](#footnote-16)*

Facts: In this case complainant Allahabad Bank filed complaint against the advocate Girish Chandra Verma alleging that out of the 52 suits which were given to the advocate for filing in the court 50 suits were filed with nominal court fees and 2 suits were not filed at all and the advocate misappropriated the sum the sum paid to him by the complainant for the purpose of court fees.

Held: U.P. Bar Council disciplinary committee held that the advocate has misappropriated the amount of the court fees and further ordered for the striking of the name of the advocate from the roll of the U.P Bar Council. The committee made it clear that legal profession is a noble profession and its members must set an example of conduct worthy of emulation.

### Deliberate delay in filing of the suit

*Prof. Krishanraj Goswami v. Vishwanath D. Mukashikar[[17]](#footnote-17)*

Facts: In this case the appellant advocate made a delay in filing in filing the suit and also made a delay in moving the interim application due to which the complainant suffered huge losses. The complainant gave two written notices to the to the appellant advocate for the return of the papers so that he could engage separate lawyers but the appellant advocate did not respond. It was also alleged by the complainant that the advocate did this deliberately in connivance with the other side

Held: the Disciplinary Committee of the Bar Council of Maharashtra and Goa found him guilty of professional misconduct and imposed punishment of suspension of licence for three years.

### Purchase of the property in dispute of the client

*P.D. Gupta v. Ram Murti and Anr. [[18]](#footnote-18)*

Facts: One Srikishan Dass died leaving behind extensive immovable properties. Claims to the said properties were made by one Vidyawati claiming to be the sister of the deceased, one Ram Murti and two others who claimed themselves to be the heir of the deceased.

Later, the properties were purchased by the advocate of Vidyawati knowing them to be disputed. The advocate thereafter sold the property to a third party and made profit. A complaint was made against the advocate to the Bar Council of Delhi.

## Contingent Fees: The Practice in India

The advocates in India are governed by the Advocates Act of India, 1961. Their professional conduct must also be in compliance with the rules prescribed by the Bar Council of India. Every advocate’s has a right to charge a professional fee for the services rendered by him. This right is not absolute and is subject to reasonable restrictions. One such restriction has been placed by Rule 20 of Part VI, Chapter II, Section II (Rules Governing Advocates) BCI Rules, which read thus:

*“An Advocate shall not stipulate for a fee contingent on the results of the litigations or agree to share the proceeds thereof.”*

The law regarding the practice of charging a fee contingent on the outcome of the case is amply clear, it is strictly illegal in so far as the practice of the legal profession in India is concerned. One of the prominent reasons for this position is that the manner in which the legal profession is organised in India, the advocate is deemed to be an officer of the court entrusted with the sacred task of assisting the court in arriving at a just decision. In such a situation if he is interested in the outcome of the case to the extent that his own professional fees is dependent on it then it would lead to the advocate becoming unduly interested in the outcome of the case.

## a conspectus of the case law on contingency fees

*H.G. Kulkarni v. & Ors.* v. *B.B. Subedar[[19]](#footnote-19)*

The respondent had allegedly entered into agreement with the complaints whereby they had agreed that the advocate would be entitled to 25% of the decretal amount towards the professional fees. The disciplinary Committee of the Bar Council of Maharashtra and Goa after going through the facts of the case came to the conclusion that by charging a fee based on the percentage basis the advocate had in fact violated Rule 20. On appeal the Bar Council of India confirmed these finding for suspended the respondent advocate’s right to practice for a period of seven years.

*Rajendra Pai v.* *Alex Fernandes and Ors.*

There was a large scale land acquisition proceedings in appellant, Mr. Rajendra Pai’s village. There were about 150 villagers whose lands were involved. Some of the land owned by the family members of the appellant also suffered acquisition. The appellant was an advocate and was also personally interested in defending against the proposed acquisition of land belonging to his family members. Some of the villagers either on their own or on persuasion confided in the appellant, who played a leading role initially in contesting the land acquisition proceedings and later in securing the best feasible quantum of compensation. There were around 150 claimants, of whom only three complained against the appellant that he solicited professional work from the villagers and that he settled a fee contingent depending on the quantum of the compensation awarded to each claimant.

The Disciplinary Committee of the State Bar Council of Maharashtra and Goa came to the conclusion that by charging a contingent fee the appellant had violated Rule 20 of the Bar Council of India Rules, which specifically prohibits the charging fee contingent on the result of the litigation. It ordered the removal of the appellant’s name from the roll of the Bar Council of Maharashtra and Goa. The order was confirmed by the Disciplinary Committee of the BCI.[[20]](#footnote-20) The matter came in appeal before the Supreme Court.[[21]](#footnote-21) The Supreme Court did not interfere with the findings of the SBC and the BCI. However, it reduced the punishment from a life time bar to suspension of the right to practise for a period of seven years.

## Suggestions

While these decisions and view taken of the Indian Courts and the governing bodies of the profession like the Bar Council of India are aimed at ensuring that the honourable profession of advocacy continues to remain so, by excluding advocates from becoming personally interested in the outcome of the cases, it fails to see that the times have changed and now most of the developed and industrial societies the world over have allowed for the system of contingency fee with adequate safeguards.

The United States has allowed contingency fee for a long time and this also explains why several negligence related issues have been brought before the American courts and the victims have been able to get handsome amounts as compensation. Similarly, England, the birthplace of the rules of champerty today allows conditional fees to be charged by the lawyers.

This practice is also followed in other common law jurisdictions like Australia and New Zealand. A socio-economic analysis of these societies indicates that one of the most important aspects of these societies is high levels of literacy, awareness and purchasing power. The high levels of literacy and awareness ensures that the people are aware of their rights and want to agitate and claim them. In such a scenario despite the generally high levels of purchasing power they may at times be unable to engage a lawyer to represent their claims as the costs and the risks involved are extremely high. It is in such circumstance that the contingency fee system gains importance.

While the above may be the benefits of the system, it is far from perfect. The system has an inherent risk of the advocate getting so interested in the outcome of the case that he abdicates his responsibility to the court. He may even be willing to compromise on the ethical practices. In the Indian context another apprehension that arises is that this may even lead to the exploitation of the client as unlike in the industrial societies here the levels of literacy, awareness and purchasing power – all are low.

However, when one compares the manner in which the American and the Indian legal system have worked over the years – one with contingency fee arrangements and the other without it – it is but evident that the former has been more beneficial to the clients. They have been able to agitate claims against big tobacco companies, the State and other powerful defendants and obtain favourable decisions and settlements. Further, the studies by the consumer groups have indicated that even though this system is formally banned in India; it is being practised at informal levels both in the sub-urban as well as urban areas.

# Conclusion

To conclude the above, the professional ethics are also termed as the duties to be followed by the Advocate; these are the morals and the basic courtesy which every person in this profession should know. These are not only the duties to be performed because the Bar Council has made the rule, but these are the basic manners which one should incorporate within them. These are the duties towards the Court, Client, Colleague or Opponent.[[22]](#footnote-22) The performance of the duty by the Advocate defines the determination, dedication and loyalty towards the profession.

The profession of law is honorable and it is expected from every person who is in this profession to be honest and work in upright manner. And any deviation in their performance of duty should be taken seriously. An Advocate in this profession has many obligations towards court, client, judge, opponent, colleagues, etc.[[23]](#footnote-23) The Advocate who does not work with sincerity, who does not follow the rules of conduct is said to have misconduct in his profession. He is guilty of the misconduct of duty for which he is punished. In order to avoid misconduct one should work in proper and appropriate manner not for the sake of getting punished but for being loyal towards them, their profession.

The fundamental aim of legal ethics is to maintain the honor and dignity of the law profession, to secure a spirit of friendly co-operation, to establish honorable and fair dealings of the counsel with his client, opponent and witnesses, to establish the spirit of brotherhood in the Bar itself; and to secure that lawyers discharge their responsibilities to the community generally.[[24]](#footnote-24) Legal profession is necessarily the keystone of the arch of government. Legal profession is not a business but a profession. It has been created by the state for the public good. Consequently, the essence of profession lies in two things:

• Organization of its members for the performance of their function.

• Maintenance of certain standards, intellectual and ethical, for the dignity of the profession.

Ultimately, as it has been upheld and reiterated that “misconduct” would cover any activity or conduct which his professional brethren of good repute and competency would reasonably regard as disgraceful or dishonorable.[[25]](#footnote-25) It may be noted that the scope of “misconduct” is not restricted by technical interpretations of rules of conduct. The standard of conduct of advocates flows from the broad cannons of ethics and high tome of behavior. It was held that “professional ethics cannot be contained in a Bar Council rule nor in traditional cant in the books but in new canons of conscience which will command the member of the calling of justice to obey rules or morality and utility.” Misconduct of advocates should thus be understood in a context-specific, dynamic sense, which captures the role of the advocate in the society at large.

1. Ethics and Morality of Legal Profession, by Naina Jain, available at <http://www.internationalseminar.org/XIII_AIS/TS%201%20(B)/19.%20Ms.%20Naina%20Jain.pdf> [↑](#footnote-ref-1)
2. Lawyers Ethics and Professional Responsibility, by Andrew Boon, Published by Bloomsbury, pg. no. 174 [↑](#footnote-ref-2)
3. Black Laws Dictionary, by Henry Campbell Black, Revised fourth edition, published by West Publishing Co., pg. no. 1192 [↑](#footnote-ref-3)
4. Harish Chandra Tiwari v. Baiju, 2002 (2) SCC 67 [↑](#footnote-ref-4)
5. (2001) 6 SCC 1 [↑](#footnote-ref-5)
6. 2003 (1) ALD 71 [↑](#footnote-ref-6)
7. AIR 2003 SC 178 Para 8 [↑](#footnote-ref-7)
8. 2002 (2) SCC 67 [↑](#footnote-ref-8)
9. Harish Chandra Tiwari v. Baiju, 2002 (2) SCC 67 [↑](#footnote-ref-9)
10. http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartVonwards.pdf [↑](#footnote-ref-10)
11. International Organization for Standardization (ISO); also see: “spoken or written in confidence”- Oxford Dictionary-pg-176, Oxford University Press [↑](#footnote-ref-11)
12. Data Protection Act, 1998- Part I, Preliminary: Basic interpretative provisions; available at: http://www.opsi.gov.uk/Acts/Acts1998/plain/ukpga\_19980029\_en [↑](#footnote-ref-12)
13. Harvard Law Review. Vol. IV December 15, 1890 No. 5, by Warren and Brandeis; available from: http://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy\_brand\_warr2.html [↑](#footnote-ref-13)
14. ibid [↑](#footnote-ref-14)
15. International Legal Profession Reform Project, Legal Profession National Law: Consultation Draft (2010), s 4.3.4. [↑](#footnote-ref-15)
16. AIR 1941 Bom 228 [↑](#footnote-ref-16)
17. AIR 1934 Rang 33 [↑](#footnote-ref-17)
18. State of Punjab v. Ram Singh, AIR 1992 SC 2188 [↑](#footnote-ref-18)
19. D.C. Appeal no. 40/1996 [↑](#footnote-ref-19)
20. D.C. Appeal No. 11/2000 [↑](#footnote-ref-20)
21. (2002) 4 SCC 212 [↑](#footnote-ref-21)
22. Supra 1 [↑](#footnote-ref-22)
23. Supra 3 [↑](#footnote-ref-23)
24. Misconduct of an advocate and Indian law in light of Supreme Court judgements, by Preeta in All Bar and the Bench, October 2nd , 2011, available at <http://blog.ipleaders.in/misconduct-of-an-advocate-and-indian-law-in-light-of-supreme-court-judgements/> [↑](#footnote-ref-24)
25. ibid [↑](#footnote-ref-25)