

“Professional Misconduct by Advocates: A Portrait of Malpractice”

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Abstract

Professional misconduct is any action which is outside the bounds of what is considered tolerable or worthy of its membership by the governing body of a profession. Advocacy is a noble profession because of which advocates are considered to be most responsible, privileged and knowledgeable person of the society and their acts are the role model for the society. Members belonging to this profession should not encourage deceitfulness and corruption, but they have to strive to secure justice to their clients

This written article would deal with the problems prevalent in the society as how a legal professional deficient in rendering quality sound services to its clients. What are the liabilities of a legal professional owe to its clients and to what extent a legal professional can be held liable. An advocate's act can also be tortuously liable for his professional negligence while rendering services. And how can the acts of a lawyer towards the Court can be amount to malpractice.

This working research paper will attempt to understand the acts of an Advocate which may amount to malpractice. To deal with this concept we will be studying the activities of advocates and how their acts can be termed as Professional Misconduct under various statutes, the fiduciary relationship that an advocate shares with his clients and how breach of such relation would amount to malpractice. Therefore to understand the extent of an advocate act and by proposing suggestions to eliminate the malpractice prevailing in the society by the legal professionals.

Keywords: legal malpractice, advocates, negligence, fiduciary duty, justice, legal service

PROFESSIONAL MISCONDUCT BY ADVOCATES: A PORTRAIT OF MALPRACTICE**I. INTRODUCTION**

Today you enter upon the practice of an age-old profession, a profession dedicated to the service of your God, your country and your fellowman. Those of us who administer the law

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know fully well that the rules of law that stand the test of the time are those that are in accord with the ideals of our religions. Advocacy, it is a noble profession and the most accountability is upon an advocate. In a noble profession like Advocacy advocates are the most privileged and erudite persons in the society and their acts are role model for the societal benefits, which are to be regulated. Professional Misconducts, which are considered outside the bounds, what are acceptable or worthy of its membership by the governing body of a profession. Malpractice, behaviour of professional misconduct which is referred as a disgrace or dishonest conduct thus advocates must despise from indulging themselves into such activities because advocacy is a noble profession for the benefits of society.

To promote a proper conduct of behaviour that to redundant the malpractices by Advocates parliament enacted Advocate Act, 1961, a streamline statute to solely deals with the conduct of Advocates. Chapter V of the Advocate Act, 1961, deals with the Conduct of Advocates. The provisions in Chapter V relate to punishment for professional and other misconducts of Advocates. “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”³. Generally advocacy or legal profession is not a trade or business, it’s a gracious, noble, and decontaminated profession for the benefit of society and the people in the society. Members belonging to this profession must not indulge themselves into deceitfulness and corruption, but they have to strive to secure justice to their clients. It’s a symbol of healthy relationship between Bar and Bench⁴.

The Advocates Act, 1961 as well Indian Bar Council are silent in providing exact definition for professional misconduct because of its wide scope, though under Advocates Act, 1961 to take disciplinary action punishments are prescribed when the credibility and reputation on the profession comes under a clout on account of acts of omission and commission by any member of the profession⁵.

II. Definition

Profession is a vocation requiring some significant body of knowledge that is applied with high degree of consistency in the service of some relevant segment of society, *by Hodge and Johnson*. Occupation especially one requiring advanced education and special training by A. S. Hornby. It is different from other types of jobs, in the sense that it requires skills and these skills will be improved with experience.

The attributes of a profession as lay down⁶

1) The existence of a body of specialized knowledge or techniques

³ Section 35(1) of the Advocate Act, 1961

⁴ <http://www.legalservicesindia.com/article/1665/Professional-misconduct-of-lawyers-in-india.html>, 09/07/2018 3:45 pm

⁵ *ibid*

⁶ Dalton E. McFarland, “*Principles of Business Management*” pg 11

- 2) Formalized method of acquiring training and experience
- 3) The establishment of representative organization with professionalism as its goal.
- 4) The formation of ethical codes for the guidance of conduct.
- 5) The charging of fees based on services but with due regards for the priority of service over the desire for monetary rewards.

A person who carries/undertakes the profession is called a professional. Depending on the profession a person undertakes, he/she is identified with a special name relevant to the profession.

Misconduct means a wrongful, improper, or unlawful conduct motivated by premeditated act⁷. It is an activity of not conforming to prevailing standards or laws or dishonest or deceitfulness, generally by people entrusted or engaged to act on behalf of others. The expression professional misconduct in the simple sense means improper conduct. In law profession misconduct means an act done wilfully with a wrong intention by the people engaged in the profession. Misconduct signifies any activity of an advocate in violation of professional ethics for his selfish ends. If an act creates disrespect to his profession and makes him unworthy of being in the profession, it amounts to professional misconduct. In other words an advocate which seeks to fulfil his selfish ends at the cost of his client such act amounts to disqualification for an advocate to continue in Legal profession.

Misconduct is sufficiently comprehensive to include misfeasance as well as malfeasance and is applied to the professional people, it include unprofessional acts even though they are not inherently wrongful⁸. The professional misconduct may consist the 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. In state of *Punjab v Ram Singh*⁹ the Supreme Court held that the term misconduct may involve moral turpitude, it must be improper or wrong behaviour, unlawful behaviour, illicit in character, a forbidden act, a transgression of established and definite rule of action or code of conduct, but not mere error of judgement, carelessness or negligence in performance of duty.

The Supreme Court has, in some of its decisions, elucidated on the concept of ‘misconduct’, and its application. In *Sambhu Ram Yadav v. Hanuman Das Khatri*¹⁰, a complaint was filed by the appellant against an advocate to the Bar Council of Rajasthan, that while appearing in a suit as a counsel, he wrote a letter stating that the concerned judge, before whom the suit is pending accepts bribes, and asked for Rs. 10,000 to bribe and influence the judge to obtain a favourable order. *The Disciplinary Committee, holding that the advocate was guilty if “misconduct”, stated that such an act made the advocate “totally unfit to be a lawyer.”* The

⁷ Oxford Dictionary

⁸ Mana Mohamed Ismail vs V. Balarathnam, AIR 1965 Kant 28

⁹ 1992 SCR (3) 634

¹⁰ AIR 2001 SC 2509

Supreme Court, upholding the finding of the Rajasthan Bar Council held that the legal profession is not a trade or business¹¹. Members belonging to the profession have a particular duty to uphold the integrity of the profession and to discourage corruption in order to ensure that justice is secured in a legal manner. The act of the advocate was misconduct of the highest degree as it not only obstructed the administration of justice, but eroded the reputation of the profession in the opinion of the public.

In another case, *Noratanman Courasia v. M. R. Murali*¹² the Supreme Court explored the amplitude and extent of the words “professional misconduct” in Section 35 of the Advocates Act¹³. The facts of the case involved an advocate (appearing as a litigant in the capacity of the respondent, and not an advocate in a rent control proceeding) assaulted and kicked the complainant and asked him to refrain from proceeding with the case. The main issue in this case was whether the act of the advocate amounted to misconduct, the action against which could be initiated in the Bar Council, even though he was not acting in the capacity of an advocate. It was upheld by the Supreme Court that a lawyer is obliged to observe the norms of behaviour expected of him, which make him worthy of the confidence of the community in him as an officer of the Court. Therefore, in spite of the fact that he was not acting in his capacity as an advocate, his behaviour was unfit for an advocate, and the Bar Council was justified in proceeding with the disciplinary proceedings against him.

It may be noted that in arriving at the decision in the case, the Supreme Court carried out an over-view of the jurisprudence of the courts in the area of misconduct of advocates, reiterated that the term “misconduct” is incapable of a precise definition¹⁴. Broadly speaking, it envisages any instance of breach of discipline. It means improper behaviour, intentional wrongdoing or deliberate violation of a rule of standard of behaviour. The term may also include wrongful intention, which is not a mere error of judgment. Therefore, “misconduct”, though incapable of a precise definition, acquires its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of duty¹⁵.

In *N.G. Dastane v. Shrikant S. Shind*¹⁶, where the advocate of one of the parties was asking for continuous adjournments to the immense inconvenience of the opposite party, it was held by the Supreme Court that seeking adjournments for postponing the examination of witnesses who were present without making other arrangements for examining such witnesses is a dereliction of the duty that an advocate owed to the Court, amounting to misconduct.

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 dishonourable. It may be noted that the scope of “misconduct” is

¹¹ Parmanand Sharma vs Bar Council Of Rajasthan And Anr, AIR 1999 Raj 171

¹² (2004) 5 SCC 689

¹³ *Supra* Note 1

¹⁴ Shri Santosh Kumar Sur vs Union Of India & Ors (2006) 6 SCC 794

¹⁵ Mani Lal vs Matchless Industries Of India

¹⁶ AIR 2001 SC 2028

not restricted by technical interpretations of rules of conduct, this was proven conclusively in the case of *Bar Council of Maharashtra v. M.V. Dahbolkar*¹⁷ the facts under consideration involved advocates positioning themselves at the entrance to the Magistrate's courts and rushing towards potential litigants, often leading to an ugly scrimmage to snatch briefs and undercutting of fees. The Disciplinary Committee of the state Bar Council found such behaviour to amount to professional misconduct, but on appeal to the Bar Council of India, it was the Bar Council of India absolved them of all charges of professional misconduct on the ground that the conduct did not contravene Rule 36¹⁸ as the rule required solicitation of work from a particular person with respect to a particular case, and *this case did not meet all the necessary criteria, and such method of solicitation could not amount to misconduct. This approach of the Bar council of India was heavily reprimanded by the Supreme Court.* It was held that restrictive interpretation of the relevant rule by splitting up the text does not imply that the conduct of the advocates was warranted or justified. The standard of conduct of advocates flows from the broad canons of ethics and high tone of behaviour. It was held that "professional ethics cannot be contained in a Bar Council rule or 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.

The Advocates Act, 1961 is a comprehensive statute that regulates the conducts of Legal practitioners and legal education in India. The legislature envisioned the establishment of Bar Council of India and State Bar Councils thus formed various disciplinary committees to concordat the misconduct of the advocates. The provision relating to the admission and enrolment of advocate, the right to practice advocacy are being provided under the Advocates Act, 1969. Sections 35 to 44 are enumerated under Chapter V to look out the conducts of the advocated. The statute has conferred penalizing power to the Bar Council of India to maintain discipline among the advocates and for the professional and other misconduct. To attract the provision i.e., Section 35 of the Act the act of misconduct must not need to be a professional misconduct in itself. The expression used in the section is Professional or other misconduct. Since not all events are connected with profession but they may amount to misconduct for example conviction for a crime even when the crime was not committed in the professional capacity. At the same time it is to be noted that a mere conviction is not sufficient to find an advocate guilty of misconduct, the court must look in to the nature of the act on which the conviction is based to decide whether the advocate is or is not an unfit person to be removed from or to be allowed to remain in the profession¹⁹.

Misconduct is not restricted to finite variety the connotation professional or other misconduct has to be read in plain and simple meaning as defined in the Oxford Dictionary. The implication of misconduct is an act done wilfully with deceitful intent and this is applied to

¹⁷ 1976 SCR (2) 48

¹⁸ Standards of Professional Conduct and Etiquette, Indian Bar Rules 2009

¹⁹ An Advocate vs Bar Council Of India and anr AIR 1989 SC 245

professional as well as unprofessional acts even when such acts are not innately wrong. Section 49 of the Advocate Act empowers the Bar Council of India to frame rules and standards of professional misconduct. Under the Act, no person has a right to make advertisement or soliciting; it is against advocate's code of ethics. He is also not entitled to any advertisement through circulars, personal communications or interviews, he is not entitled to demand fees for training and to use name/service for unauthorized purposes²⁰.

In various cases involving contempt of court, the court held that if any advocate or legal practitioner is found guilty of the act of contempt of court, he/she may be imprisoned for six years and may be suspended from practicing as an advocate²¹.

III. Liabilities of Advocates:

1. Civil Liabilities
2. Tortious Liabilities

1) Civil Liabilities:

A lawyer when renders services with respect to litigation matters owes a primary duty of assisting the court in the administration of justice. It supersedes the duty he owes to the client. Therefore his liability for deficiency in service must be determined without ignoring such primary duty. Apart from that a lawyer can invoke certain defences to claim exoneration from liability. Like doctors the liability of lawyers can be based either on contract or on tort law. However cases decided under civil law for negligence of lawyers are very few in India. In consumer courts also only limited numbers of complaints are filed. Hence the position of lawyers' liability is examined mainly in the light of cases decided by courts in other jurisdictions. Wherever Indian decisions are available, they are also incorporated in the study.

- Contractual Obligation:

The extent of lawyer's obligation towards his client for the breach of contract depends upon the terms of the contract²². 'Generally a lawyer is retained to render services on legal matters. Obligation with respect to business matters can also arise if the lawyer accepts such unequivocal instructions by the client²³. It follows that nothing prevents a lawyer from contracting to render advice on a business question.

Some obligations of lawyers have to be discharged within the strict time limits imposed by the circumstances of the client. It gives an inference that in such a situation time is the essence of the retainer. Any failure to discharge the contractual obligation within the stipulated time attracts liability. In *Stirling v. Poulgrain*²⁴, the first plaintiff instructed the lawyers to transfer two farms to a trust with the object of reducing the estate duty on her

²⁰ Retrieved on: <http://www.legalservicesindia.com/article/article/professional-misconduct-of-lawyers-in-india-1665-1.html>

²¹ In Re: Vinay Chandra Mishra AIR 1995 SC 2348

²² Midland Bank Trust Ltd. v. Herr, Stubbs & Kem, [1978] 3 All E.R. 571(Ch.D.)

²³ Yager v. Fishman & CO, [1944] 1 All E.R. 552 (C.A.)

²⁴ 1980] 2 N.Z.L.R. 402.

death. The Inland Revenue Authority agreed for a particular valuation provided the transfers were affected before a specified date. But the lawyers failed to effect the transfer within the stipulated time. As a result the valuation increased. The court held that there was a breach of contract on the part of the lawyers.

At times a client seeks advice of a lawyer on a future transaction in advance. If the advice is tendered, the duty ceases. No duty is imposed on a lawyer to remind the client's memory or repeat the advice, unless he is requested to do so and he has accepted it unqualifiedly²⁵. There is an implied obligation on every lawyer to be skilful and careful²⁶. A lawyer can terminate the retainer for justifiable causes. If he gives reasonable notice, he will not incur any liability²⁷. But unjustifiable termination attracts liability²⁸. A client can also terminate the retainer if a lawyer fails to discharge his obligations²⁹. On such an eventuality a lawyer has to be blamed for the termination of the relation and accordingly he will be held liable.

- *Fiduciary Relationship*

Fiduciary relationship is a relationship of trust between two parties or occupying a position with respect to another such that the other party is obliged in such a manner by various rules of law to act solely in the interest of other, whose right to be protected by the other party. An Attorney and Client share the same fiduciary relationship with each other where the interest and rights of the party are to be protected by the attorney. Clients put their trust and belief upon their attorney that he/she will pull his/her clientele out of their dire situation in which they have been struck thus to take undue advantage of their situation is against the ethics of attorneys, because advocacy is a noble profession which object is to guide the clients to the path of justice, this profession is not all about the monetary basis but is an object to let an individual to walk on a path from which a person has been misguided and has resulted in a dire situation therefore helping the person means providing guidance to the society to form a better structure leading to benefits. It is well recognized that a lawyer owes a fiduciary duty to a client.

In 2008 the Wisconsin Supreme Court reaffirmed in *Berner Cheese Corp. v. Krug*³⁰ its view of the fiduciary duty that a lawyer owes to a client. In this case, a dispute arose between the client and the lawyer, who both were listed in the settlement of a litigation matter. It was alleged that the lawyer had breached a fiduciary duty owed to the client, but the circuit court dismissed that claim.

²⁵ Yager v. Fishman & Co (1943) 77 Ll.L.Rep. 268

²⁶ Nocton v. Ashburton, [1914] A.C. 932 at p. 956 (H.L.)

²⁷ See the Solicitors Act (English) 1974, s.65(2).

²⁸ See the Indian Contract Act 1872, s. 73.

²⁹ In Re Wingfield and Blew, [1904] 2 Ch. D. 665 at p.684.

³⁰ 312 Wis. 2d 251, 752 N.W.2d 800

According to the Advocates Act 1961 There following duties of an Advocate towards his Client³¹

- Qualification must be absolute: When a Client hire a lawyer, the Advocate must be absolutely qualified to deal with the case and represent the client in the court of Justice.
- Trust of the client: An Advocate must never break the trust of the client. There are many times when advocate takes money from the opposite party and loose the case on purpose. The Advocate should at all costs uphold the interest of the client.
- Full disclosure to the Client: The Advocate is responsible towards the client for full and true disclosure of the circumstances and consequences of the case.
- Not to disclose any conversation with the Client: A lawyer is not allowed to disclose any conversation with his client, directly or indirectly to anyone³². If he does so he will be liable under Sec. 126³³ of the Indian Evidence Act of 1872.

The fiduciary duty between an attorney and its client arises out of the attorney-client relationship, it logically follows that a non-client's effort to pin liability on an attorney is difficult if not impossible. But that does not stop claims from being made. Even though a non-client has no direct claim against the opposing attorney for breach of fiduciary duty, he may try to claim that the opposing lawyer participated in his own client's breach of fiduciary duty. The claim could be couched in terms of conspiracy or aiding and abetting³⁴.

³¹ Section 49(1)(c) of Advocates Act, 1969

³² [https://www.lexcart.com/blog/relationship-between-advocate-and-client/7,16/7/2018 7:25 pm](https://www.lexcart.com/blog/relationship-between-advocate-and-client/7,16/7/2018%207:25%20pm)

³³ Professional communications.—No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment: Provided that nothing in this section shall protect from disclosure—

(1) Any such communication made in furtherance of any 1[illegal] purpose; 2[illegal] purpose;"

(2) Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment. It is immaterial whether the attention of such barrister, 2[pleader], attorney or vakil was or was not directed to such fact by or on behalf of his client. Explanation.—The obligation stated in this section continues after the employment has ceased. Illustrations

(a) A, a client, says to B, an attorney—"I have committed forgery, and I wish you to defend me". As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(b) A, a client, says to B, an attorney—"I wish to obtain possession of property by the use of a forged deed on which I request you to sue". This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(c) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account-book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment. This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

³⁴ *Chu v. Hong*, 249 S.W.3d 441 (Tex. 2008)

The Supreme Court³⁵ held that the RBI does not place itself in a fiduciary relationship with the Financial institutions (though, in word it puts itself to be in that position) because, the reports of the inspections, statements of the bank, information related to the business obtained by the RBI are not under the pretext of confidence or trust. In this case neither the RBI nor the Banks act in the interest of each other. By attaching an additional “fiduciary” label to the statutory duty, the Regulatory authorities have intentionally or unintentionally created an *terrorem effect*.

- *Deficiency in Legal Service*

The optimal object in regulating legal services ensures planning for better performance of their commitments and for and for that we shall then extend the consideration, and shall give more requisite attention to have control over quality, quantity and cost of legal services; to the fairness of contracts; to the fairness in competition. All these variations are the needs and most appropriate forms for the purpose of regulating legal services.

These variations play a very important role in the activities of an advocate which may drive them act in a particular manner thus resulting in deficiency of work for instance that an attorney does not have a quality work and to complete such work in a shorter duration the attorney may not put his full competency in completing that work, or when there is a load of work on an attorney he may want to get some of his not-so-important work to be completed without giving sufficient time which a case may require, or when a case is of higher cost lest attorney is not being paid according to the cost of the case matter which may lead the attorney to not to work to the fullest of his potential thus resulting in Legal Deficiency.

In *Malyon v. Lawrance, Messer & Co*³⁶ Case the plaintiff met with a road accident. His legal professionals allowed the claim to be statute barred. In the meantime the plaintiff contracted neurosis which was not expected to clear up till the conclusion of the litigation. The court awarded damages for the value of the original claim and compensation for loss of earnings caused thereby. *Legal professionals’ and their professional organizations need not themselves become risk carriers to be involved in and to influence the manner of organization and operation of legal service plans.* They can act and have in many instances acted as consultants and have contributed their expertise as board members of consumer-sponsored organizations; or they have provided liaison with individual attorneys, drafted participating attorney agreements, and encouraged the members of the bar to participate.

- *Quality of Legal Services*

Quality of legal services is to comprise the professional competence of legal professionals and his capacity and willingness to exercise his best professional judgment in advising his clients without interference by a third party and without distortion by conflicting interests.

³⁵ Reserve Bank of India and Ors. v. Jayantilal N. Mistry and Ors (2011)8 SCC 497

³⁶ [1968] 2 Lloyd’s Rep. 539 q

In India, the Legal service is governed by the Legal Practitioners (Fees) Act, 1926³⁷ provides that *no legal practitioner who has acted or agreed to act shall, by reason only of being a legal practitioner, be exempted from liability to be sued in respect of any loss or injury due to any negligence in the conduct of his professional duties*. The Act defines inter alia the right of Legal practitioners to sue for their fees and their liability to be sued in respect of negligence in the discharge of their professional duties. The Act defines the term legal practitioner to mean, (a) a legal practitioner as defined in section 3 of the Legal Practitioners Act, 1879,³⁸ and (b) a legal practitioner shall not be deemed to “act” if he only pleads, or to “agree to act” if he agrees only to plead.

In *Mathew v. Maughold Life Assurance Co. Ltd*³⁹ the legal professionals advised on a scheme to reduce estate duty liability. *They failed to inform her that she should exercise a particular option if her husband survived for seven years*. As a result of it she could not exercise the option and estate duty liability could not be reduced. *Legal professionals were held liable for incomplete advice*.

The Indian Supreme Court in *N. Veerappa v. Evelyn Sequira*⁴⁰, held that a legal practitioner cannot claim exemption from liability in respect of any loss or injury suffered by the client due to any negligence in the conduct of his professional duties merely by reason of being a legal practitioner. But whether or not this is to be considered to be the established position is shrouded with ambiguity⁴¹ owing to the following observations of the court⁴²:

We are not expressing any opinion on the matter except to point out that there is a specific provision in the Legal Practitioner’s (Fees) Act, 1926 setting out the legal practitioners would also be liable for being sued by their clients if they had been negligent in the performance of their professional duties.

The Supreme Court further analysed various provisions of *the Legal Practitioner’s (Fees) Act, 1926* which would go to show that any legal practitioner who acts or agrees to act for any person may settle with the said person the terms of his engagement and the fee to be paid for his professional services; that the legal practitioner will be entitled under law to institute and maintain legal proceedings against his client for the recovery of any fee due to him under the agreement or as per the costs taxed by the court where there has been no pre-settlement of the fee; and that no legal practitioner who has acted or agreed to act shall merely by reason of

³⁷ Act No. 21 of 1926.

³⁸ The Legal Practitioners Act, 1879 defines a legal practitioner as an advocate, vakil of attorney of any High Court, a pleader, mukhtar or revenue agent.

³⁹ [1985] 1 P.N. 142

⁴⁰ (1988) 1 SCC 557

⁴¹ 9R. Aditya Narayan “Advocates” Liability for Negligence in Criminal Cases: The Fallouts” Available at <http://www.legalserviceindia.com/articles/follouts.html>

⁴² Id. At 571

his status as a legal practitioner be exempt from liability to be sued in respect of any loss or injury due to any negligence in the conduct of his professional duties⁴³.

In *V.S. Shukla v. Brzjesh Kumar Dwivedi*⁴⁴ case the Madhya Pradesh State Commission took the view that if an advocate failed to plead the case, the client was free to engage the service of another advocate. The above view is contrary to the view taken in *Riaz Ahmad Sharifkhan*, which enjoins a duty on an advocate to do the needful to safeguard the interest of the client.

In *Riaz Ahmad v. Sharzf Khan v. Babu Mastafklzan*⁴⁵ case in the Maharashtra State Commission observed. *Once the advocate is engaged by the client and he receives fees in part or in full, he is duty bound to attend the interest of his client.* He must file the proceeding as asked for by the client fort with. He must incorporate all the pleadings subject to law and rules and he must be diligent in filing the proceedings before the court or the tribunal. He cannot relax on this point, *it is his duty to maximise the benefit and to minimise the loss to his client the client may lose or win.*

- *Breach of Privileged Communication as Professional Misconduct*

A "privileged professional communication" is a protection awarded to a communication between the legal adviser and the client. It is out of regards to the interest of justice, which cannot go on without the aid of men skilled in jurisprudence in the practice of Courts, and in those matters affecting rights and obligations, which form the subject matter of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources. Deprived all professional assistance, a man would not venture to consult any skilled person, nor would only dare to tell his counsel half his case⁴⁶.

In Indian Law Section 126 to 129 of Indian Evidence Act, 1972 deals with the privileged communication that is attached to the professional communication between a lawyer and its client. Section 126 and 128 pertains to those circumstances under which a lawyer can give evidence of such professional communication happened between them. Section 127 similarly restrains interpreters, clerks or servants of a lawyer, whereas section 129 of the Act states when a lawyer can be compelled to disclose the confidential communication which has been taken place between him and his client.

Section 126 and 128 mention circumstances under which the legal adviser can give evidence of such professional communication. Section 127 provides that interpreters, clerks or servants of legal adviser are restrained similarly.

The interests of the administration of justice, the observation of the highest traditions of the Bar of which the advocate is a member should itself dictate him to reject the proffered brief for the other side. *The question of propriety cannot depend upon the confidential*

⁴³ DEFICIENCY IN SERVICE UNDER LEGAL PROFESSION at 46

⁴⁴ (1997) 3 C.P.J. 334

⁴⁵ (1998) 3 C.P.J. 559

⁴⁶ *Greenough vs. Gaskell* (1833)1 Myl. & K. 98 as per Brougham L.C.

communication; he is the best person to judge in what circumstances he should appear against the accused and in doing so, always he must interpret any particular situation against himself and against his interests for the maintenance of the highest standards of professional ethics⁴⁷. "Quod dubitas ne feceris"⁴⁸ is a good rule for the regulation of one's own conduct.

2) Tortious Liabilities

A tort is a civil wrong for which the remedy is an action for unliquidated damages and which is not exclusively the breach of a contract, or the breach of a trust, or the breach of other merely equitable obligation⁴⁹.

It is pertinent to understand what is meant by tortious liability or rather the nature of tort law in order to understand its utility. To throw more light, the word tort evolved, from at one time very nearly passing into literary use as a synonym for wrong but after the middle of the seventeenth century, a practise began in the courts of the common law, of distinguishing between actions in contract for breaches of contract and actions for other wrongs, and of using the word tort as a compendious title for the latter class of actions⁵⁰. The liability of legal professionals arises independent of a contract. In tort liability is mainly based on professional negligence⁵¹. A legal professional is bound to exercise such care and skill which is expected from reasonably competent legal professionals. Accordingly a legal professional is not under an obligation to know all the laws. In *Montriou v. Jefleries*⁵² the court observed, "No attorney is bound to know all the law. God forbid that it should be imagined that an attorney or a counsel or even a judge is bound to know all the law".

But he is bound to know certain statutes and laws that reasonably competent and knowledgeable legal professionals ought to have known. In *Fletcher & Son v. Jubb Booth and Hellz'well*⁵³, a client instructed the legal professionals to initiate an action against the local authority for personal injury. He omitted to do so within the period of limitation prescribed by the Public Authorities Protection Act, 1893. It was held that he was negligent for not initiating the action within the period of limitation and bound to pay compensation to the client.

⁴⁷ Public Prosecutor, Andhra vs Kothakapu Etreddy Venkata Reddi AIR 1961 AP 105

⁴⁸ What you doubt of, do not do

⁴⁹ Salmond, SALMOND ON THE LAW OF TORTS

⁵⁰ Available on <http://www.legalserviceindia.com/article/1129-Torts-In-India.html> accessed on 21 July 2018 at 09:26 p.m.

⁵¹ R. A Percy (ed.), "Charlsworth on Negligence London, para 1006 (1977), Available on http://shodhganga.inflibnet.ac.in/bitstream/10603/5795/16/16_chapter%2010.pdf accessed on 21 July, 2018 at 9:33 p.m

⁵² (1895) 2 C. & P. 113

⁵³ [1920] 1 K.B. 275

- Professional Negligence

Breach of a duty caused by the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property⁵⁴.

As per the definition there are 3 constituents that are followed in India:

(1) *A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty;*

(2) *Breach of the said duty; and*

(3) *Consequential damage*

In this legal malpractice action against criminal defence lawyer, plaintiff must allege and prove that attorney's malpractice resulted in a more severe conviction or longer sentence than necessary⁵⁵.

To prove the act of malpractice of an attorney, sole accusation of claim does not amply prove the attorney an accused the claimant has to prove the act of the attorney which would amount to malpractice.

In *Johnson v. Hart*⁵⁶ a sole testamentary beneficiary in their individual capacity could not maintain a legal malpractice action against the attorney for the estate based upon the attorney's alleged negligent services.

Liability under Consumer Protection Act, 1986

To ensure protection and interest of the innocent buyer of goods and user of services, Parliament enacted the Consumer Protection Act in the year 1986 to safeguard the interest of the Consumers.

Ever Since the enactment of the Consumer Protection Act the scope of it is expanding and with the help of plethora of judicial pronouncement of the National Commission and Supreme Court, the Act has now developed its popularity among the society. This statute serves as a check against the seller of goods and service providers from selling or providing the consumer with damaged goods or unreliable services respectively⁵⁷.

⁵⁴ *Law of Torts* by Ratanlal and Dhirajlal

⁵⁵ *Desetti v. Chester*, 290 Va. 50, 772 S.E.2d 907

⁵⁶ 279 Va. 617, 692 S.E.2d 239

⁵⁷ Available on http://www.legalprofessionalsclubindia.com/articles/LEGAL_PROFESSIONALS_SLIBILITY-UNDER-CONSUMER-PROTECTION-ACT-237.asp accessed on 22 July, 2018 at 9:48 p.m.

Definition of service⁵⁸ has a very wider meaning. The concept of service should be understood and its meaning depending upon the context in which it has been used in any enactment. The definition is bifurcated in 3 parts. The main part of the definition is followed by inclusive clause and ends by exclusionary clause. The main clause of the definition in itself is very wide and it applies to any service made available to potential users. Both the words “any” and “potential” are significant and are of very wider amplitude. According to Black’s Law Dictionary the word “any” has a diversity of meaning and maybe employed to indicate “all” or “every” as well as “some” or “one” and its meaning in the given Act depends upon the context and the subject matter of the Act. The use of word “any” in the context has been used in clause (o)⁵⁹ indicates that it has been used in wider sense extending from one to all.

As per the recent developments that have taken place are the indicators of an oncoming state of chaos due to unnecessary extension of the ambit of the statute to a forbidden territory by holding legal professionals liable for deficiency in services under the aforesaid Act⁶⁰.

The High court of Madras in the case of *Srimathi and others v. The Union of India and others*⁶¹, has decided that the services provided by the legal practitioners fall within the ambit of the Consumer Protection. The high court observed that there is no such provision in the Advocates Act to bar the jurisdiction of other courts and authorities or tribunals in relation to matters connected with the advocates Act does not have any provision to enable the bar council to deal with the dispute between the client and the advocate if the clients seek a remedy of damages or refund of money paid to the advocates or sums on monetary claim. The bar council is empowered to deal with merely disciplinary matters and consider whether the advocate is guilty of misconduct which will fall under *section 6 (1) of the Advocates Act, 1961*⁶². Hence, the contentions that “the Advocates Act prevails over the Consumer Protection Act and consumer redressal forum has no jurisdiction to deal with claims against the advocates” were held to be untenable. As the first part of the section makes it clear, service of any description will fall service of all legal professionals to his client.

In the case of *D.K. Gandhi v. M. Mathias*⁶³, the national consumer redressal commission made it clear that all professionals, including legal professionals, should come under the ambit of the Consumer Protection Act. The plaintiff had engaged the professional services of legal professionals and filed a consumer complaint against him at the district consumer

⁵⁸ Section 2(1)(o) of the Consumer Protection Act, 1986 defines service as service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement of the purveying of news or other information, but does not include the rendering of any service free of charge of under a contract of personal service.

⁵⁹ *ibid*

⁶⁰ *Supra* Note 55

⁶¹ AIR 1996 Mad 427: 1996 (2) CTC 402: (1996) II MLJ 482, para 7

⁶² S. 6 of the Advocates Act sets out the functions of the state bar council.

⁶³ Order dated August 06, 2007 in RP No. 1392/2006 of the National Consumer Disputes Redressal Commission, New Delhi

forum. The district consumer forum directed the legal professionals to pay Rs. 3,000 as compensation for mental agony and harassment. State consumer disputes redressal commission overruled the district forums order by stating that a complaint against a legal professionals was not maintainable before the consumer forum as the service rendered by legal professionals did not come under the section the reasoning given by the state commission was erroneous.

The national commission stated that “the ambit and scope of Section 2(1) (o) of the Consumer Protection Act which defines “service” was very wide and well established. It covered all services except rendering of services free of charge or a contract of personal service. Undisputedly, legal professionals were rendering service. They were charging fees. It was not a contract of personal service. Therefore, there was no reason to hold that they were not covered by the provisions of the Consumer Protection Act, 1986”.

The question whether legal professionals should come under the purview of the Consumer Protection Act, 1986 reached the Supreme Court in a recent case⁶⁴. The Supreme Court held that advocates are not liable to be dragged to consumer courts for allegedly providing unsatisfactory services to their clients. The bench gave the temporary ruling after a cursory and preliminary examination of the relevant laws and said it would give final hearing after a detailed examination of the issue⁶⁵.

In fact, if legal professionals blunder and do not make the right arguments by flawed drafting of a case, they should be held accountable. It will certainly improve the judicial system and weed out substandard professionals in the legal profession. It will accelerate the improvement in service delivery in legal counselling. Legal professionals are just like service providers in any other profession and if technical consultants can come under the provisions of the Consumer Protection Act, so should legal professionals since they provide similar service to clients as technicians⁶⁶.

The national commission says that legal professionals may not be responsible for the favourable outcome of a case as the result/outcome does not depend only on legal professionals’ work. But if there is deficiency in rendering services promised, for which consideration in the form of fee is received by him, then the legal professionals can be proceeded against under the Consumer Protection Act⁶⁷.

⁶⁴ Bar of Indian Legal Professionals v. D.K. Gandhi SLP (C) NO. 3053 of 2008, SLP (C) No. 11539 of 2008, SLP (C) No. 8786 of 2008, dated April 13, 2009.

⁶⁵ The case is converted to Civil Appeal No. 2647/2009 and has been listed before the appropriate bench as the Delhi High Court Bar Association v. D. K. Gandhi. See, www.supremecourtfindia.nic.in

⁶⁶ *Supra* Note 61

⁶⁷ [1978] 3 All E.R. 571; a firm of solicitors was sued for damages for their failure to register a formal agreement, as a consequence of which the plaintiff could not enforce his option under the agreement to purchase the freehold reversion of a farm at a stated price within a period of ten years as the estate had been conveyed to another

IV. Conclusion

An advocate while discharging his professional assignment has a duty towards his client, a duty to his opponent, a duty to the court, a duty to the society at large and a duty to himself. It requires high degree of probity and poise to strike a balance to arrive at the place of righteous stand, during the times when there are conflicting claims. An advocate is also an officer of the Court who has the responsibility to render services of sound quality. Deficiency in services in the nature of absence when the matters are scheduled, filing of incomplete and inaccurate pleadings, lots of time even illegible and without personal check and verification, the non-payment of court fees and process fees amount to deficiency in work.

Usually the act of an Advocate affects only to his clients but in certain circumstances persons who are directly injured by the acts of the advocates or omissions can also bring an action against him. An Advocate's liability to the disappointed beneficiary is recognised in many jurisdictions. Legal profession does not allow an advocate to withdraw his liability for deficiency in services. If a legal professional contracts out his liability for deficiency in services such acts are barred under Law and puts prohibition against such activities to protect the interests of the clients from the unscrupulous legal professionals.

According to the study there is a lot of variation in the characteristics of legal malpractice cases. The dimensions characterizing lawyers' malpractice are more extensive in nature and the issues that arise differ in important ways depending on those dimensions.

As one would expect, there is a lot of variation in the characteristics of legal malpractice cases. We would argue that the variation in this area of professional negligence is substantially greater than in the most visible area, medical negligence. The dimensions characterizing lawyers' malpractice are more extensive than those characterizing medical malpractice, and the issues that arise differ in important ways depending on those dimensions.

The relationship which is shared between an advocate and his client is a relationship of trust also known as fiduciary relationship. In this a lawyer is responsible and has the liability to keep the conversation relating to case matters private and maintain secrecy. If such measurements are not being taken by an advocate hired by a person to resolve the matter involving and having knowledge of Law which thus requires a legal professional to deal with certain matters by productively using his competence. If the advocate does not respect the relationship and fail to maintain the secrecy about the case matter therefore he is deficient in rendering quality sound service which he is bound to render. I want to conclude that it is not the number of laws or the out-dated or old laws which cause problem but it is the ineffective and incompetent mechanism which implement them are the real problems.