

**LEGAL PROFESSION: CHALLENGES AND PROSPECTS**

**&**

**THE ART OF ADVOCACY**

**By**

***Hon'ble Mr. Justice F.M. Ibrahim Kalifulla<sup>1</sup>***

**1 - Introduction**

I deem it a matter of pride, pleasure and privilege to be present before this august gathering of young advocates, doyens from the Bar and my fellow brothers, who have assembled here on this auspicious day for the Inaugural Function of “*Redefining Legal Practice for Advocates – Generation Next*” and extend my sincere appreciation to the organizers. As a member of the Bench, I am extremely happy to observe such initiatives being promoted for the welfare and development of young members of the bar, who are going to shape the future of legal practice and significantly influence the effective and efficient functioning of Courts. As *Justice MC Cardie* stated<sup>2</sup>;

*“the alternative to reign of law is the chaos of the jungle. Imagine what would be the state of things if every litigant were to plead his own cause. Conceive, if you can, a Court without a Bar. Conceive the situation of a judge set to try causes and administered legal rights between party and party without the aid of professional advocates.”*

To me, the Bar is an essential component of our legal system and it is paramount that both the Bench and Bar coexist harmoniously with each other and together they can contribute effectively in achieving greater heights in the field of law. I have been asked to give a speech on the topic “*Legal Profession: Challenges and Prospects*” to which I have added “*The Art of Advocacy*”, but before I divulge into the topic, I think I must spare a few words about the legal profession, its place and order in society and its responsibilities.

The profession of law is a great profession, the most brilliant and attractive of the peaceful professions, with responsibilities both inside and outside it, which no person carrying on any other

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<sup>1</sup> *Judge, Supreme Court of India. This Lecture was delivered on the Inaugural Function of “Redefining Legal Practice for Advocates – Generation Next (1-10 Years) Continuing Legal Education to young lawyers at the district level, organized by the Tamil Nadu Judicial Academy on 15/12/2013. I would like to appreciate & acknowledge the support & contribution of my Law Clerk cum Research Assistant, Mr. Varun Srinivasan.*

<sup>2</sup> *Sir Henry Alfred McCardie, High Court of Justice of England and Wales in one of his lectures*

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profession has to shoulder. It is a great controlling and unifying institution which places upon each his duties, gives to each his rights and enforces from each obligations. It is composed of a body of men with a high sense of honour and marked by far less mutual jealousy or ill-will than any other. In the words of *Mr. Justice McCardie*<sup>3</sup>,

*“the spirit among counsel is one of generous emulation and not the spirit of embittered and petty rivalry. The brotherhood of the Bar is a notable and felicitous fact.”*

Law is a learned profession not merely in the sense that learning is displayed in the practice of it, but that it calls for the high and noble conduct which is a corollary and consequence of all true learning. As *Burke*<sup>4</sup> has observed,

*“Law is a science which does more to quicken and invigorate the understanding than all other kinds of learning put together.”*

In the practice of the profession, the lawyer has to deal with the greatest possible variety of human relations and have his mettle constantly tried from every point and it gives him a special opportunity to equip himself with those qualities, which count for pre-eminence in society. The capacity to analyse and sift facts, to penetrate the inmost recess of the human mind and to discover there the sources of men's actions and their true motives, and to perceive and present them with directness, accuracy and force, are qualities which the practice of the profession both demands and develops. His genius to achieve results and peculiar gift of mastering and disentangling complex situations, have won for him the reputation that a lawyer can achieve anything. His profession is, amongst all the learned professions, the most independent one. Its independence, which can never be lost sight of, is the bed-rock upon which it claims to lead the country are based. No member of the legal profession ever hesitates to condemn injustice and tyranny. These qualities which he possesses by education and by training make him the leader of society as a matter of course.<sup>5</sup>

But it is also stated that the practice of the profession is inconsistent with the stern sense of moral obligation and involves an amount of dishonesty and untruth on the part of the practitioner. This again to me is a misconception. The art of advocacy which is assumed to be the art of *‘making the*

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<sup>3</sup> *Ibid.* 2

<sup>4</sup> Full text: *“The law is a science which does more to quicken and invigorate the understanding than all the other kinds of learning put together; but it is not apt, except in persons very happily born, to open and to liberalise the mind exactly in the same proportion.” (LAM,15-17)*

<sup>5</sup> *K.V.Krishnaswamy Aiyer, in his book “Professional Conduct and Advocacy”*

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*worse appear the better reason,*’ is one to which many lay minds appears incompatible with truth and justice. Whatever the profession, it can be practiced well or ill and the guilt of a few cannot be regarded as the disposition of the many. “*As there are spots in the sun so may there be blemishes in the Bar.*” Oftentimes there is honest disagreement on facts between parties and the advocate is bound to present his client’s case in the best possible aspect. I am certain that the practice of the profession involves nothing which can be said to be in disregard of truth. *Lord Macmilian*<sup>6</sup> says;

*“Once the vital point is realized that the advocate in court is engaged not in expressing his own views of the case but is presenting and marshaling all that can be said of his client’s view of it, all room for the charge of insincerity disappears.”*

A gibe which is also cheaply made by persons, who ought to know better, that the lawyer is a venal person who prostitutes his talents for money, is malicious as it is untrue. Hence, the very profession of law being a noble one, it is up to advocates to ensure that people respect and not despise it. We have been blessed with the likes of Gandhi, Ambedkar, Palkivala, who besides being great Advocates and contributors to the field of law have lived their lives with the highest sense of justice, ethics and the moral obligation to give back to society and are the very embodiment of how a lawyer should be. It is the duty of a ‘*Noble*’ Advocate to safeguard law, assist justice and help prevail peace in society, even at the cost of his monetary interests. The nobility of his profession calls for settling the disputes and avoiding furtherance of these disputes by every possible means. Thus, the advocate should put before his clients the drawbacks in seeking court’s assistance, namely, expenses, prolonged processes, hardships, etc, which could well be avoided. As far as possible he should use the method of persuasion and compromise for settling disputes. Here *Mahatma Gandhi’s* views<sup>7</sup> may be enlightening;

*“I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter man’s hearts. I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so deeply burnt into me that a large part of my time during the 20 years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – Not even money. Certainly not my soul.”*

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<sup>6</sup> *Hugh Pattison Macmillan, Judge, House of Lords, in one of his decisions*

<sup>7</sup> *My experiments with the truth p 100*

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Hence, it is an advocate's duty to instill confidence in the public. Even Rule 46<sup>8</sup> of the '[Standards of Professional Conduct and Etiquette](#)' prescribed by the Bar Council of India requires that *"Every advocate shall in the practice of the profession of law bear in mind that any one genuinely in need of a lawyer is entitled to legal assistance even though he cannot pay for it fully or adequately and that within the limits of an Advocate's economic condition, free legal assistance to the indigent and oppressed is one of the highest obligations an advocate owes to society."* I sincerely hope that this is followed by young lawyers of today and provide the much needed assistance to people in genuine need and thereby maintain the dignity and reputation of the profession.

In light of this context, I had the pleasant experience where, I along with our *Former Hon'ble CJI, Mr. Altamis Kabir*, had the wonderful opportunity to start an initiative to provide for free legal assistance to people deprived of legal support, and thereby started a Legal Aid Clinic in the state of Jammu and Kashmir.<sup>9</sup>

## **2 - Professional Ethics**

*John Stuart Blackie*<sup>10</sup> says;

*"A man may be as brilliant, as clever, as strong and as broad as you please and with all these, if he is not good, he may be a paltry fellow and even the sublime which he seeks to reach in his most splendid achievements, is only a brilliant sort of badness. One thing is needful; money is not needful; power is not needful; even health is not needful; but character alone – a thoroughly cultivated will – is that which can truly save us."*

Character is vital in all professions and walks of life, and in the legal profession particularly, the maintenance of the honesty of the lawyer is a matter of the first importance. The most worthy and effective advertisement possible for a young lawyer, especially with his brother lawyers, is the establishment of a well merited reputation for professional capacity and fidelity to trust. To me an advocate without character is like a ship without a rudder.<sup>11</sup> As *Lord Jeffrey*<sup>12</sup> puts it, *"A good*

<sup>8</sup> As under the Advocates Act, 1961

<sup>9</sup> Scheme for Effective Functioning of Free Legal Aid Clinics in the State of Jammu & Kashmir. Jammu & Kashmir State Legal Services Authority (Legal Aid Clinics) Scheme on 21st December 2010 in terms of Order No. 105-SLSA(LS) of 2010 dt. 21.12.2010. Refer Jammu & Kashmir High Court Legal Services Committee newsletter December 2011.

<sup>10</sup> *The Bastrop Advertiser (Bastrop, Tex.)*, Vol. 57, No. 34, Ed. 1 Saturday, December 4, 1909

<sup>11</sup> Karl Gottfried Maeser, President of [Brigham Young University](#)

<sup>12</sup> Francis Jeffrey, Lord Jeffrey (23 October 1773 – 26 January 1850) was a [Scottish judge](#) and [literary critic](#).

*name, like good will, is got by many actions and lost by one.” Also as said by Mahatma Gandhi, “A ‘No’ uttered from deepest conviction is better and greater than a ‘Yes’ merely uttered to please, or what is worse, to avoid trouble.”<sup>13</sup> Hence, to me character is the most essential component of ethics and is something which every advocate must develop and exercise in their daily lifestyle. As Judge Donovan points out, “the foundation of a lawyer’s fortune is character... ..out of sight, yet never out of mind and never out of hearing.....character grows from every transaction, little & large.”*

### **2.1 - What is Ethics?**

The term Ethics I believe, is something, which all of us inherently possess. We can refer to it using different terminologies, but to me ethics is two things. First, ethics refers to well-founded standards of right and wrong that prescribe what humans ought to do, usually in terms of rights, obligations, benefits to society, fairness, or specific virtues. For example, it refers to those standards that impose the reasonable obligations to refrain from rape, stealing, murder, assault, slander, and fraud. It also includes those that enjoin virtues of honesty, compassion, and loyalty. It comprises of standards relating to rights, such as the right to life, the right to freedom from injury, and the right to privacy. Such standards are adequate standards of ethics because they are supported by consistent and well-founded reasons.

Secondly, ethics refers to the study and development of one's ethical standards. As mentioned above, feelings, laws, and social norms can deviate from what is ethical. So it is necessary to constantly examine one's standards to ensure that they are reasonable and well-founded. Ethics also means, then, the continuous effort of studying our own moral beliefs and our moral conduct, and striving to ensure that we, and the institutions we help to shape, live up to standards that are reasonable and solidly-based.

When standards of professional conduct are applicable to members of the legal profession, we call them Legal Ethics. In the words of Chief Justice Marshall<sup>14</sup>- “*The fundamental aim of legal ethics is to maintain honor and dignity of the Law profession, to secure a spirit of friendly cooperation between the Bench and the Bar in the promotion of higher standards of justice, to establish honorable and fair dealings with the counsel, with his clients, opponent and witnesses*”.

<sup>13</sup> *Young India: Volume 9 -- Gandhi (Mahatma); 1927*

<sup>14</sup> [4th Chief Justice of the Supreme Court of the United States](#)

## **2.2 – Ethical Issues & Challenges**

Most of you who have joined the Bar recently, must have formed an idea as to the concept and the role played by the profession in the administration of justice. The word 'ethics' only means rules of conduct pertaining to a particular class of human action. When we, therefore, talk of ethics of the legal profession, we only refer to the action of members of the Bar in the discharge of their duties and obligations and in the exercise of their rights and privileges. *K.V. Krishnaswamy Iyer*, a prominent advocate of the then High Court, in the composite State of Madras, said with reference to the members of the Bar;

*“In your dealings in and outside Court, you should always bear in mind that every member of the Bar is a trustee for the honour and prestige of the profession as a whole.”*<sup>15</sup>

This is the quintessence of legal ethics and though several years have gone by, even today a member of the Bar continues to be so, vis-à-vis, the profession of law. This is a message, which you have to keep in mind always.

As *DRINKER* in his '*Legal Ethics*'<sup>16</sup> observes,

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

The issues and challenges pertaining to the ethics of advocates, is such a wide and vast subject that it is not possible to cover it within the compass of a single lecture; I find you will be having a number of lectures on this subject by experienced lawyers and judges. I shall endeavor however to tell you some matters which I consider worth your while to know.

### **1. Advocates' duty towards his clients**

*“To my clients I will be faithful; and in their causes zealous and industrious. Those who can afford to compensate me, must do so; but I shall never close my car or heart because my client's*

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<sup>15</sup> *Ibid* 5

<sup>16</sup> *Henry .S. Drinker, 1953 Columbia University Press, New York*

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*means are low. Those who have none and who have just causes, are, of all others, the best entitled to sue, or be defended; and they shall receive a due portion of my services, cheerfully given.*"<sup>17</sup>

In my opinion an advocate owes a duty to his client in several ways;

- He must give a patient hearing to the client.
- He must examine all his papers.
- He must after discussing the case with his client, advice him correctly, even if it be that the advice is not palatable to the client.
- He should account for the clients' money strictly and return the unspent amount to him.
- He must represent his client in court with undivided fidelity and not divulge his secrets or confidences.
- He should not appear for two clients whose interest's conflict.
- He should not in any way encourage an illegal transaction.
- When a settlement of pending suit or appeal is proposed, he should give his honest opinion according to the best of his ability and leave it to the client to follow it or not. An advocate should be vigilant to discover chances of compromising controversies. But he should not pressurize the client in that behalf. But where the client stands a great risk, inspite of advice, still desires to fight the case to finish, according to me, it is the duty of the advocate to fight it for him and to use every legitimate argument to bring about success.

Besides this, according to me, a client is also entitled to say to his counsel; *"I want your advocacy and not your judgement."* In fact *Lord Atken* says that, *"an advocate may urge freely a view with which he does not himself concur, for it often happens that the opinion of the judge differs from our own. An argument that may not convince us may convince the judge before whom we urge it; and after all, it is his business to judge."*

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<sup>17</sup> *Resolution 18, Hoffman's 50 Resolutions*

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While discussing the relationship between an Advocate and a client, the Supreme Court in *State of U.P. v. U.P. State Law officers' Association*<sup>18</sup>, very categorically, sums up the relationship as follows;

*“The relationship between the lawyer and his client is one of trust and confidence. The client engages the lawyer for personal reasons and is at liberty to leave him also, for the same reasons. He is under no obligation to give reasons for withdrawing his brief from his lawyer. The lawyer in turn is not an agent of his client but his dignified, responsible spokesman. He is not bound to tell the court every fact or urge every proposition of law, which his client wants him to, however irrelevant they may be. He is essentially an adviser to his client and is rightly called a counsel in some jurisdictions. Once acquainted with the facts of the case, it is the lawyer’s discretion to choose the facts and the points of law which he would advance. Being a responsible officer of the court and an important adjunct of the administration of justice, the lawyer also owes a duty to the court as well as to the opposite side. He has to be fair to ensure that justice is done. He demeans himself if he acts merely as a mouthpiece of his client. This relationship between the lawyer and the private client is equally valid between him and the public bodies.”*

II. **Advocates’ Duty towards the Court**

i. **Advocate is an officer of justice and friend of the Court:**

The cardinal principle which determines the privileges and responsibilities of an advocate in relation to the court is that he is an officer to justice and a friend of the court. This is the primary position. A conduct therefore, which is unworthy of him as an officer of justice, cannot be justified by stating that he did it as the agent of his client. His status as an officer of justice does not mean he is subordinate to the judge. It only means that he is an integral part of the machinery for the administration of justice.

ii. **Co-operation between the Bench and the Bar is a necessity:**

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<sup>18</sup> AIR 1994 SC 1654: 1994(2) SCC 204

According to me, the first duty which advocates and judges owe to each other is of co-operation. Co-operation between the Bench and the Bar is not a mere conventional statement. It is a fundamental necessity. Without it, there can be no orderly administration of justice. *Sir Cecil Walsh* in his book called *The Advocate*<sup>19</sup> says that:

*“Nothing is more calculated to promote the smooth and satisfactorily administration of justice than complete confidence and sympathy between Bench and the Bar”.*

iii. **What the counsel owes to the court:**

- a) The first duty which the counsel owes to the court is to maintain its honour and dignity—this is the cardinal principle determining the advocates’ relation in court.

The advocate owes courtesy and respect to the court for the following reasons:

- Because he is the like judge himself, an officer of the court and an integral part of the judicial machinery. The legal position consists of the Bar as well as Bench, and both have common aims and ideals.
- In theory, it is the King or Sovereign who presides in the court of justice, and judge is merely the mouthpiece and representative of the Sovereign. Respect shown to the court is, therefore, respect shown to the sovereign whose representative the judge is.
- Because not only litigants and witnesses but the general public will get their inspiration in this respect from the examples of advocates. It is necessary for the administration of justice that judges should have esteem of the people.
- Because it is good manners, and advocates before anything else are “gentleman of the Bar.”
- Even from the purely practical standpoint, there is nothing to be gained but there is much too loose by antagonising the Court. Conflict with the judge renders the trial disagreeable to all and generally an injurious effect on the interests of clients.

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<sup>19</sup> *The advocate, his aims and aspirations, [Walsh, Cecil Henry, Sir, b. 1869](#), Allahabad : Printed at the Pioneer Press, 1916*

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- Because it is necessary for the dignified and honorable administration of justice that the court should be regarded with respect by the suitors and people.
  - The advocate should not display temper in court. He will not indulge in any kind of insinuation in the court against the judge. He should convince the judge by argument and reason and not by appeal to his sentiments. While the case is going on, the advocate cannot leave the court without the court's permission, and without putting another man in charge.
- b) The advocate must not do anything which lowers public confidence in the administration of justice
- c) It is the duty of the Bar to support judges in their independence because in the integrity of judges lies the greatest safeguard of a nation's laws and liberties. Judicial independence is the only protection against tyranny and whims of the executive.
- d) The advocate must not do anything which is calculated to obstruct, divert or corrupt the stream of justice, for instance, he must not advise disobedience to the courts order and decrees.
- e) Another duty which the advocate owes to the court is that of fidelity, he must be honest in his representation of the case. He must not deceive the court.
- f) The counsel is under an obligation to present everything to the judge openly and in the court and nothing privately. He must not attempt any private influence upon the judge; seek opportunities for the purpose; or take opportunities of social gatherings to make ex parte statements or to endeavour to impress his views upon him.
- g) The advocate must not place himself in a position which he cannot effectively discharge his obligations to the Court as minister of justice. He should not have any personal interest in the litigation he is conducting. It will be misconduct on his part to stipulate with his client to share in the results of litigation.
- h) He should always remember that precedents are more efficacious than arguments; (*Valindoria sunt expla quam verba; el plentus opera docetur quam voce*). Even if there is

any decision against him, it is the duty of the lawyer to disclose it. He may later on distinguish it on the facts of particular case, or even contend that the decision does not lay down sound law; if he does so, he will win the esteem of the judge.

- i) If in case there is a conflict between the duty to the client and duty towards the court, *Lord Denning, M.R. in Rondel v. W.*<sup>20</sup>, has rightly observed;

*“.....he (counsel) has time and again to choose between his duty to his client and his duty to the court. This is a conflict often difficult to resolve; and he should not be under pressure to decide it wrongly. When a Barrister or an advocate puts his first duty to court, he has nothing to fear.....it is a mistake to suppose that he is the mouthpiece of his client to say what he wants.....he must disregard the most specific instructions of his client, if they conflict with his duty to the court. The code which requires a Barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to indiscipline.”*

III. **Advocates' duty towards the Opponent & Opposing Counsel**

An advocate shall not in any way communicate or negotiate upon the subject matter of controversy with any party represented by an advocate except through that advocate.<sup>21</sup> The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of the client with a person the lawyer knows to be represented in the matter by lawyer, unless pursuant to law or rule of court or unless the lawyer has the consent of the lawyer for that person. If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is not represented by a lawyer, except to advise the person to obtain a lawyer.<sup>22</sup>

*Justice Raj Kishore Prasad*<sup>23</sup> said that it is both morally and professionally wrong to mislead an opponent, or put him on wrong scent, regarding any point in the case.

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<sup>20</sup> (1966) 3 All ER 657

<sup>21</sup> Rule 34 of BCI Rules

<sup>22</sup> CANON 7.18 of New York Bar Association

<sup>23</sup> P.D. Gupta v. Ram Murti, 1997 (7) SCC 147

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Similarly it is a duty of an advocate to be fair to an opposing advocate. You should treat the opposing advocate as a gentleman and should never suspect him. He is engaged as much as you are in the search for truth as an officer of the court. Relevant facts should not be concealed or withheld from him nor should he misled by such concealment or withholding. During the arguments interruptions should be avoided as far as possible. As you do not like to be interrupted, equally you should not interrupt your counterpart. You should not denigrate the performance of your counterpart in the presence of his client. All controversies should be avoided and good relations between the counsels should not be affected outside the court. A lawyer should not forget that he is not only fighting the battle of his client but that he is also assisting the court in the administration of justice.

The advice of *Sir P.S. Sivaswami Aiyar* is worth noting: *“there is one thing which budding lawyers should remember and that is that a victory won by foul play is not worthy. If you give your opponent counsel a full and fair chance of himself heard, and then you beat him, you are entitled to credit. But, if you do anything by word or by deed or by suggestion or otherwise, to interfere with the fair hearing which your opponent counsel might otherwise obtain, the victory which you may win is tainted and is not worth having. No self-respecting man ought to care for it.”*

#### ***IV. Advocates' duty towards Public***

*Mr. Ram Keshor Ranade* has very aptly summarized the same in one of his addresses:

*“In every country lawyers have played a vital role in the progress of their nation and they have always been the vanguard in the struggle for freedom. With regard to lawyers in England, Asquith, one of the great Prime Ministers of England, has rightly observed:*

*‘I absolutely make this claim, that there is no class or profession in our community which has done more. I will go further; I will say that there is none which has done much to define, to develop and to defend, the liberties of England.’*

*I make bold to say that the aforesaid remark applies with equal force to our country. The lawyers of England and America have recognized that the members of the Indian Bar are second to none among them and Viscount Haldane, twice Lord Chancellor of England, expressed the opinion that*

*Indian Lawyers could compare not only favourably but could excel some of the leading men of the English Bar.*”<sup>24</sup>

An advocate according to me, shall uphold the constitution, help in the maintenance of the Rule of Law, promote the advancement of justice and assist on the enforcement of the fundamental rights of the people. An advocate shall not act contrary to the basic principles of morality and at all times, shall act honestly. He shall not render any service or give advice involving breach of the law or implying disrespect to the established. This I feel is the duty and responsibility he owes to the public.

***V. Advocate’s Duty towards Self***

This according to me is the most important duty, as once a person learns to respect himself; all other aspects will fall in place. The following excellent advice given by an eminent lawyer to young advocates should epitomize the duty to self;

*“To my young friends a word of advice; stick to the profession – seek to elevate it. Do not seek by it to make money. Doing that makes it a trade not a profession. Be fair in charges. Help the poor with advice and with professional aid. If it occurs to you, as it should to look out for old age, believing that Webster was right when he said that the fate of a lawyer was to work hard, live well and die poor, use economy and as you acquire something to lay up, buy, in some growing town or city, a building, a business one, if you can, even if it involves a mortgage for part; rent will keep down interest and pay taxes and the property one day will enrich you. You will have hard work to get well off by simply saving and the community will expect you to live comfortably. Do not speculate. Study law and history in all free time and manifest it by your action in the courts. Do not be a politician. But always vote and do the duty of a citizen. Be no member of a party, but independent – a slave to none. Deserve honours and office. If they come, as, if you deserve them, they should, do honour them. If they do not, never mind. There is one who seeth not as man seeth, whose ‘well done, good and faithful’ is worth all the dignities of all the world.”*<sup>25</sup>

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<sup>24</sup> AIR 1960 Jour. 66

<sup>25</sup> Parker’s advices to the members of the Bar, Essex Country – New Jersey Law Journal for January, 1906 cited in 40 AME, Law Rev. 283

To conclude, a learned writer in referring to the subject gives the following rules that needs to be followed by advocates, to avoid the challenges, which, by way of Biblical analogy, he calls 'A Lawyer's Ten Commandments.'

a) **Duties to Client:**

- i. *Be loyal to the interests of the client whose cause you have championed and in his cause be guided by high moral principles. Do not let the amount of your fee determine the amount of your industry.*
- ii. *Neither underestimate nor overrate the value of your advice and services in your clients behalf.*

b) **Duties to Court:**

- iii. *Be honest with and respectful to the Court.*
- iv. *Do not depend on bluffs or tricks or pulls to win a case, but depend on thorough preparation.*

c) **Duties to Public:**

- v. *Give a measure of your best legal service to such public affairs as may best serve your community. Remember also to protect the defenseless and oppressed.*
- vi. *Never seek an unjustifiable delay. Neither render any service nor give any advice involving disloyalty to the law.*

d) **Duties to Fellow Attorneys:**

- vii. *Be friendly with and keep faith with the fellow members of the Bar; publish their good characteristics rather than their shortcomings. Especially, be on friendly terms with the young man starting in the legal profession and if necessary, inconvenience yourself in order to encourage him.*
- viii. *Do not discuss your cases with the court in the absence of opposing counsel.*

e) **Duties to Self:**

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- ix. *Avoid the 'easy-come, easy-go' method with your finances. Bank on no fee until paid.*
- x. *Keep up regular habits of systematic study of law."*

These codes of rules<sup>26</sup> epitomize the attributes that a lawyer should possess to overcome any ethical challenges presented to him during the practice of his profession.

### **2.2.1 – Effect of Non-Compliance; Instances of Professional Misconduct**

In *In Re: Mr. A an Advocate*<sup>27</sup>, a five judge Bench of the Supreme Court, while questioning whether an advocate on record writing letters and soliciting brief, was guilty of the professional misconduct, held that it was against the etiquette of the Bar and its professional ethics to solicit briefs from clients and an advocate who does so must be guilty of the unprofessional conduct and further, he deserved no sympathy of the Court and must be suspended. *Chief Justice Sinha*, has very clearly expressed the significance of Professional Ethics;

*“In our opinion, the Advocate has mischosen his profession. Apparently he is a man of very weak moral fibre. If he is ignorant of the elementary rules of professional ethics, he has demonstrated the inadequacy of his training and education befitting a member of the profession of law. If he knew that it was highly improper to solicit a brief and even then wrote the post-card in question, he is a very unworthy member of the learned profession. In any view of the matter, he does not appear to be possessed of a high moral calibre, which is essential for a member of the legal profession. If anything, by adopting the attitude of denial which has been demonstrated to be false in the course of the proceedings before the Tribunal, he has not deserved well of the Court even in the matter of amount of punishment to be meted to him for his proved misconduct. In our opinion, he fully deserves the punishment of suspension from practice for five years. This punishment will give him enough time and opportunity for deciding for himself, after deep deliberation and introspection, whether he is fit to continue to be a member of the legal profession. In our view he is not. Let him learn that a lawyer must never be a liar.”*

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<sup>26</sup> Similar principles are enshrined and provided in detail under Section 49(1)(c) of the Advocates Act, 1961

<sup>27</sup> [1962]Supp1SCR288

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In *V.C. Rangadurai v. D. Gopalan and Ors*,<sup>28</sup> a 3 judge Bench of the Supreme Court held that, "*Nobility of law profession lasts till members maintain their commitment integrity to serve community and every delinquent who deceives his common client deserves to be frowned upon.*" Hence the relationship between the lawyer and client being a fiduciary one, it is the duty of the advocate to uphold the same.

The legality of the Bar Association Resolution that none of its members will appear for an accused came up for consideration in, *A.S. Mohammed Rafi v. State of Tamil Nadu, rep. by Home Dept. and Ors*.<sup>29</sup> The Supreme Court while dealing with the resolution of the Bar not to defend police personal in the court held that, professional ethics requires that a lawyer cannot refuse a brief provided a client is willing to pay his fees and the lawyer is not engaged otherwise. Such type of resolutions are wholly illegal and against all tradition of Bar. My brother *Markandey Katju J.* stated thus;

*"In our opinion, such resolutions are wholly illegal, against all traditions of the Bar, and against professional ethics. Every person, however, wicked, depraved, vile, degenerate, perverted, loathsome, execrable, vicious or repulsive he may be regarded by society has a right to be defended in a court of law and correspondingly it is the duty of the lawyer to defend him. We may give some historical examples in this connection. When the great revolutionary writer Thomas Paine was jailed and tried for treason in England in 1792 for writing his famous pamphlet 'The Rights of Man' in defence of the French Revolution the great advocate Thomas Erskine (1750-1823) was briefed to defend him. Erskine was at that time the Attorney General for the Prince of Wales and he was warned that if he accepts the brief, he would be dismissed from office. Undeterred, Erskine accepted the brief and was dismissed from office.*

*However, his immortal words in this connection stand out as a shining light even today:*

*From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend from what he may think of the charge or of the defence, he assumes the character of the Judge; nay he assumes it before the hour of the judgment; and in proportion to his rank and reputation puts the heavy influence of perhaps*

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<sup>28</sup> AIR1979SC281, (1979)1SCC308, [1979]1SCR1054

<sup>29</sup> AIR2011SC308, (2011)1SCC688

*a mistaken opinion into the scale against the accused in whose favour the benevolent principles of English law make all assumptions, and which commands the very Judge to be his Counsel.”*

Hence, these decisions are but a few examples to demonstrate, the dire circumstances, lawyers will be placing themselves in, if they indulge in unethical practice. I highly advice and recommend to all, to tread only in the path of justice.

### **2.2.2 - Ethical Impact of Information Technology on Lawyers**

Besides the abovementioned principles, another aspect, which I felt might be of relevance to the young advocates and members of the Bar and which I have observed is not given much importance in our country, is the ethical impact of Information Technology.

Advances in technology are occurring exponentially and these advances increase the pace of practice and client expectations, forcing lawyers to adapt or face extinction. Understanding and implementing new technologies are difficult and time-consuming for lawyers. But now, with the advent of Information Technology, law along with its advocates, should keep up with the changing dynamics, or else, will become casualties to these turbulent times.

From an ethical standpoint, I personally feel that advocates will have to be even more careful in terms of handling various documents, etc., as unlike the yester years where we were using only typewriters to draft various complaints, documents, etc., and use the registered post to deliver the same, nowadays, advocates use computers instead, which allows to store data and also send notices, documents using electronic mail. Although this might be a very good substitute to a typewriter, not to say a major boon, but since advocates deal with highly sensitive and confidential data these days, it is very likely that the same can be misused, very easily too and hence, I sense that there should be an independent code of rules governing the same.

Below are certain observations and suggestions, which I feel needs to be taken into consideration by advocates and the Bar as a whole;

#### **i. Privileged communications**

A lawyer who comes into possession of a privileged written communication of an opposing party through the lawyer's own impropriety, or with knowledge that the communication is not intended

to be read by the lawyer, must not use the communication nor the information contained therein in any respect and must immediately return the communication to opposing counsel, or if received electronically, purge the communication from the system. This includes communications received through e-mail.

*ii. Conflict of Interest*

To ensure that there is no breach of the obligations and to avoid conflict of interest when delivering legal services while using the Internet or e-mail, a lawyer must determine the actual identity of parties with whom the lawyer is dealing.

*iii. Confidentiality*

A lawyer has a duty to keep all confidential information concerning a client's business, interests and affairs acquired in the course of a professional relationship.

- He must not disclose any confidential information regardless of its source and whether or not it is a matter of public record.
- He must not disclose the identity of a client nor the fact of the lawyer's representation.
- He must take reasonable steps to ensure the maintenance of confidentiality by all persons engaged or employed by the lawyer.

A lawyer while using electronic means of communication, must ensure that communications with or about his client reflect the same care and concern for matters of privilege and confidentiality normally expected of a lawyer using any other form of communication. This would include e-mail, whether via the Internet, internal e-mail or otherwise, or the use of cellular telephones or fax machines to transmit confidential client information.

I advise all lawyers using such technologies to develop and maintain a reasonable awareness of the risks of interception or inadvertent disclosure of confidential messages and how they can be minimized. Encryption software is available and must be used, if electronic means of communication are used, for those confidences that may be so valuable or sensitive that it is in the client's interest to take the extraordinary step of encrypting to protect them. The challenge, as in so

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many ethical areas, is to recognize those extraordinary situations and exercise sound judgment in relation to them.

Some other aspects which a lawyer, when using electronic means to communicate in confidence with clients or to transmit confidential messages regarding a client must:

- develop and maintain an awareness of how technically best to minimize the risks of such communications being disclosed, discovered or intercepted;
- use reasonably appropriate technical means to minimize such risks;
- when the information is of extraordinary sensitivity, advise clients to use encryption software to communicate with their lawyer, and use such software; and
- develop and maintain such legal practices as offer reasonable protection against inadvertent discovery or disclosure of electronically transmitted confidential messages.

I would also like to provide certain examples from different jurisdictions and how they have handled the same;

In the instant case<sup>30</sup>, an attorney inappropriately accessed confidential e-mails in an effort to obtain an advantage in a campaign to unionize employees in her workplace. The attorney used both her office and home computers in an attempt to access the e-mail accounts of more than 40 employees and at least one member of the employer's Board of Directors. The purpose of this access was to monitor anti-union sentiment during a unionizing effort that she initiated and supported. Some of the messages she deleted had not yet been read by the recipients. C the lawyer chose to delete contained anti-union information or sentiment. None of this activity was authorized. The lawyer was suspended for two years.

Similarly, when lawyers use their computer knowledge to obtain a competitive advantage against other attorneys, can also face sanctions based on their activities. In one such case, a New York lawyer called his competitor's voice mail system, logged in, and reviewed and deleted voice mails and was subsequently charged in a Federal indictment with violating Federal felonies related to the

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<sup>30</sup> *IN RE: Julia Ellis BROWN, Opinion No. 26129, Supreme Court, STATE OF SOUTH CAROLINA, 2006*

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unlawful access to stored communications. The New York disciplinary authorities also successfully sought the lawyer's disbarment.

According to me, all lawyers have a fiduciary responsibility to preserve the confidentiality of records on their computers, such as clients' files or government records. Based on this responsibility, a system should be created that monitors access to these records on a daily basis and that provides a continual detection mechanism for unauthorized access.

These are but a few instances of professional misuse. India developing as rampantly as it is in the international arena, must also take notice of these scenarios and apply the same.

### **3 - Art of Advocacy**

Having dealt extensively with the Ethical issues and challenges, I also felt it appropriate in explaining the concept of "Advocacy", as it is a corollary to the principle of professional ethics and one cannot be independently executed without the other, as both are essential facets for an advocate's success.

Before I delve into explaining the Art of Advocacy, there is a very important and essential ingredient that needs to be demonstrated, be it any profession, in order to achieve success and that is "Industry"

*"Live like a hermit, work like a horse"<sup>31</sup>*

This quote to me is the essence of advocacy and without which no man can achieve success. The above quote should be enshrined in the minds of all those who want to realize greatness in the field of law. Advocacy is not something which one acquires inherently or genetically. It all starts with hours and hours of diligent work and dedication. A sine qua non for success is that you must put forth infinite industry. *Lord Atkin* said,

*"one thing was essential; the capacity for hard and regular work. Nobody had ever risen in the legal profession by doing a few hours' work here and there when the mood came upon him."*

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<sup>31</sup> Chief Justice of India, Mr. SH Kapadia, (<http://news.outlookindia.com/items.aspx?artid=752297>)

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You have heard it said that “*industry is Fortune’s right hand.*” It is not in that sense that I am referring to industry. A great man said, “*the longer I live, the more I am certain that the great difference between man and man is invisible energy.*”

You may have learning, you may have intellect, you may have the good fortune to secure your first clients, but do not believe that you can secure abiding success without industry. As a learned writer puts it, “*The genius of success in the contests of the forum is the genius of hard work.*”<sup>32</sup> I would say that industry would supply even the lack of learning or intellect, for genius itself is but the infinite capacity for taking pains. I can say with confidence that no man has succeeded in the legal profession merely by his intellect and without industry. Let industry, then, be the *motto* of your professional life. Even for the learned profession of law, you need not be great in intellect or in learning, but if you are a giant in the industry you are likely to be a giant in the profession. Without industry “*the armoury of the advocate will lack weapons on the day of battle.*” A learned lawyer said, “*luck generally comes to those who look after it and my notion is, it taps once in a lifetime at everybody’s door, and if industry does not open it, away it goes.*”<sup>33</sup> Nothing is truer in advocacy than that preparation is power, and a diligent second-rate man will time and again win victories over a brilliant but less industrious adversary. Hence, my advice to you is, always put the adequate effort; there is no shortcut to success without it. If you feel yourself lagging behind, remind yourself what you are working for and what your ultimate goal is and let that be your source of motivation. Remember, if one ignores the law, the law will also ignore him. That is why it is said that “*law is a jealous mistress.*”<sup>34</sup>

Having stated the most important step to advocacy, once this is followed, half the battle is won. In fact I would also like to quote *Judge Abbot Parry*, who in an admirable book entitled ‘*The Seven Lamps of Advocacy*’<sup>35</sup>, refers to the essential qualities that an advocate must possess for success in the Bar, which I recommend be followed to the letter.

1. ***Honesty***: “*The best of lawyers of all generations have been devotees of honesty*”.

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<sup>32</sup> <http://www.archive.org/details/cu31924020162123>

<sup>33</sup> *The Standard (Concord, N.C.), 1890-06-06*

<sup>34</sup> The full quotation is: “[The law] is a jealous mistress, and requires a long and constant courtship. It is not to be won by trifling favors, but by lavish homage.” This is attributed to Joseph Story, *The Value and Importance of Legal Studies*, in *The Miscellaneous Writings of Joseph Story*, 503, 523 (1851).

<sup>35</sup> Parry, Edward Abbott, Sir, 1863-1943. *Seven lamps of advocacy*. London, T.F. Unwin [1923]

Honesty to me is the most important quality that an advocate should possess. His thoughts, words and deeds should have sincere co-relation to each other with genuineness. An advocate should be dependable and reliable to everyone who seeks his advice and services. The uprightness, integrity and honesty of an advocate will increase his reputation and respect in the society.

- ii. **Courage**: *“Advocacy is a form of combat where courage in danger is half the battle. Courage is as good a weapon in the forum as in the camp. Charles Hutton’s. He bath in perfection the tree chief qualifications of an advocate: Boldness, Boldness and Boldness.”*

It is the duty of an advocate to fearlessly uphold the interests of his client by all fair means without fear of any unpleasant consequences to himself or any other person. It is the knowledge and skill of the advocate that gives him the necessary courage and confidence to present the case fearlessly and to uphold the interest of the client. The knowledge and the skill can be acquired and developed by mastery of facts, mastery of laws, and mastery in drafting and presentation of convincing arguments.

- iii. **Industry**: *“Charles Lamb quotes ‘the dry drudgery of the desks’ deadwood-Advocacy is indeed a life of industry and a lawyer must study his brief in the same way that an actor studies his part. Success in advocacy is not derived at by intuition.”*

I have already dealt with this at length.

- iv. **Wit**: *“the lamp of wit is needed to lighten the darkness of advocacy. Often the wit of a lawyer will turn a Judge from an unwise course, where judgement or rhetoric would certainly fail.”*

Judges and lawyers have to deal with a variety of serious and important matters affecting life and liberty of the people. So constant clashes between them is common. Anxiety for a favourable verdict on the part of the lawyers; and perpetual worry for the pursuit of truth on the part of the judges generate strain and tension. Occasional wit and humour, provoking a smile or laughter will help them to ease the tension, and refresh themselves to sharpen their brain for the effective discharges of their duties.

- v. **Eloquence**: *“Eloquence of manner is real eloquence and there is a physical as well as psychological side to advocacy.”*

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Eloquence means the fluency, force and style of using the language. Strong vocabulary is one of the powerful weapons, which an advocate should possess. Words are his keys of thought. Strong vocabulary gives him assurance, builds his self-confidence and increases his personality. Words must be employed with eloquence. The art of persuasive and impressive speaking will give the desired result in his favour.

- VI. ***Judgement:*** *“in nothing does the lawyer more openly exhibit want of judgement than in prolixity.”*

It means the ability to come to a sensible conclusion and make wise decisions at the relevant time in the proper way. It is on the basis of these conclusions he should employ the necessary facts and techniques in the case in which he is engaged. This quality is necessary from the beginning of filling the case till its final disposal. An advocate must always anticipate all the possible moves of the other side and must develop the necessary presence of mind, alertness and tact to cope with any awkward situation of difficulty that may arise in the case.

- VII. ***Lamp of Fellowship:*** *“it is exactly like a great public school, the boys of which have grown older, and have exchanged boyish for manly objects. By keeping the lamp of fellowship burning, we encourage each other to walk in the light of the seven lamps of advocacy.”*

Fellowship means the membership in friendly association or companionship. Fellowship is exactly like great public schools, the boys of which have grown older, and have exchanged boyish for manly objects. *Shakespeare* said, *“Do as adversaries do in law. Strive mightily but eat and drink as friend.”*<sup>36</sup> Though the advocates are opponent parties before the Bench, they are not enemies with each other. Their conflict ends as they come out of the door steps of the Court. *Daniel Webster*<sup>37</sup> says, *“Lawyers on opposite sides of a case are like the two parts of shears, they cut what comes between them, but not each other”*. There is no discrimination of age, ability, experience and riches etc. between the advocates. All are equal. Courts give them all equal respect. Among advocates, there is just the same rough familiarity, the general ardour of character, the same kind of public opinion expressed in exactly the same blunt, unmistakable manner. By keeping the

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<sup>36</sup> *The Taming of the shrew, Act 1, scene 2, 269-277*

<sup>37</sup> *Daniel Webster (1782 - 1852)*

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lamp of fellowship burning, advocates encourage each other by sharing the knowledge to walk in the light of the seven lamps of advocacy.

Besides the above mentioned 7 Principles, I would like to add one more lamp, i.e. "*Tact*"<sup>38</sup>, and can be called as "The Eight Lamps of Advocacy". Tact is the ability of handling people and situations skillfully and without causing offence. An advocate must be in a position to tackle and win his client, opponent party, opponent advocate in a smoother way. Many people of unequal ability have failed for want of tack. An advocate should not quarrel with the Court or loose temper over trifle things in the Court and outside. Men of unquestioned ability have suffered for quarrelling with the tribunal or for standing on their dignity over trifles, for getting their clients, or for losing their tempers; they are men of parts but without tact.

I would like to conclude on the aspect of advocacy by referring to an observation made by the Supreme Court of India in *J.S. Jadhav v. Mustafa Haji Mohamad Yusuf*<sup>39</sup>;

*"Advocacy is not a craft but a calling; a profession wherein devotion to duty constitutes the hallmark. Sincerity of performance and the earnestness of endeavor are the two wings that will bare aloft the advocate to the tower of success. Given these virtues other qualifications will follow of their own account. This is the reason why the legal profession is regarded as a noble one."*

#### **4 - Conclusion**

An advocate's duty is as important as that of a Judge. Advocates have a large responsibility towards the society. A client's relationship with his/her advocate is underlined by utmost trust. An advocate is expected to act with utmost sincerity and respect. In all professional functions, an advocate should be diligent and his conduct should also be diligent and should conform to the requirements of the law by which an advocate plays a vital role in the preservation of society and justice system. An advocate is under an obligation to uphold the rule of law and ensure that the public justice system is enabled to function at its full potential. Any violation of the principles of professional ethics by an advocate is as unfortunate, as is unacceptable. Ignoring even a minor violation/misconduct militates against the fundamental foundation of the public justice system. An advocate should be dignified in his dealings to the Court, to his fellow lawyers and to the litigants.

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<sup>38</sup> *Ibid.* 5

<sup>39</sup> *AIR 1993 SC 1535: 1993(2) SCC 562*

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He should have integrity in abundance and should never do anything that erodes his credibility. He has a duty to enlighten and encourage the juniors in the profession. An ideal advocate should believe that the legal profession has an element of service also and associate with legal service activities. Most importantly, he should faithfully abide by the standards of professional conduct and etiquette prescribed by the Bar Council of India in Chapter II, Part VI of the Bar Council of India Rules. With these few words of wisdom, I wish one and all nothing but the best.

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