THE PATHOLOGY OF THE INDIAN LEGAL PROFESSIONS
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I INTRODUCTION

THE SILVER JUBILEE OF THE Bar Council of India is an important event in the career of the Indian democracy and for its future. Even as we celebrate the achievement of the Indian legal professions on this landmark occasion, an examination of some of the deformations is also essential to provide rectification by the dedicated efforts of the Indian Bar.

Learned professions are often distinguished from 'occupations' and 'businesses' by their more explicit pursuit of, and greater fidelity, to, certain basic societal values. Lawyers as a profession are thus oriented to the achievement of conditions of justice in society. We may not be able to say with any tolerable measure of consensus what 'justice' signifies; but there may be a fair measure of consensus on the idea of conditions of justice, one of which is the construction of public discourse on the nature and limits; legitimacy and legality, of state power. The denial of such a discourse often signifies an end to the very quest for justice.

If lawyers, constituting learned professions, are to be responsible for creating and sustaining conditions of justice in society, their role obligations have to be articulated. This is done through explicitly formulated Codes of Ethics. The Codes also provide us standards for identification and measure-
ment of professional deviance. In this paper, we analyze both the nature of the Code and the measure of professional deviance; the impact such deviance has upon the value of justice, which the learned professions of law are to pursue, is not examined here in any detail.

II THE CODE OF PROFESSIONAL ETHICS

All members of all legal professions are bound by the elaborate Code of Ethics codified in Part VII, Chapter 11 of the Rules promulgated by the Bar Council of India under section 49 of the Advocates Act. Prefaced by a long preamble, the code of conduct described as "Standards for Professional Conduct and Etiquette" comprises forty-seven provisions, is divided into seven parts. Apparently, the Code defines, inclusively, the phrase "professional and other misconduct" used by Section 15 of the Act which provides for disciplinary proceedings against the errant members of the Bar. The Preamble clearly states: "The rules hereinafter mentioned contain canons of conduct and etiquette adopted as general guides; yet the specific mention thereof shall not be construed as a denial of the existence of others equally imperative though not specifically mentioned." Section 1 specifies ten rules under the rubric "duty to court"; only two rules under Section III refer to duty to opponent (Rules 34-35), four rules in Section IV isolate "duty to colleagues"; six rules in section V deal with prohibition on employment; one rule in each in Section IV and V provide respectively for duty of imparting legal training and duty to render legal aid. The bulk of the rules (rules 11 to 32 in Section 11) crystallize the duty towards clients.

The extent to which the rules are mandatory, productive of disciplinary consequences, is nowhere specified. Section 35 does no doubt casts a duty on the Bar Councils of States to act suo motu or on a receipt of complaint of professional and other misconduct to refer the matter to the disciplinary committee. But the suo motu jurisdiction is wholly discretionary. And the jurisdiction arising from complaints is hamstrung by formidable technicalities. A complaint has to be in the form of a petition, duly signed and verified as required under the Code of Civil Procedure", an English translation of the complaint has to be filed if it is written in some other language. Similar formalities exist in the appeals procedures. It is provided that lawyers may appear before the Committee; and when the complainant is unable to afford a lawyer an amicus curiae may be appointed.

Part VII, Chapter 1, which contains these rules reiterates at two places (Rule 135 and Rule 1135) that no suo motu action or disciplinary enquiry shall be dropped "solely by reason of its having been withdrawn, settled or otherwise compromised, or that complainant does not want to proceed with the enquiry." All disciplinary proceedings are in camera.

Before we consider the enforcement of the Code through the disciplinary committees of the Bar Councils a few general comments on the nature of the Code may be in order. First, the Code assumes that there is a unitary legal profession in India, for all of which basic standards may be prescribed. But as indicated elsewhere there are many legal professions in India. The prohibition, for example, on tourism under Rule 36 presses a standard of conduct, perhaps, appropriate to the "superstructural" professions; whether it is appropriate to the "grassroots" professions, at the present stage of development, must remain an open question. If the potential injustice of tourism to clients and litigants is to be combated, this would only be possible through recognition and regulation of tourism in some professions. An undifferentiated prohibition which cannot be enforced without abolishing certain legal professions (structured through paraprofessional services) severely affects prospects of internalization of other desirable and feasible norms. In speaking to all advocates as a homogenous collectivity, the Code risks non-communication with diverse bodies of advocates, especially those located outside the "superstructural" legal professions.

Second, the Code is declared by the Preamble as containing "general guides" for professional conduct and etiquette. Although the prohibitions are couched in mandatory terms (by the tiresome "shall not" littering the text), it is not immediately clear as to whether violation of each and every rule is actionable. Clearly, some rules are couched in a summoning language but do not seem to create obligations, violation of which will create ground for disciplinary proceedings. Not surprisingly, the foremost example of this is provided by Rule 41 describing the obligation to provide free legal aid to the "indigent and the oppressed" as one of "the highest obligations an Advocate owes to the society." The "highest obligation" is, of course, as in the formulations of the Directive Principles of State Policy, subject to the "limits of an Advocates" economic condition". But we know that even the superstar lawyers, whose economic condition is unconscionably affluent, even refuse summarily to see an indigent person with urgent need for legal assistance. We also know that most senior lawyers stay away from the legal aid programmes of the state. We also know that when the Supreme Court itself issued notice to the Supreme Court Bar Association in Hussainara to assist the Court is handling the massive undertrial cases, the Association did not even respond. We know that leading Indian lawyers did not rush to assist the Bhopal victims. An exception here or there, either in the grassroots or superstructural legal professions, does not disprove the rule that lawyers in India have understood Rule 41 of the Code as, in its nature, unenforceable. As far as I know, neither a complaint nor a suo motu proceeding has occurred with regard to Rule 41. All this is in accordance with the market for legal services, which is organized, more or less, as a sellers' markets. But now of Article 39-A, a new Directive Principle concerning
The code contains provisions for legal services, which are essential to the functioning of the legal profession. These provisions include rules for the conduct of legal practitioners, the regulation of law firms, and the enforcement of ethical standards. The code also includes provisions for the resolution of disputes between clients and attorneys, as well as for the handling of conflicts of interest.

Prominent lawyers are expected to be characterized and directors of many communities

integrate all business enterprises into the growth of the separate sectors in many ways.

In addition, the code seeks to ensure that lawyers may improve their ethical standards and professionalism. The code includes provisions for the continuing education of lawyers, which are designed to keep them updated on the latest developments in the field of law.

The code also contains provisions for the protection of the public. These provisions include rules for the advertisement and solicitation of clients, as well as for the publication of information about the qualifications and experience of attorneys.

The code is designed to ensure that the legal profession operates in the public interest. It seeks to balance the needs of clients with the ethical responsibilities of attorneys. Through its provisions, the code seeks to ensure that the legal profession is accountable to the public and operates in a manner that is consistent with the highest standards of professional conduct.
consulted" by the other side. Rule 33 thus embodies a duty for the resourceful client, not for an ordinary one.

In fact, the Code nowhere differentiates between and among clients. But "clients" constitute a heterogeneous category. Surely, governments, statutory corporations, trade unions, companies, nationalized banks, public financial institutions registered societies, cooperative societies, marketing associations differ, in many substantial ways, from individual clients. Liberal sociologists of the legal profession, when they talk about the famous lawyer-client dyad, create the impression, perhaps unintended, that the clientele of the Indian lawyers is almost always furnished by individual persons. This is clearly not the case.

"Artificial" or non-natural legal persons, constituted by or recognized at law, have, in comparison with individual clients barring among these the most resourceful, have enormous staying power as far as litigation is concerned. The cost of litigation is absorbed by the organization, right up to the final stage of review. The decision to litigate and strategies of litigation, including retaining and hiring lawyers, is a part of corporate strategy of the group personality. If the gains of victory form a part of corpus for corporate activity, the losses arising out of litigation form a liability which has to be absorbed or passed on to the consumer. Corporate clients have the capability of being repeat players; as against the one shot role usually played by individual clients. The remuneration from corporate clients is far more assured than from individual ones. And the level of fees and expenses is justifiably higher in case of dealings with corporate than with individual clients. The obliteration of these crucial differences among clients, by reducing everyone who seeks higher legal services to one common denominator, the Code deliberately falsifies social reality. The market for legal services for corporate clients is differently organized than for individual clients. The lack of differentiation in ethical norm for corporate clients, where lawyers' earnings tend to reach the maximum limits, is not inadvertent. It is consistent with the very nature of the organized market for legal services.

For example, the salutary rule that "an advocate shall not, at any time, be a party to fomenting of litigation" (Rule 18) is readily understandable in case of individual clients. But in regard to corporate clients it makes no sense. If payment of tax—whether direct or indirect—has to be postponed, so that the available money can be used for the immediate needs of trade, commerce, industry, litigation will have to be "fomented" knowingly by advocates as per the interests of the client. Litigation will have to be planned not so much for ultimately avoiding liability at all; but for the fluidity and mobility of resources urgently needed by the corporate client. It is due to, at least partly, such "fomenting" that thousands of crores of rupees in excise, for example, have been blocked for decades through litigation. The preamble to the enactments of the Supreme Court in the Cases of the England's case are worth noting in this connection; so in the opinion of Justice O. Chinnappa Reddy, endorsed by all his brethren, in Mc Dowell, concerning the questionable thinness of the distinction between "tax planning" and "tax evasion."

Fourth, the Code exempts from its restrictions on employment the entire class of government lawyers, defined broadly as law officers not just of the union and state government but as also inclusive of the law officers of any public or corporate bodies (Rule 44). The recognition of service lawyers, by way of an exception to the market economy of legal services otherwise inscribed on the Code, is also a major concession to the state. But it is doubtful whether all the Rules can, in effect, apply to the service Bar. The law officers of the Union of India cannot, by definition, implement Rule 4 which requires an advocate to use his "best efforts to restrain and prevent his client from resorting to sharp or unfair practices or from doing anything in relation to Court...which the advocate ought not to do." Since the executive has the last say in the matter of appointment of justices and transfer of the High Court justices which may at least be considered "unfair", if not "sharp" practices, a government lawyer cannot do justice to the client while at the same time implement the spirit of this Rule. The Attorney General had to justify the mass transfer of sixteen justices during the emergency; and again an arrogant circular issued by a Union Law Minister to High Court justices in 1980. The obligation, further elaborated by the Rule, that an advocate shall not "consider himself merely a mouthpiece of the client" is also far too onerous especially in so far constitutional cases for a government lawyer than a private attorney. Similarly, Rule 19 does not make much sense for government lawyers who occasionally have to act on instructions from political sources placed higher than the concerned department briefing her as a "client." Nor may Rule 41 extend to service lawyers, unless their terms and conditions of service permit them to offer legal aid.

All in all, therefore, the standards contained in the Code fail to distinguish between different legal professions in India. They also fail to distinguish between and among types of clients. They reflect, in distinctive ways, the internal morality of the market for legal services. Although as the preamble declares the lawyers to be the officers of the court, the Code as such does not go beyond matters of etiquette, dress and decorum in relation to courts. Nowhere does the Code stipulate as professional misconduct many of the following behaviour patterns which have now become notorious:

— the practice of bench-fixing
— the practice of supressing inconvenient precedents, unfavourable to the case
— the practice of asking for a transfer of a judge on the grounds of alleged corruption
— the practice of lobbying the Chief Justice of High Court, Chief Justice of India, and even the government concerning the integrity of an ad hoc or an additional judge at the time of his confirmation (recall the unverifiable basis of Justice Prakash Narain's decision not to recommend S.N. Kumar)
— the practice of asking for repeated adjournments
— the slovenly manner in which preparation for cases is undertaken by most "superstructural" legal professionals
— the practice of prolix argumentation with an eye to the maximization of fees per appearance
— the practice of charging unconscionable fees regardless of the paying capacity of clients and the nature of the case
— the practice, during lawyer's strike, of picketing even the homes of judges
— the practices which help the growth of administrative corruption in the court staff
— the practice of "fraternizing" with justices
— the practice of making oral concessions contrary to written pleadings and then contesting a judgment which records and proceeds on the concessions.

These, and associated, practices have been subjected to public exposure and commentary in the last decade. At yet the Bar Council of India has not thought it fit to elaborate more precisely the full implications of what the phrase "officers of the court" should really convey in relation to such behaviour-patterns of lawyers. Even in terms of internal morality of the market for legal services, these practices are "unfair" and need to be combated. In terms of constitutional and professional morality, of course, nothing can be more pressing in its urgency than a more precise and vigorously enforceable code of professional conduct. Apparently, the organized Bar is not too unhappy about these practices.

This is most clear in relation to the phenomenon of "sonstroke" elsewhere. To this we now turn in some detail to demonstrate the pathology of the legal profession.

The "Sonstroke" Phenomenon

Rule 6 of the Code prescribes that an advocate shall not practice before a court or any other judicial forum "sitting alone or otherwise, if the sole or any member thereof is related to the Advocate as husband, father, grandfather, son, grandson, brother, father-in-law, son-in-law, uncle, nephew, first cousin, wife, mother, daughter, sister, mother-in-law, daughter-in-law, aunt or niece."

The Rule, at first sight, looks detailed and explicit. A layperson reading it will hail it as a collective self-abnegation of the highest order expected from a truly learned profession. The impression that the Rule creates is that no near relation of a judge may practice in the court in which she holds the office of a judge.

The layperson would be surprised to learn that the prohibition contained in the Rule is not at all that clear. Lawyers as a profession live and thrive on ambiguity, inherent in, or imparted to, words. Here, indeed, the lawyer themselves are acting as legislators in relation to the standards of their own conduct. The conventional understanding of this Rule has been it prohibits appearance before the relative judge "sitting alone or otherwise"; the word "otherwise" means singly or with other judges. Whether a judge sits singly or in a Bench, the decisions made by the judge or the Bench are the decisions of the Court as whole. The court rarely sits as a full court. Therefore, court is nothing else than a judge sitting singly or in Benches. The prohibition in Rule 6, accordingly, applies to a relation of judge practising before a single judge Bench or a Bench in which the relative judge is included. It is professional misconduct for a relative lawyer to appear before such a judge.

The problem of "sonstroke" or rather "spouse stroke" has at long last come before the Supreme Court of India in the case of Pramila Nesargi, a former chairperson of the Karnataka Bar Council, who recently married Judge Nesargi of the Karnataka High Court. In keeping with the conventional understanding of Rule 6 she did not practice before the judge-husband. According to available reports, some justices of the High Court found it rather embarrassing that a Brother's wife should appear before them. It seems that the Karnataka Bar Council was inclined to consider the matter seriously when she filed a writ before the Supreme Court challenging any wider interpretation of the Rule, wider than the conventional one, as an infringement of her fundamental rights to carry on trade, profession or business. The matter is still pending with the Supreme Court. The gist of the petition, inaccessible to me despite best efforts so far, is that a wider interpretation debarring a spouse to practice in the court at which the husband happens to be judge would be violative not just of the Article 19(f)(f) right but also of the gender non-discrimination norm of Article 15(1). The
petition is not likely to come up for hearing for quite a while, so unpredic-
table is the movement of certain sensitive matters at the Court.

Rule 6 raises many interesting basic questions. First, it raises the ques-
tion concerning the meaning of the word “court”; second, the Rule postulas-
et an image of a judge as a frail human person; third, the Rule raises the question concerning the ambit of the well-worn maxim that justice must not only be done but seem to be done and fourth it raises the pertinent question of exploitation of relatives as forensic strategies and subtle exploitation of the judicial psyche as well.

(i) On the Meaning of the Court:

It is amazing but true that there should be any ambiguity concerning the
most basic notion of law: namely, on the meaning of the term “court.” All
other terms—lawyers, practice, jurisdiction, judgment, precedent, appeal,
review and even the notion of a judge—depends on the meaning one wishes
to impart to the term “court.”

The court, first of all, is an institution, with its own distinctive statuses
and roles, with its own history, ideology, value systems and culture, which
give meaning and significance to these statutes and roles. Interestingly,
it is the institution of the court which endows judges with their statuses and
roles; it is difficult to imagine the role of judges outside the institutions we
call courts. Courts are forums in which the notion of a judge has it, as it
were, its being. That is why a retired judge may be addressed as a judge;
but we all know that it is merely a form of deference, meaning no more than
that.

The total number of judges who shall constitute a court is fixed by the
constitution or legislation or in some cases by mere executive determination.
Notionally, the court may comprise one single judge. But usually courts
have a plurality of judges. When judges sit singly or in pairs of two or three or
five they do so under various rules, at the discretion of the presiding judge as
to who shall constitute the pair. Once the bench of a sole or plural judges is
formed according to rule and discretion, that bench becomes the court for
the purposes of the exercise of the powers invested in the judiciary.

The Supreme Court, for example, sits in six courts; each Bench dis-
charges the functions and powers of the Supreme Court as a whole. Subject
to review or appeal provisions, the decision of the Bench is the decision of
the Court. Contempt of a judge or a bench is contempt of the entire Court.

If you ask the question: What is the Supreme Court of India? The
answer may be as follows. It is a Court presided over by the Chief Justice
of India with eighteen associate (pusine) justices. It would not be correct to
say that the Supreme Court does not at any given time exist as an entity,
as a collectivity, that the expression “Supreme Court” is a confused shorthand
for several distinct and separate courts, depending on the number of Benches;
nor it would be right to say that Supreme Court has convened only twice
since the Independence—one when Golak Nath and second when Kesavananda
was heard by the Full Court. The Supreme Court has functioned, we shall
say, since the Constitution came into force, including during vacations when
there is usually a vacation judge. If we ask the question who granted bail
to Shri L.N. Thapar the other day: shall we say it was Justice Vankataramiah
at his house or shall we say it was the Supreme Court? Who reviewed that
order? Would the answer be: two justices sitting on Monday or should it be
the Supreme Court?

These are no idle questions; rather, the way we answer these questions
have a vital bearing on Rule 6 and through it on the overall integrity of legal
professions and the administration of justice.

If we say, as the conventional approach to Rule 6 would have us say, that
there is a plurality of Supreme Courts (as many Supreme Courts as many
Benches of it), that would be a correct behavioural description of the Supreme
Court. But would it be a correct legal description of it? The Constitution
contemplates one Supreme Court; and one High Court; not several. The
Advocates Act refers to the Supreme Court and High Courts in the legal
constitutional sense in Section 30 to which Rule 6 explicitly refers. The
behavioural description is, of course, correct as such; as so is the legal/con-
stitutional description. But the two descriptions are in direct conflict.

Can lawyers, of all the people, shun the legal/constitutional description?
If they do, several Supreme Courts (behaviourally) would have one (beha-
viourally and constitutionally) Chief Justice.

Article 141 announcing that the law declared by the Supreme Court shall
be binding on all courts will have to mean that the law declared by each and
every Bench of the Supreme Court, regardless of the theory of precedent or
the Supreme Court Rules. But the doctrine of precedent, partly embodied in
Article 141, does not legally/constitutionally entail this. Are we then to say
that a Bench of two Supreme Court justices is a “lower” or “subordinate”
Supreme Court to a Bench of three and a Bench of three is similarly subordinate
to a Bench of five and so on? But if we prefer the behavioural over the
constitutional/legal definition, we have no other logical alternative than to
say that there are Supreme Courts within the Supreme Court, indeed to a
point of saying that there is exist the Supreme Court but a large number of
Supreme Courts. Indeed, one would need superb legal ingenuity to emerge
through the dynamic inconsistencies and even absurdities that such a notion of the Court would entail.

(ii) The Image of the Judge

Why Rule 6? The assumption is that if near relations practice before the concerned judge, human elements will distort her sense of fairness and duty in the course of administration of justice. The assumption, further, is that if near relations do not practice before the concerned judge, all would be well. But would not the wife, husband, son, daughter, or mother of a judge residing with him, hosting social occasions at the judge’s residence, not affect Brother judges regard or treatment of them as advocates? If the concerned judge is frail, aren’t her Bretheren? The conventional interpreters of Rule 6 assume that the concerned judge is more vulnerable than her Brethren, because near relations of that judge are not their near relations. True, but they are known by the Brethren as near relations of a Brother judge. There is little doubt that if judges are vulnerable to favourable disposal of cases of their relations, their Brethren cannot, as a practical measure, afford to altogether overlook that a “classification” Bhabi or Bhai, Daughter or Son is arguing before them. The impact of near relations of a Judge on Brother Judges may even be more intense in some cases, as when two judges have been family friends and would not like to hurt the career of each other’s near relations. If judges are human beings, and they undoubtedly are, they are all equally vulnerable to human frailties. It is not good social psychology, certainly not in Indian conditions, to say that a relative judge is much more vulnerable than a brother judge to whom the near relations are close in social terms.

If, on the other hand, we attribute a strong personality, character and sense of judicial discipline to Brother Judges, when near relations of the concerned judge appear before them, logically we should attribute the same strength to the concerned judge herself? In that case, Rule 6 must be a candidate for immediate repeal?

(iii) The Maxim of the Appearance of Justice

The maxim that justice must not merely be done but must be seen to have been done may impel us to a conventional interpretation of Rule 6. But the very same maxim could also impel others towards a wider prohibition under the Rule. The latter was precisely the basis of objection articulated by justices of Karnataka High Court to the wife of Justice Nesargi practising in the High Court of Karnataka at all. Many sitting justices elsewhere have taken the view that their spouses or children or other relatives should practice at forums other than High Courts where the concerned judge is functioning. The Rule is, of course, not addressed to High Court or any other judges; it applies express verbis to advocates. In any event, the fact that some relations of judges practice in courts other than the one in which a relation of theirs is a judge should testify that their own understanding of Rule 6 is wider than the conventional interpretation and also of the maxim which that understanding involves in a limited, and a warped, form.

(iv) Use of Relations as “Forensic Strategies”

It is by now well-known that the conventional interpretation of Rule 6 has resulted in practice of indirect bench-fixation. The simplest way is the technique of filing a vakalatnama in the name of near relation. Obviously, that particular case cannot be placed before a judge to whom the lawyer is dearly related. In strict theory, this should produce no difference whatsoever. But judges vary in their ideologies and philosophies. Some express these overtly and aggressively, others disguise these in appearances of impartial adjudication. Shrewd lawyers know, by way of knowledge of court-craft, how judges are ideologically predisposed (e.g. as pro-labour/pro-management; pro-tenant/pro-landlord; pro-assessee/pro-revenue; pro-state/liberal, anti-state). To prevent the listing before a judge of a particular ideological predisposition, near relations of judges practicing in the jurisdiction are requested to file an appearance. If they agree, the relative judge stands disqualified. Whether or not this assures a desired litigational outcome is irrelevant; what is relevant is the apprehended increase, by the Bar as well as clientele, of the prospects of a favourable outcome. It is well-known that near relations of judges have done well in some High Courts, far beyond their standing; and that one of the reasons, usually unstated, urged in justification of the policy of transfer of High Court judges is the possibility that relations may be so used or allowed themselves to be used as to occasion, without the knowledge of the judge, and even to her colleagues, indirect bench-fixing.

The Bar has actively supported demand for transfer of judges, which is now a settled policy. Many Bar Associations have publicly or privately levelled charges of nepotism at the doorstep of some specific justices. But it has not acknowledged that the “professional” practices of relations of judges practising as counsel have often resulted in the insidious practice of indirect bench-fixing. Perhaps, some lawyers to whom such practice is inconceivable are not able to perceive in existence at all; and some others have been so accustomed to it as to view it as a necessary evil. Maybe, only few lawyers use this practice as a forensic strategy. How extensive is this use must remain a matter of informed estimates; but its existence must not be gainsaid.
When the Chief Justice of a court is confronted with a situation of this sort when she has to assign the case to Benches, there is simply no way which she can avoid knowing who the lawyers are and what the case is. No matter before what Bench the case is posted by, or under the orders of, the Chief Justice, both Brother Judges, the Bar and sometimes even the litigants may place uncharitable interpretation on this assignment. A Judge is thus exposed to considerably subtle pressures; even if she treats such situations as routine ones, and takes them in her daily stride, there is simply no way in which she can avoid unexpected calumny through the “grapevine” of the Bar.

Of course, charges of nepotism can be made even if the near relations of a High Court or Supreme Court judge practice in forums other than these courts. Some people will always perceive them as near relations first and as advocates next. Some judges, unknown to the concerned judge, may assist the near relations in ways calculated to ingratiate themselves with “superior” judges who have a say on their careers and possibly later elevations. Whether such calculations succeed or not, slander-happy people would never fail to put two and two together. But such a possibility cannot be taken into account to justify a further extension of Rule 6 to prohibit legal practice in the same territorial jurisdiction; to do that would certainly justify the charge of unconstitutional deprivation of the right to freedom to practice any legal profession.

What the Supreme Court will decide in the Nesargi petition is not for me to foretell. If it decides to sustain the conventional interpretation of Rule 6, it would not merely have to overcome theoretical and constitutional difficulties in conceptualizing the meaning of the term “court.” The Supreme Court will have also to consider the risk of legitimating attendant evils which the practice by near relations has undoubtedly caused on a conventional interpretation, evils which some of its outstanding justices have decried often in public lamentation and evils which have reluctantly led them to endorse the policy of transfer of the High Court justices. Perhaps, it is time for the Supreme Court to experiment with a more strict interpretation of Rule 6 and forbid practice by near relations before the entire court where a concerned judge functions as such. The fundamental right to practice a profession cannot be, and need not be, interpreted to mean the right to practice the profession of law in a chosen forum at all times. Temporary exclusion, until retirement of the concerned judge, from a forum is justified on strong grounds of integrity of administration of justice which is in itself a constitutional value.

At the same time, the Bar Council definitely should, on its own initiative, legislate certain additional requirements, no matter whatever is the final decision in the Nesargi petition. One additional requirement should be that no advocate, who is among the enumerated relations of a judge, shall engage in the practice of law from the official residence of a judge. Near relations are entitled as relations to reside with the judge; but they should not be considered entitled to use in any way whatsoever the official residence and facilities offered to a judge for their own purposes. To do so should be a clear case of professional deviance.

PROFESSIONAL DEVIANCE

One official indicator of professional deviancy is furnished by complaints, or suo motu proceedings, before the disciplinary committees of the Bar Council of states. But reports of these proceedings are not published. Appellate proceedings before the Bar Council of India were published for a few years in its quarterly journal; even this practice has now been discontinued. A handful get routinely reported. But, on the whole, statutorily organized legal professions have felt no need of reporting adjudicated cases on professional deviancy. In itself, this indicates a low valuation of the Code of Conduct, so elaborately enunciated in the Rules. Clearly, one way to promote understanding, and efficacy, of the Code would be to ensure the widest possible dissemination, and as a matter of priority, of the decisions enforcing compliance with it and punishing deviations from it. Systematic publication will also enable clients to acquire an understanding of the justice of the peer-group adjudication in the disciplinary committees and, in appropriate cases, to seek justice from it. The BCI must adopt a rule, since all disciplinary proceedings are held in camera and the identities of lawyers often protected, that all decisions enforcing the Code must be published annually. Surely, this could be a policy determination appropriate to the silver jubilee mood of the BCI.

I have examined some forty five appellate decisions from the BCI disciplinary committees reported for the period 1972-1978 in the Journal of the Bar Council of India. The number is statistically significant. It might suggest that professional deviancy is not effectively present or that it is not brought too often for adjudication. Perhaps, the latter is the more probable situation. Of these proceedings only four were suo motu; the rest were complaint-based. If one looks at the gravity of charges of lapse professional conduct, one finds the sample qualitatively very significant. The sample is also very significant in terms of the adjudicatory role of the disciplinary committees, which constitute a minor, and yet not altogether negligible for that reason, illustration of peer-group adjudication based on the principle of elected 'judiciary.' Table A provides details concerning the origination of the disciplinary proceedings.
TABLE A

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<th>State</th>
<th>Number of Appeals</th>
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LOW APPELLATE PRESENCE

Table A reveals that only eleven state Bar Council's disciplinary proceedings were subject to review of the BCI; the other state Bar Councils are conspicuous by their appellate absence. If we adopt as significant the unit of five appeals, only four states emerge: Maharashtra (10); Punjab Haryana (8), Uttar Pradesh (7) and Rajasthan (6). These states contributed a workload of 31 out of 45 appeals to the BCI disciplinary committees. Maharashtra leads in another way also: it has contributed three out of a total of four suo motu actions (Rajasthan having contributed the fourth); in all other states the proceedings were complaint-based.

How do we understand the exclusion of other Bar Councils from the appellate workload of the Bar Council of India (hereafter ECI)? And, by the same token, the low appellate workload (less than five units) from 7 out of eleven states represented in Table A? One may attribute this state of affairs to the superior client satisfaction and integrity of low-use or no use (in appellate recourse terms) states. This is notionally possible but sociologically atrocious. The other way to understand this phenomenon would be to say the affected parties in state disciplinary proceedings were satisfied with or accepted the outcome anyhow. This is certainly plausible. But this would also suggest that in this case the state verdicts were in favour of the advocate and against the complainant.

But our data suggests a contrary braid: of the 45 cases studied by us the appellant is in as many as 42 cases has been a lawyer, appealing both against conviction and suspension. And in close to 39 cases the BCI Committees affirmed the finding of professional misconduct, while in most cases varying the suspension and punishment. If this may be held to be indicative of a certain trend, it becomes obvious that all states excepting the four mentioned above proceeded to enforces the Code in ways which clearly favoured advocates.

An alternate hypothesis should also be taken into account. It may be that the filing of complaints by clients may have been low; not because there were no genuine complaints but because either clients did not know about disciplinary procedure at all or were prevented from availing it because of some sort of settlement, duress or inability to hire lawyers to file a complaint on a perception that nothing will emerge out of such disciplinary recourse. This last factor, if validated by empirical research, will certainly justify the hypothesis of pro-lawyer bias in disciplinary adjudications.

THE PATTERN OF DEVIANCE

The cases reveal a variety of deviant conduct, susceptible to classification. First, we have situations of deviance concerning clients; second, there are cases relating to the abuse of judicial process; third, we have situations of disrespect to the court or judicial authority; fourth, disciplinary action follows conviction of lawyers for criminal offences. Statistically, the largest number in our sample belong to the first category: 15 cases out of 39 relate to the infringement of the Code in relation to clients. But cases in other categories, though not so numerous, do reflect the tenacity of certain other types of deviance. We look at these briefly now.

(f) Client-centered deviance

Of the fifteen complaints in this category, six relate to non-payment of decreetal amount and three to rendering of accounts and return of monies due. In each of these cases, the disciplinary finding of professional misconduct has been affirmed on appeal; although almost each, the initial penal sanction has been moderated on appeal.

The most extraordinary case of unlawful retention of client's monies is, perhaps, a 1974 decision where a lawyer retained the settlement award of Rs. 2612.25 made in favour of three bidi workers in Madhya Pradesh; although the lawyer described himself as a "champion of the poor labourers" for whom he claimed to work tirelessly, he was not at all able to explain his behaviour in retaining the money. The Bar Council of India described this
as a "serious" professional misconduct; it accepted the belated deposit of the amount without interest; and disciplined the lawyer by issuing a reprimand! The great concern shown for the impoverished at that time—the decision is given on 6 November 1975 soon after the declaration of the national emergency—it apparently had no effect on the custodians of the standards of professional conduct.

In another case, an Andhra Pradesh advocate retained for eleven long years a sum of Rs. 6410 from the daughter and widow of a deceased litigant. The BCI Disciplinary Committee held that "there cannot be a clearer case of misuse or misappropriation of client's monies"; it also noted that the advocate "had deliberately kept" the family of the deceased client "in the dark for years" and adopted an "obstructionist attitude" with a view "to retain the monies as long as possible"; it stated further, that if the money and been deposited in the bank it would have earned an interest of Rs. 4000 even at the rate of 6% per annum. The defence argument was that this was an established "practice" in the mofussil, which also consisted in not keeping a separate account of client's money. The disciplinary committee said that "we cannot countenance such practice." It felt that the sentence of suspension of one year was too lenient and the "appellant must be thankful that there is no appeal for enhancement of punishment."

This, too, was a decision given during the emergency (3 July 1976) when the entire Nation was being sought to be disciplined, the disciplinary jurisdiction of the statute—organized Bar could not gear itself to do justice to the standards it had set, so sonorously before itself.

In the only, solitary case in which the Disciplinary Committee of the BCI has enhanced the punishment, Mr. Manikant Tiwari, an advocate at Kanpur, Uttar Pradesh, was engaged by a firm to execute a decree. Tiwari did not pay to the firm an amount of Rs. 654 withdrawn from the court in three instalments. The firm, after a year's futile correspondence, instituted a suit for the recovery of the amount. The disciplinary committee of the BCI enhanced the punishment to five years suspension and also awarded costs. I need not comment on the contrast between the earlier two decisions and this one; the amount involved was smaller, the period for which it was retained was about a year, the initial punishment was greater in comparison. Surely, the distinguishing factor here was that a firm was the complainant. I will leave you to decode the message.

The other sub-category of client centered deviance relates to non-performance of duties as an advocate in terms of non-appearance before judicial authorities or unsconsiciable delays in filing proceedings. We have four such decisions, holding the advocate responsible for professional misconduct.

In one case, the advocate V.N. Bhatnagar, after being instructed and after having received his fees for filing a suit, decided not to file proceedings at all. Retired Lt. General Gurdyal Singh found this conduct unbecoming of a lawyer; the BCI committee found that he was guilty of professional misconduct, inclusive of making misleading statements to the client that the proceedings had been filed. Suspension for one year was imposed, although the decision does not indicate reasons mitigating a higher punishment of extended suspension.

There is at least one reported decision when the advocate not merely did not file a suit for specific performance of contract for sale of land, but knowingly misled the client by intimidation to the effect that a suit was being proceeded with. Through his own exertions the client, in a distant part of Andhra Pradesh, found that no suit was filed; what was worse, the limitation period for legal action had been overrun already. The client lost valuable property. The disciplinary committee of the BCI could not believe the purported evidence by the advocate seeking to exonerate him altogether. He was found guilty of "gross negligence and dereliction of duty towards his client." For this gross dereliction, the Council awarded him the punishment of three months' suspension from practice.

Deliberate failure to appear before judicial authority has been held to constitute professional misconduct. In a case from Maharashtra, the respondent lawyer could show no reason whatsoever for not appearing before the motor vehicles tribunal, or for not returning the papers taken from the other side ostensibly for producing a settlement. This default persisted for close to a year, necessitating recourse by the Tribunal to the disciplinary jurisdiction of the Bar Council. The BCI committee laid down the salutary principle that this behaviour vitiated the fundamental notion of the lawyer as an "officer of the court." The lawyer was suspended from practice for a period of six months.

Yet another variety of client-centred deviance is a situation in which an advocate for a party appears both as witness and advocate in the same case. There is at least one case from Punjab and Haryana Bar where a lawyer "of some standing" appeared as a material witness for the opponent while having been engaged by the petitioner. Under section 31 the BCI committee held this to be "gross misconduct" but it merely proceeded to confirm the penalty of reprimand imposed by the state Bar Council. There are no other cases available to us. But it would be presumptuous to say that this particular decision by the severity of its punishment had a deterrent effect on the Indian Bar since 1975.

The third sub-category of deviance concerns a lawyer engaged by one party appearing or assisting the other side. In P. Panda v. Ganesh Mahapatra
the disciplinary committee of the BCI rightly stressed that Rule 33 of the Code, like many other rules, embodies pre-existing conventions. The appellant lawyer appeared for the deceased Khendu against one Tirthraj on a complaint for paddy crops theft. He also appeared for recovery of land against many parties, including Tirthraj. After three and half years of his appearances for the Khendu, who died, and then his family, he appeared in two cases involving Tirthraj, on his behalf, and the former clients. Infringement of Rule 33 was found on the ground that the appellant lawyer could probably use confidential information received by him from the Khendu family against them when appearing for Tirthraj. Taking a lenient view of the matter, the lawyer was reprimanded by the committee.

In contrast, in a major decision, in Sri Sant Ram Lumb v. Dewan Chand and Khazanchi Mal, the disciplinary committee of the BCI set aside the finding of professional misconduct made by the Punjab and Haryana Bar Council and cancelled the reprimand.

The advocate here appeared for Khazanchi Mal in a mutation proceeding then appeared against him in respect to a criminal proceeding against the same party involving the same land. The Committee made an exhaustive survey of the earlier judicial decisions and came to the view that in order to constitute professional misconduct under the Rule it laid down “a total embargo from appearance in the same proceeding.” The embargo extends to “a ban on appearance for the opposite party in the same unit, appeal or other matter where the Advocate had advised the other party or drawn pleading or acted for the other party.” Here the two proceedings—one for mutation and other under Section 145 Cr. P.C.—were viewed as legally distinct.

Of course, thus interpreted, as a matter of law, one does not know whether Rule 33 can be really activated at all in the future, without very compelling evidence concerning the factual sameness of the issues and actual demonstration of the use of confidential information. This decision has its own peculiar “sonstreck” twist as well in that the father represented the son (who was the lawyer in mutation proceedings) in the criminal matter for a day. The committee observed that it is not “uncommon in our courts to see father and son opposing each other as counsel tooth and nail with full confidence reposed in them by their respective clients.” Is it really so?

(ii) Abuse of judicial process:

The first set of decisions under this rubric confront us with the problem of knowingly identifying wrong persons. The two cases here present interesting vignettes of professional misconduct and peer group adjudication. Advocate R.S. Gupta of Lucknow identified Basedo Lal as the (deceased)

retired District Judge Ejaz Husain before the compensation authority. The impersonator received and encashed bonds of the value of Rs. 4350/- and a cash voucher of Rs. 32; the legal representatives of the deceased were thus deprived of their rightful claims. Gupta admitted to wrongdoing and was suspended by the Uttar Pradesh Bar Council for a period of three years. The disciplinary committee of the BCI reduced the suspension to a period of one year because “the appellant is a young person” with a large family to support. The committee said that had he exercised “due care and diligence” he won’t have identified a person wrongly.

In another case, Major Chranjit Singh obtained an exparte divorce against his wife Sandeep Kaur on the ground that she has abandoned the Sikh religion by conversion to Christianity. The certificate was issued by the Priest of the Mehtodist Church, Patiala. B.S. Thapar, an advocate, conspired to produce false evidence by presenting Sandeep Kaur before the Priest, and then before the oath commissioner, as Gurdip Kaur. He identified her as Gurdeep Kaur before the Priest and the Oath Commissioner. For what the conspiracy was hatched has to be left to your imagination, as the account of facts is rather scanty. But Thapar was held to have wrongly assisted the impersonation. Believe it or not, but it remains true, that, without indicating any mitigating circumstance, the disciplinary committee suspended Thapar for six months, after the ritualistic statement that the legal profession is a “noble one” and an “advocate is expected to behave in a proper, lawful manner.” Once again, I resist the temptation of writing a little essay at the lack of fit between this noble rhetoric and crass reality of disciplinary jurisdiction.

The second set of cases relate to misrepresentation and fraud on courts. The decisions bear a detailed scrutiny.

In L. D. Jaisinghani S. K. J. Modi is unusual because both parties were lawyers. Advocate Jaisinghani, in a tenancy matter, having given a solemn undertaking to the Bombay High Court that he would vacate the flat within six months, secured an extension from the Small Causes Court totally suppressing the fact of the undertaking. When Modi moved a contempt petition, Jaisinghani apologized unconditionally. In the disciplinary proceedings, the Maharashtra Bar Council suspended him for a period of one year. The disciplinary committee of the BCI agreed with the fact that Jaisinghani, a lawyer of some standing, had committed a fraud on the court but reduced the suspension to forty days already served. The committee commissiated with his “unfortunate predicament” since it is an “extraordinarily difficult affair to get alternative accommodation in Bombay.” He had also undergone the “travail” of contempt proceedings; he must, therefore, have learnt a lesson.
Yes, these are the words of the disciplinary committee of the BCI, one of whose members became the Chairman of the Bar Council of India, aside from serving as its Vice Chairman. The issue was not the housing situation in Bombay; nor was it Jaisinghans's standing and his plight.

The issue was, as both the disciplinary committee recognized, one which involved fraud on court by a lawyer of considerable standing. The issue was a lawyer misleading the court knowingly; even the initial suspension was lenient, given the gravity of proved misconduct. A brother lawyer had brought the petition—one hopes not just as a mere landlord but as one who cared for the standards of the Bar and the integrity of the judicial process.

In another case from Bihar, the Registrar of Patna High Court directed the attention of the Bihar Bar Council to a complicated fact-situation in which a senior lawyer (about eight years standing) and a junior lawyer (of a twenty months standing) had together misled the High Court by affirming that the revision petition filed by them was done for the first time, and this was contrary to facts. The Council suspended the senior from practice for two years and the junior for one month for beguiling the Court. The disciplinary committee of the BCI in so holding, of course, uttered the mouthful, or rather three mouthfuls of rhetoric, concerning the purity in administration of justice and the responsibilities of lawyers.

The third area relates to evidence. Tutoring of witnesses has been acknowledged by the disciplinary committee of the BCI as "unfortunately very prevalent in our country." They have decried the fact even when interpolation of the document was completely "unnecessary" (mark the word!!) tutoring of witnesses has often led to this practice, exposed in cross-examination and casting unnecessary doubt on the otherwise reliable testimony. And yet, as far as I know, the disciplinary committees have not been able to satisfy themselves, even on the bases of circumstantial evidence, that in given cases tutoring could have been said to be established. Let us follow the only two cases in our sample where the charges of professional misconduct formed the fraternal discourse of the statutory Bar.

In one case, from which the foregoing observations have been culled, a Judicial Magistrate in Allahabad recorded the finding that during the cross-examination of witnesses "witness was well tutored before he came to the court" and, therefore, declined to believe his testimony. In fact, the magistrate found that the document was prepared by the advocate himself with "extraordinary zeal." While the BCI committee accepted the proposition that the "observations of the Magistrates and Judges are evidence under the Evidence Act," it held that they do not constitute "conclusive proof" of professional misconduct. The committee than came to the finding that the "observation of the learned Judge was not justified!" In fact, the committee took great pains to ascertain whether the magistrate had taken proper care to ascertain the truth under the relevant provisions of the Evidence Act.

More importantly, at a general level, the committee introduced a distinction known to medieval metaphysics when it ruled that that "merely taking down the statement of a witness 'for the purposes of briefing senior or arguing counsel would not amount to "tutoring" witnesses but "if some flourish is introduced it would be tutoring."" Not being a practising lawyer, I confess incomprehension of this distinction between taking down a statement without flourish and one with it. If this case is any guide the distinction amounts to this: if the lawyer allows someone else to write down the statement, endorses it as a statement of a probable witness, does not give it to her for the purposes of memorizing, there is no tutoring. All this sounds very nice until we remember reading earlier in the decision that the person who wrote it (one Mathur Das) was not produced before the committee; nor had it any way of knowing his handwriting. If there is any meaning to be attributed to the word "flourish", it is contained by the way matter was actually decided.

Another case in this genre is equally scandalous. The District and Sessions Judge, Udaipur, in trying the accused under section 307 of the Indian Penal Code came across a situation in which the lawyer had written to a witness instigating her to change her statement. The lawyer admitted to his having written the letter "in a state of intoxication." The disciplinary committee found in so many words that there was "irresistible inference... that he had instigated" the witness to "change her statement." The tenor of the letter was found "unbecoming" and the committee was "constrained" to find the advocate guilty of professional misconduct.

To what end? The "lapse" was viewed with "disfavour" and a hope was expressed "that such lapses will not occur and repeated in future." A warning was issued to the advocate to "remain more careful in the future."

Why so? Because of a mitigating factor. And that was that while the witness was being asked to change her statement, she was not being "asked to give a false statement." Another mitigating circumstance: the advocate had joined the profession rather late in life. Do I need to say anything more?

(iii) Disrespect to judicial authority

The first case involves the behaviour of an advocate before the Assistant Appellate Income Tax Commissioner, Bombay. The young advocate repre-
sented his father who suffered from cardiac asthma. He prayed that the father be examined in commission. Citing a judicial decision, the Commissioner wrote that the illness had to be genuine; and that a commission could only be sent for evidence after the doctor was examined and cross-examined. This made the advocate angry. He wrote a few letters including one dated 30 March, 1974. In this, the advocate alleged a high degree of corruption to the authority ("staggering heights of corruption"):

It seems that dishonest, unscrupulous, and corrupt authorities of Income-tax Department do not learn from previous experience. You are an agent of Khimji Poonja. You are, therefore, a conspirator in this crime on the nation... When such serious allegations of corruption have been made against you, you cannot sit as a Judge in the same case... Let you honestly be first investigated by the Central Bureau of Investigation and we are taking the necessary steps for the same...

All this was written. There is vituperation and there are threats. The Bar Council of Maharashtra initiated suo motu action on a report by the Commissioner. The BCI decision does not tell us what punishment was ordered by the Council. But it reduced the punishment to a mere reprimand and an admonition that the lawyer should desist from doing such things in the future. This because the lawyer apologized unconditionally. The other mitigating factors were: "consideration of his age, the family he maintains, the reputation he has earned in his Bar to become the Secretary of the Local Bar..."

The Council acknowledges that such behaviour has the potential of a lawyer's name from being removed from the Bar. But this is not a fit case for such action, given the mitigating circumstances. 128

The other case4 involved disciplinary action for drunken and disorderly behaviour by an advocate in the Court of Sub-divisional Magistrate in Katni, Madhya Pradesh. There was evidence in evidence on the issue whether the inebriated member of the bar actually occupied the chair of the judge or merely occupied the dias. But the disciplinary committee found that he had entered the Court premises in an intoxicated stage. The picture presented of the advocate, they said, was "nasty". The committee, they said, views such an act with "reprehension". What follows? "The Committee feels that the ends of justice will be served under the circumstances by reprimanding the advocate." What are the "circumstances"? Let the committee speak in its own words: "The incident is dated 29-7-66 and the complaint is dated 29-1-1968. As such the respondent advocate has suffered protracted trial! Where, pray, is the protracted trial? The case was transferred to the BCI in 1974 under the Advocates Act; the Council rendered its decision on 26 October 1975. Seven years had elapsed since the original incident. There is no evidence in the decision of any "protracted trial"; or of any hardship suffered by the lawyer as a result. The expression "ends of justice" is used; but we do not hear much of the obligation of a lawyer as an "officer of the court." And on what grounds does delay condone an inexcusable professional misconduct?

(d) Conviction of a lawyer for criminal offence:

The two decisions in this area are indeed remarkable. The first case P.B. Jog v. Bar Council of Maharashtra26 involved a lawyer who was a deputy mayor of the Poona Municipal Corporation. He used "extremely obscene and vulgar" language in stigmatizing his political opponents at a public meeting in Pune in May, 1966. He was convicted by a magistrate under sections 294 and 153 of the Indian Penal Code and sentenced to a fine of Rs. 1000. The High Court of Bombay enhanced the fine to Rs. 3000. The Maharashtra Bar Council suspended, in a suo motu action, the advocate for a period of one month; the BCI committee agreed. In so doing, it said "May be if we have for the first time to impose punishment in the matter, we may, having regard to the heavy fine imposed not ordered suspension for a month!"

And this was said after holding that such conviction does fall within the ambit of "other misconduct" under section 35 of the Advocates Act and after quoting the Bombay High Court that "serious notice is required to be taken" of this behaviour! Instead the BCI took serious notice of the fact that the lawyer committed the offence out of exasperation at harassment by political adversaries!

In the second case,24 the High Court of Andhra Pradesh upheld the conviction of advocate G.L. Nagareddy for attempted rape of a client's wife. The Andhra Pradesh High Court affirmed the conviction but reduced the sentence to five (from ten years') rigorous imprisonment. The BCI committee thought that this case called for a drastic action of removal of name of the advocate from the rolls. Even so, it could not, in accordance of its "soft" justice approach, resist the observation that: "It is always open to reinstate the advocate on proof that he is a charged man and fit to be admitted into profession!" One wonders if this is, in fact, legally possible or justified under the Advocates Act!

THE OVERALL PATTERN OF PEER GROUP ADJUDICATION

The Advocates Act inaugurated a tradition of peer group adjudication by transferring the power of disciplinary adjudication from courts to the Bar
Councills. Clearly, the underlying assumption was that legal professions, being learned professions, were best equipped to articulate a code of ethics and to enforce it in a judicious manner. The first part of the assumption has been justified. The Bar Council’s Code, though far from being comprehensive, clearer or adequate, offers a superior normative beginning than the scattered adjudications by courts on disciplinary matters. On the other hand, the question does arise as to whether the experimentation with peer group adjudication has served the purposes of enforcing a minimal level of integrity in Indian legal professions. My regretful answer to this question is that it clearly has not.

First, it is clear that although the Bar Councils have extensive powers under section 35(3) to reprimand, suspend and debar a deviant advocate, the removal of an advocate from the rolls of the Bar is a punishment awarded only in one out of 45 cases in our study; and that too on a conviction for attempted rape. Even the suspension ordered by the Bar Councils of States, as seen by us already, is usually drastically reduced on appeal. Although the sentence can be enhanced, only in one case\(^7\) the BCI committee thought it fit to do so. Even in cases of proven misappropriation or abuse of judicial process the appellate order passed by the BCI are clearly influenced by other factors than maintenance of high standards of discipline congenial to any learned profession.

Second, the available information reveals that the BCI committees are prone to protect the lawyer not merely from adverse publicity but also from adequate sanction. Either the advocate found delinquent is too young or too senior; in either case the disciplinary order is reduced to inconsequentiality, in most cases, on appeal. The character of delinquency is always offset by considerations of rehabilitation of a lawyer back into profession. The dominant consideration seems not to enforce the Code as a vehicle of fairness and efficiency to clients, or dignity and respect for judicial authorities or cleansing the profession of ‘unprofessional’ elements. Overall, peer group adjudication seems to create a climate where the Code itself may not be taken seriously at all by the lawyers.

Third, the ways in which complaints are processed, at least at the level of the BCI, allow for no building of tradition or continuity. More than one disciplinary committee is constituted. The committees decide the matter in each case without a normative past. Apart from the continuity of approach in the collective aversion to enforcement by adequate sanctions, there is no continuity at all. The disciplinary committees of the BCI have before them no body of "precedents"; you hardly find a reference to prior decisions in similar cases.

Fourth, although the Act envisages expedition in disciplinary proceedings, our sample reveals that the average time taken by the BCI committees is between two to three years. Undoubtedly, the members of the disciplinary committee are themselves lawyers with their own practice; they have to sort out mutual convenience for their meetings. Since legal practitioners may appear before the disciplinary committees, they too have to be accommodated. There is no special sense of urgency concerning disciplinary proceedings. It almost seems to be a part of necessary evils attaching to the BCI membership: it’s a job that has to be done not out of any missionary zeal to maintain integrity in the professions and in the administration of justice but in compliance with routine statutory obligations. In comparison, election petitions are attended to with remarkable expedition and with a certain air of excitement!

Fifth, there is asymmetry in legal representation. The appellant lawyer usually is able to afford the services of senior and even eminent lawyers. In contrast, very often the complainant is unrepresented. No amicus curiae was appointed in a single case in our study; and the state Bar Councils do not always seem to feel the need for effective legal representation in appeal.

Sixth, although the Act authorizes the Bar Council of India to bring to itself any case before the state Bar Councils (Section 36(2)), this does not seem to have happened in any noticeable measure. There are at least six transferred cases in our sample; but these cases are not under Section 36(2) but relate to transfer of jurisdiction from courts to the Bar Council. Cases not disposed of by the state Bar Councils within one year from the date of receipt of complaints or commencement of proceedings automatically stand transferred, now under Section 36B, to the BCI. But there is no period prescribed within which the BCI must decide the matter.

Seventh, even the Act recognizes that the peer-group adjudication suffers from the probability and possibility of fluctuation in the actual membership of the disciplinary committees because of elections. Section 36A now requires that the new disciplinary committee may step into the shoes of the old and "continue the proceedings from the stage at which the proceedings were so left by its predecessor committee." Discontinuity in adjudication is thus a necessary component of peer-group adjudication.

Eighth, the Act sanctions the possibility that there might be a "hung" disciplinary committee. If there is no clear majority opinion, Section 41(5) requires that the matter shall be referred to the Chairman or the Vice-Chairman of the State Bar Council who shall hear parties as he thinks fit, deliver his opinion and "the final order of the disciplinary committee shall follow this opinion." This curious provision is designed to avoid dissensions concerning the order of dismissal of complaints for professional or other misconduct or for order making any of the three penalties. Presumably, this provision is also applicable to the BCI in virtue of Section 42B. We have
come across no case in our sample where this provision has been invoked at the state or central Bar Council levels. The Act instead of requiring unanimity in matters of enforcement of the Code not merely authorizes situations of ruling by majority but also situations of chaotic disensus. This provision allows a rather extraordinary remedy of intervention by non-members of the disciplinary committee.

Overall, the situation of the peer group adjudication is sad and bad. Robust adjudication of professional deviance is inhibited by many factors, the electoral politics of the Bar Councils being the most salient of these. Lawyers as adjudicators, certainly at the BCI level, have shown themselves incapable of enforcing the Code vigorously as the final custodians of ethical standards of a learned profession. Further, the way the enforcement is structured, it is reactive rather than proactive. The frustrated client has, first of all, to know that possibilities of recourse through disciplinary process exist; the Bar has done very little to make this knowledge a part of campaign of any legal literacy programme. Even when people know, filing a complaint before the remote state capital from the distant tehsil or taluka, is onerous. If, at the end of the day, the client wins, the advocates always appeal to the remote New Delhi; and the BCI is ever so ready to affirm conviction but reduce punishments to triviality. The client never seems to get any recompense; and the advocates, more or less, go scot-free.

A PROGRAMSCHRIFT FOR THE RENEWAL OF PROFESSIONAL ETHICS

The situation calls for drastic reversal. If the experimentation with the peer-group adjudication is to continue, the Advocates Act needs to be fundamentally amended to provide at least the following:

— it shall be the responsibility of each member of the Bar Council to receive in a designated area of the state any complaints concerning professional and other misconduct and to bring it before the State Bar Council;

— whenever the state Bar Council, as a whole, rejects the complaint in limine, a record of its reasons, shall be sent to the complainant and be published;

— a retired High Court judge who is not engaged in active practice or a retired Supreme Court judge shall be the ex-officio chairman of all disciplinary committees;

— the chairman of the legal aid committee of the state also shall be the ex-officio member of the disciplinary committee;

— no member of the Bar Council against whom any election petition or a disciplinary proceeding has ever been brought shall be eligible to sit on the disciplinary committees;

— the disciplinary committees shall be constituted and publicly announced at the time of the formation of the Bar Council;

— the State Bar Council should prepare memorandum of reasons, publicly accessible, explaining why the disciplinary proceeding could not be completed within the statutorily fixed reasonable limitation period.

— the Act must make mandatory suo motu action in all cases of recorded convictions of advocates for criminal offence and indicate general guidelines for the exercise of suo motu power for disciplinary action;

— a time-period for appellate proceedings must be fixed;

— in the appellate proceedings, the Act should provide, that no reduction in the initial sentence shall be made in certain categories of unprofessional or unethical conduct: e.g. misappropriation of client's monies, abuse of judicial process, and gross violation of the dignity of courts and other judicial authorities; indeed, for these a minimum form of punishment should be prescribed, with powers of enhancement in appropriate cases;

— all proceedings in the disciplinary jurisdictions should be public; there is no reason to hold them in camera; the Bar has been firmly against this kind proceedings even in trials for rape and for 'terrorists.'

— all reports of the disciplinary proceedings at the state and all-India level should be regularly and fully (without editing) published

— an annual report concerning the state of disciplinary enforcement should be placed before Parliament.

One hopes that the Bar Council of India, in the immediate aftermath of its Silver Jubilee celebrations, will examine the scope of the Code of Ethics and the state of self-regulation, along the lines proposed in this paper. If this task is undertaken as a matter of high national priority, its Golden Jubilee celebrations will be even more worthy of the historic status of a major national event. Let no one be able to say that the Indian Bar which so magnificently struggles to attain accountability for power in civil society and the state makes its own lack of accountability a special virtue.
Councils. Clearly, the underlying assumption was that legal professions, being learned professions, were best equipped to articulate a code of ethics and to enforce it in a judicious manner. The first part of the assumption has been justified. The Bar Council’s Code, though far from being comprehensive, clear or adequate, offers a superior normative beginning than the scattered adjudications by courts on disciplinary matters. On the other hand, the question does arise as to whether the experimentation with peer group adjudication has served the purpose of enforcing a minimal level of integrity in Indian legal professions. My regretful answer to this question is that it clearly has not.

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Second, the available information reveals that the BCI committees are prone to protect the lawyer not merely from adverse publicity but also from adequate sanction. Either the advocate found delinquent is too young or too senior; in either case the disciplinary order is reduced to inconsequentiality, in most cases, on appeal. The character of delinquency is always offset by considerations of rehabilitation of a lawyer back into profession. The dominant consideration seems not to enforce the Code as a vehicle of fairness and efficiency to clients, or dignity and respect for judicial authorities or cleansing the professions of “unprofessional” elements. Overall, peer group adjudication seems to create a climate where the Code itself may not be taken seriously at all by the lawyers.

Third, the ways in which complaints are processed, at least at the level of the BCI, allow for no building of tradition or continuity. More than one disciplinary committee is constituted. The committees decide the matter in each case without a normative past. Apart from the continuity of approach in the collective aversion to enforcement by adequate sanctions, there is no continuity at all. The disciplinary committees of the BCI have before them no body of “precedents”; you hardly find a reference to prior decisions in similar cases.

Fourth, although the Act envisages expedition in disciplinary proceedings, our sample reveals that the average time taken by the BCI committees is between two to three years. Undoubtedly, the members of the disciplinary committee are themselves lawyers with their own practice; they have to sort out mutual convenience for their meetings. Since legal practitioners may appear before the disciplinary committees, they too have to be accommodated. There is no special sense of urgency concerning disciplinary proceedings. It almost seems to be a part of necessary evils attaching to the BCI membership; it’s a job that has to be done not out of any missionary zeal to maintain integrity in the professions and in the administration of justice but in compliance with routine statutory obligations. In comparison, election petitions are attended to with remarkable expedition and with a certain air of excitement.

Fifth, there is asymmetry in legal representation. The appellant lawyer usually is able to afford the services of senior and even eminent lawyers. In contrast, very often the complainant is unrepresented. No amicus curiae was appointed in a single case in our study; And the state Bar Councils do not always seem to feel the need for effective legal representation in appeal.

Sixth, although the Act authorizes the Bar Council of India to bring to itself any case before the state Bar Councils [Section 36(2)], this does not seem to have happened in any noticeable measure. There are at least six transferred cases in our sample; but these cases are not under Section 36(2) but relate to transfer of jurisdiction from courts to the Bar Council. Cases not disposed off by the state Bar Councils within one year from the date of receipt of complaints or commencement of proceedings automatically stand transferred, now under Section 36B, to the BCI. But there is no period prescribed within which the BCI must decide the matter.

Seventh, even the Act recognizes that the peer-group adjudication suffers from the probability and possibility of fluctuation in the actual membership of the disciplinary committees because of elections. Section 36A now requires that the new disciplinary committee may step into the shoes of the old one and “continue the proceedings from the stage at which the proceedings were so left by its predecessor committee.” Discontinuity in adjudication is thus a necessary component of peer-group adjudication.

Eighth, the Act sanctions the possibility that there might be a “hung” disciplinary committee. If there is no clear majority opinion, Section 41(5) requires that the matter shall be referred to the Chairman or the Vice-Chairman of the State Bar Council who shall hear parties as he thinks fit, deliver his opinion and “the final order of the disciplinary committee shall follow this opinion.” This curious provision is designed to avoid dissension concerning the order of dismissal of complaints for professional or other misconduct or for order making any of the three penalties. Presumably, this provision is also applicable to the BCI in virtue of Section 42B. We have
come across no case in our sample where this provision has been invoked at the state or central Bar Council levels. The Act instead of requiring unanimity in matters of enforcement of the Code not merely authorizes situations of ruling by majority but also situations of chaotic dissensus. This provision allows a rather extraordinary remedy of intervention by non-members of the disciplinary committee.

Overall, the situation of the peer group adjudication is sad and bad. Robust adjudication of professional deviance is inhibited by many factors, the electoral politics of the Bar Councils being the most salient of these. Lawyers as adjudicators, certainly at the BCI level, have shown themselves incapable of enforcing the Code vigorously as the final custodians of ethical standards of a learned profession. Further, the way the enforcement is structured, it is reactive rather than proactive. The frustrated client has, first of all, to know that possibilities of recourse through disciplinary process exist; the Bar has done very little to make this knowledge a part of campaign of any legal literacy programme. Even when people know, filing a complaint before the remote state capital from the distant tehsil or taluka, is onerous. If, at the end of the day, the client wins, the advocates always appeal to the remote New Delhi; and the BCI is ever so ready to affirm conviction but reduce punishments to triviality. The client never seems to get any recompense; and the advocates, more or less, go scot-free.

**A PROGRAMSSCHRIFT FOR THE RENEWAL OF PROFESSIONAL ETHICS**

The situation calls for drastic reversal. If the experimentation with the peer-group adjudication is to continue, the Advocates Act needs to be fundamentally amended to provide at least the following:

— it shall be the responsibility of each member of the Bar Council to receive in a designated area of the state any complaints concerning professional and other misconduct and to bring it before the State Bar Council;

— whenever the state Bar Council, as a whole, rejects the complaint *in limine*, a record of its reasons shall be sent to the complainant and be published;

— a retired High Court judge who is not engaged in active practice or a retired Supreme Court judge shall be the ex-officio chairman of all disciplinary committees;

— the chairman of the legal aid committee of the state also shall be the ex-officio member of the disciplinary committee;

— no member of the Bar Council against whom any election petition or a disciplinary proceeding has ever been brought shall be eligible to sit on the disciplinary committee;

— the disciplinary committees shall be constituted and publicly announced at the time of the formation of the Bar Council;

— the State Bar Council should prepare memorandum of reasons, publicly accessible, explaining why the disciplinary proceeding could not be completed within the statutorily fixed reasonable limitation period.

— the Act must make mandatory *suo motu* action in all cases of recorded convictions of advocates for criminal offence and indicate general guidelines for the exercise of *suo motu* power for disciplinary action;

— a time-period for appellate proceedings must be fixed;

— in the appellate proceedings, the Act should provide, that no reduction in the initial sentence shall be made in certain categories of unprofessional or unethical conduct: e.g. misappropriation of client's monies, abuse of judicial process, and gross violation of the dignity of courts and other judicial authorities; indeed, for these a minimum form of punishment should be prescribed, with powers of enhancement in appropriate cases;

— all proceedings in the disciplinary jurisdictions should be public; there is no reason to hold them *in camera*; the Bar has been firmly against this kind proceedings even in trials for rape and for 'terrorists.'

— all reports of the disciplinary proceedings at the state and all-India level should be regularly and fully (without editing) published

— an annual report concerning the state of disciplinary enforcement should be placed before Parliament.

One hopes that the Bar Council of India, in the immediate aftermath of its Silver Jubilee celebrations, will examine the scope of the Code of Ethics and the state of self-regulation, along the lines proposed in this paper. If this task is undertaken as a matter of high national priority, its Golden Jubilee celebrations will be even more worthy of the historic status of a major national event. Let no one be able to say that the Indian Bar which so magnificently struggles to attain accountability for power in civil society and the state makes its own lack of accountability a special virtue.
NOTES

1. See U. Baxi, *The Indian Legal Professions At Crossroads* (1986, Forthcoming) for the notion of "legal professions".

2. See U. Baxi, supra note 1, for the distinction between "superstructural" and "grass-roots" professions.


5. 1986 (1) S.C.C. 264

6. 1985 (3) S.C.C. at 230

7. 5 *J. Bar Council of India* 230 (1976)

8. Id. at 206

9. 2 *J. Bar Council of India* 70 (1973)

10. 3 *J. Bar Council of India* 513 (1974)

11. 7 *J. Bar Council of India* 393 (1978)

12. 3 *J. Bar Council of India* 529 (1974)

13. 2 *J. Bar Council of India* 275 (1973)

14. 3 *J. Bar Council of India* 370 (1974)

15. Id. 160

16. 2 *J. Bar Council of India* 87 (1973)

17. 3 *J. Bar Council of India* 525 (1974)

18. 2 *J. Bar Council of India* 61 (1973)

19. 6 *J. Bar Council of India* 192 (1977)

20. 5 *J. Bar Council of India* 235 (1976)

21. Id. at 241.

22. 1 *J. Bar Council of India* 122 (1972). This appears to be the decision of the Rajasthan Bar Council, not of the BCI.

23. 4 *J. Bar Council of India* 217 (1975)

24. 7 *J. Bar Council of India* 272 (1978)


26. 3 *J. Bar Council of India* 461 (1973)

27. See supra note 9