

# Legal Framework Governing Company Secretaries

## Lesson 4

### KEY CONCEPTS

- Company Secretary ■ Transparency ■ Accountability ■ Disciplinary Mechanism ■ Associate Member
- Fellow Member ■ UDIN ■ eCSIN

### Learning Objectives

#### To understand:

- Expectation from a member with respect to various aspects of the ethical conduct
- Functions and Duties of Company Secretaries
- Board of Discipline and Disciplinary Committee
- Provisions relating to misconduct under the Company Secretaries Act, 1980

### Lesson Outline

- Introduction
- Associate and Fellow Company Secretaries
- Register of Members
- Disciplinary mechanism
- Appeal to Authority
- UDIN and eCSIN
- Guidelines for Advertisement by Company Secretary in Practice
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings
- Other References (Including Websites and Video Links)

## REGULATORY FRAMEWORK

- The Company Secretaries Act, 1980
- The Company Secretaries Regulations, 1982
- ICSI (Guidelines for Advertisement by Company Secretaries), 2020
- The Companies Act, 2013

## INTRODUCTION

The need to have a profession of Company Secretaries was first felt in early 50's, when the business environment had started changing, that had necessitated the services of a professional to bring Corporate Discipline.

The Government set up an Advisory Board on a non-statutory basis, to help it in standardizing the basic qualifications needed for manning the position of Company Secretaries and to hold the qualifying examination.

Subsequently, the Department of Company Affairs conducting examination leading to Government Diploma in Company Secretaryship (GDCS), marked the beginning of the profession of Company Secretaries in an organized manner. Later in the wake of substantial increase in the number of candidates for GDCS, the Institute of Company Secretaries of India was set up and registered as a company on 4th October, 1968 under Section 25 of the Companies Act, 1956 (i.e. not for profit company) with its registered office at New Delhi. The work relating to Company Secretaries' Examination and all allied matters were taken over by the Institute with effect from 1st January 1969.

In 1980, the Government moved the Company Secretaries Bill, 1980 to convert the Institute into a statutory body.

While moving the Company Secretaries Bill, 1980 for consideration by the Lok Sabha on 16th June, 1980, the then Minister of Law, Justice and Company Affairs, Shri P. Shiv Shankar had said, "An essential ingredient in the healthy growth of the corporate sector is the induction of professional management. The Government attaches special importance to the development of professional management, so that the corporate sector can evolve and function in tune with the changing needs of the times, and the social responsibilities that this important segment of the economy has to shoulder. The profession of Company Secretaries has an important part to play in the introduction of professionalism in the area of corporate management."

Company Secretary (CS) professionals are recognized as Key Managerial Personnel (KMP) under the Companies Act, 2013, wherein they are entrusted with a senior-level position in the management and are an intrinsic part of the Board of corporate entity. Since past five decades, Professionals have witnessed a substantial and spectacular growth and development made by Institute of Company Secretaries of India (ICSI) especially in the areas of recognitions obtained from various Agencies/ Government for the benefit of its members.

### Recognition of Company Secretary Profession-A fascinating journey

In 1887, Lord Justice Esher made the remarks on the duties of the Company Secretary while writing out his judgment in The Court of Appeal in *Barnett Hoares & Co. v South London Tramways Co. (18 QBD 1887)* that, company secretaries could not be assumed to have authority for anything. A Secretary is a mere servant, his position is that he is to do what he is told.

It took 90 years for the Judiciary to take note of the emergence of the Company Secretary in the Corporate World. The remarks made by the celebrated Lord Denning, in *Panorama Developments (Gilford) Ltd v. Fidelis Furnishing Fabrics Limited (1971) (3 All ER 16) (CA)* observed as under:

"..... times have changed. A Company Secretary is a much more important person nowadays than he was in 1887. He is an Officer of the company with extensive duties and responsibilities. This appears not only in

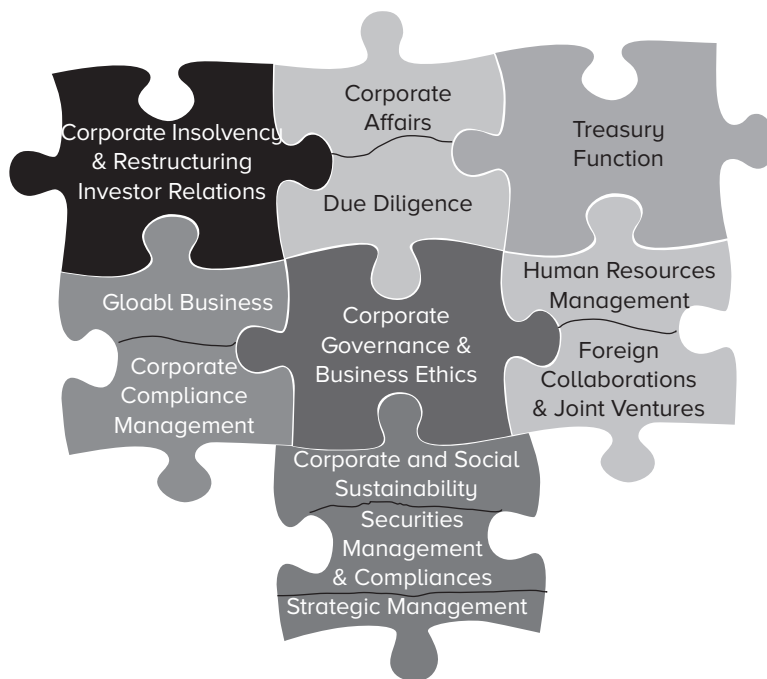
the modern Companies Act but also by the role which he plays in the day to day businesses of companies. He is no longer a mere clerk. He regularly makes representations on behalf of the company and enters into contracts on its behalf which come within the day to day running of the company's business. So much so that he may be regarded as held out as having authority to do such things on behalf of the company.....".

The above acknowledgement in the status of the company secretary coming as it did from no less a person of the stature of His Lordship was most definitely a defining moment announcing his arrival as an important cog in the wheel where a corporation was concerned. The growth in his stature was in keeping with the greater and wider acceptance of the corporate form of business, the emergence of corporate laws, bringing in its wake, the requirements of a host of compliances.

### Functions and Duties of Company Secretaries

The expectations from the Company Secretaries, as they are increasingly being referred to as "governance professionals" now also extend to the areas of Corporate Social Responsibility (CSR), Business Responsibility and Sustainability Reporting (BRSR) and Environment Social Governance (ESG), all of which put together highlights the focus on sustainability, where the CS has infinite opportunities to excel as a preferred professional.

The Company Secretary is an in-house legal expert and a compliance officer of the company, possessing expertise in corporate laws, securities laws & capital market and corporate governance. The Company Secretary is chief advisor to the board of directors on best practices in corporate governance, bearing responsibility for all regulatory compliances of company, corporate planner and strategic manager. The role of company secretary may be understood by referring the below image:



According to the section 205 of the Companies Act, 2013 read with rule 10 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the Company Secretary must perform the following functions and duties:

- To report to the Board about compliance with the provisions of this Act, the rules made thereunder and other laws applicable to the company;
- To ensure that the company complies with the applicable secretarial standards;

- To provide to the directors of the company, collectively and individually, such guidance as they may require, with regard to their duties, responsibilities and powers;
- To facilitate the convening of meetings and attend Board, committee and general meetings and maintain the minutes of these meetings;
- To obtain approvals from the Board, general meeting, the government and such other authorities as required under the provisions of the Act;
- To represent before various regulators, and other authorities under the Act in connection with discharge of various duties under the Act;
- To assist the Board in the conduct of the affairs of the company;
- To assist and advise the Board in ensuring good corporate governance and in complying with the corporate governance requirements and best practices; and
- To discharge such other duties as have been specified under the Act or rules; and
- Such other duties as may be assigned by the Board from time to time.

### CASE LAW

*Mayank Agarwal (Applicant) VS. M/s. Technology Frontiers (India) Private Limited (Respondent Company) National Company Law Tribunal (Chennai Bench) IA/2/2021 in CP/75/CHE/2021*

The Company Secretary can represent before various regulators and other authorities in connection with discharge of various duties under the Act. The NCLT being a quasi-judicial authority the Company Secretary can very well do the same

In this case, the Company Secretary of the respondent company had sent the notice to the applicant under Section 90(5), (who is nominee director of the Respondent Company) on May 3rd, 2021 along with the form to disclose their Ultimate Beneficial Ownership of the shares held.

However, the applicant alleged that the company alone is empowered to apply to NCLT under Section-90(7) of the Companies Act, 2013 and Company Secretary has not taken approval from Board of directors to file the present petition.

The Company Secretary of Respondent Company in his written submission stated that he has the *locus standi* as per the board resolution passed for his appointment which clearly states that “he can perform any duties as required under Companies Act, 2013” and have the authority to enter into pleadings on behalf of company even in absence of formal board authorization. Further, he referred to the provisions of section 205 of the Companies Act 2013, under which he is authorized to represent and that it is his duty to do so.

**Order:** The usage of the words “Company shall give notice” under Section 90(5) makes it amply clear that the Key Managerial Personnel have to do this activity of seeking information; in order to find out the Ultimate Beneficial Owners. The Company Secretary has acted diligently and promptly to ensure compliance of the mandatory provisions. Hence, the application stand dismissed.

Further, as per regulation 6(2) of the SEBI (LODR) Regulations, 2015, a listed company is required to appoint a qualified company secretary as the compliance officer. The compliance officer of the Company is responsible for:

- (a) ensuring conformity with the regulatory provisions applicable to the listed entity in letter and spirit;
- (b) co-ordination with and reporting to the Board, recognised stock exchange(s) and depositories with respect to compliance with rules, regulations and other directives of these authorities in the manner as specified from time to time;

- (c) ensuring that the correct procedures have been followed that would result in the correctness, authenticity and comprehensiveness of the information, statements and reports filed by the listed entity under these regulations;
- (d) monitoring email address of grievance redressal division as designated by the listed entity for the purpose of registering complaints by investors:

However, the company secretary is also entrusted with the duties for ensuring compliance with SEBI (Prohibition of Insider Trading) Regulations, 2015 including maintenance of various documents and also to ensure compliance of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 etc.

### Company Secretary as a part of Senior Management

The Regulation 16(d) of the SEBI (LODR) Regulations, 2015 provides that the senior management shall mean the officers and personnel of the listed entity who are members of its core management team, excluding the Board of Directors, and shall also comprise all the members of the management one level below the Chief Executive Officer or Managing Director or Whole-Time Director or Manager (including Chief Executive Officer and Manager, in case they are not part of the Board of Directors) and shall specifically include the functional heads, by whatever name called persons identified and designated as key managerial personnel, other than the board of directors by the listed entity.

Accordingly, the role of Company Secretary in the various segments, is performed in different capacities. Broadly the Company Secretary is having the opportunities in the following two domains:



### Some Legal Terminologies and Interpretation

According to section 2(1)(c) of the Company Secretaries Act, 1980 “Company Secretary” means a person who is a member of the Institute of Company Secretaries of India.

Section 2(1)(j) of the Company Secretaries Act, 1980 states, “Register” means the Register of members of the Institute maintained under section 19 or the Register of firms of the Institute maintained under section 20B, as the case may be.

Under the Companies Act, 2013 Company Secretary has been defined under section 2(24) as: ‘Company Secretary’ or ‘Secretary’ means a Company Secretary as defined in clause (c) of sub section (1) of Section 2 of the Company Secretaries Act, 1980 who is appointed by a company to perform the functions of the Company Secretary under the Companies Act, 2013.

Section 2(25) of the Companies Act, 2013 defines “Company Secretary in Practice” means a company secretary who is deemed to be in practice under sub-section (2) of section 2 of the Company Secretaries Act, 1980.

Section 2(51) of the Companies Act, 2013 defines “key managerial personnel”, in relation to a company, means—

- (i) the Chief Executive Officer or the managing director or the manager;
- (ii) the company secretary;
- (iii) the whole-time director;
- (iv) the Chief Financial Officer;
- (v) such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and
- (vi) such other officer as may be prescribed.

## ASSOCIATES AND FELLOWS

The members of the Institute shall be divided into two classes designated respectively as Associates and Fellows.

### (1) Associate Members

“Associate” means an Associate Member of the Institute.

As per section 5 of the Company Secretaries Act, 1980, Any person other than a person to whom the provisions of sub-section (4) apply, shall, on his name being entered in the Register of members, be deemed to have become an Associate and as long as his name remains so entered, shall be entitled to use the letters “A.C.S.” after his name to indicate that he is an Associate.

According to Regulation 4(1) of The Company Secretaries Regulations, 1982 as amended by the Company Secretaries (Amendment) Regulations, 2020.

No person shall be entitled to have his name entered in the Register of Members as an Associate, unless he,—

- (a) has passed examinations conducted by the dissolved company and has completed practical training either as prescribed in the earlier regulations or as prescribed in the Company Secretaries (Amendment) Regulations, 2020; or
- (b) has passed the qualifying examinations and completed the practical training as prescribed in these regulations; or
- (c) has passed such other examination and completed such other training outside India as is recognised by the Central Government or the Council as being equivalent to the examination and training prescribed in these regulations; or
- (d) had registered himself as a student with the Institute of Chartered Secretaries and Administrators, London on or before 31st December, 1972 and had passed the Final Examination or Professional Programme Examination of that Institute and had either possessed the required practical experience or undergone the prescribed practical training as stipulated for candidates passing the Final Examination or Professional Programme Examination conducted by the Institute; or
- (e) is an Indian citizen who is a “person resident outside India” as defined in clause (w) of section 2 of the Foreign Exchange Management Act, 1999 and has become a member of the Institute of Chartered Secretaries and Administrators, London, after passing the qualifying examination conducted by that Institute and had either possessed and required practical experience in India or abroad, or undergone the prescribed practical training as stipulated for the candidates passing the Final Examination or Professional Programme Examination conducted by the Institute.

### (2) Fellow Members

“Fellow” means a Fellow Member of the Institute.

As per section 5 of the Company Secretaries Act, 1980, A person, being an Associate who has been in continuous practice in India as a Company Secretary for at least five years and a person who has been an Associate for a continuous period of not less than five years and who possesses such qualifications or practical experience as the Council may prescribe with a view to ensuring that he has experience equivalent to the experience normally acquired as a result of continuous practice for a period of five years as a Company Secretary shall, on payment of such fees, as may be determined, by notification, by the Council, and on application made and granted in the prescribed manner, be entered in the Register of members as a Fellow.

According to Regulation 4(2) of The Company Secretaries Regulations, 1982 as amended by the Company Secretaries (Amendment) Regulations, 2020.

- (i) No person shall be entitled to have his name entered in the Register of Members as a Fellow unless he,-
  - (a) was a Fellow including Honorary Fellow of the dissolved company immediately before the commencement of the Act; or
  - (b) was admitted as a Fellow under the earlier regulations; or
  - (c) is an Associate and has been in continuous practice in India as a Company Secretary for at least five years; or
  - (d) is an Associate for a continuous period of not less than five years and possesses such qualifications or practical experience as may be determined by the Council.
- (ii) No Associate member shall be admitted as a fellow member of the Institute, if; -
  - (a) he has been found guilty of any professional or other misconduct and his name has been removed from the Register or he has been imposed fine referred in sub-section (3) of sections 21A or sub- section (3) of section 21B at any time during the preceding five years on the date of application; or
  - (b) he has not completed such minimum numbers of Professional Development Credit Hours as may be determined by the Council:

Provided that in the case of any person belonging to any of the classes mentioned in sub- regulations (1) and (2), who is not permanently residing in India, the Council may, by resolution, determine, such further qualifications and conditions, as it may deem necessary or expedient.”

### Certificate of practice

As per regulation 2(d) of the Company Secretaries Regulations, 1982 ‘certificate of practice’ means a certificate granted under these or earlier regulations entitling the holder to practise as a Company Secretary.

A member is entitled to continue the practice of Company Secretary, whether in India or elsewhere, only after obtaining a Certificate of Practice.

### Deemed “to be in practice”

As per section 2(2) of the Company Secretaries Act, 1980, a member of the Institute shall be deemed “to be in practice” when, individually or in partnership with one or more members of the Institute in practice or in partnership with members of such other recognised professions as may be prescribed, he, in consideration of remuneration received or to be received, –

- (a) engages himself in the practice of the profession of Company Secretaries to, or in relation to, any company; or
- (b) offers to perform or performs services in relation to the promotion, forming, incorporation, amalgamation, reconstruction, reorganization or winding up of companies; or
- (c) offers to perform or performs such services as may be performed by –
  - (i) unauthorized representative of a company with respect to filing, registering, presenting, attesting or verifying any documents (including forms, applications and returns) by or on behalf of the company,

- (ii) a share transfer agent,
- (iii) an issue house,
- (iv) a share and stock broker,
- (v) a secretarial auditor or consultant,
- (vi) an adviser to a company on management, including any legal or procedural matters,
- (vii) issuing certificates on behalf of, or for the purposes of, a company, or
- (d) holds himself out to the public as a Company Secretary in practice; or
- (e) renders professional services or assistance with respect to matters of principle or detail relating to the practice of the profession of Company Secretaries; or
- (f) renders such other services as, in the opinion of the Council, are or may be rendered by a Company Secretary in practice.

### REGISTER OF MEMBERS

Regulation 3 of the Company Secretaries Regulations, 1982 specifies that the Institute shall maintain a Register of Members in the proforma referred to in Schedule 'A' manually or electronically or in any other mode as may be determined by the Council. The Register shall include the following particulars about every member of the Institute, namely:—

- (a) full name, date of birth, domicile, residential and professional addresses;
- (b) membership number and the date on which his name is entered in the Register;
- (c) qualifications;
- (d) Certificate of practice number, if holding
- (e) email-id, mobile number, telephone number if any, and such other particulars as may be determined by the Council.

The member shall communicate to the Institute any change of his details entered in the Register, within thirty days of such change.

### Removal from the Register of Members

As per section 20 of the Company Secretaries Act, 1980, in the following cases the Council may remove from the Register the name of any member of the Institute—

- (a) who is dead; or
- (b) from whom a request has been received to that effect; or
- (c) who has not paid any prescribed fee required to be paid by him; or
- (d) who is found to have been subject at the time when his name was entered in the Register of members, or who at any time thereafter has become subject, to any of the disabilities mentioned in section 8, or who for any other reason has ceased to be entitled to have his name borne on the Register of members.

The Council shall remove from the Register of members the name of any member in respect of whom an order has been passed under this Act removing him from membership of the Institute.

### Disciplinary Mechanism

The member of the Institute is subject to the Disciplinary mechanism provided for under Chapter V (Misconduct) of the Company Secretaries Act, 1980 (the Act).

Chapter II of the Company Secretaries (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 prescribes procedures of Investigation related to Complaints and Information; Fee for filing complaint; Registration of complaint; Withdrawal of a complaint etc.



### Disciplinary Directorate

Section 21 of the Act provides for the establishment of a Disciplinary Directorate headed by an officer of the Institute designated as Director (Discipline) and such other employees for making investigations in respect of any information or complaint received by it. On receipt of any information or complaint along with the prescribed fee, the Director (Discipline) shall arrive at a prima facie opinion on the occurrence of the alleged misconduct. The Disciplinary Directorate shall follow such procedure as may be specified to make investigations under the Act.

Where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the First Schedule, the matter shall be placed before the Board of Discipline.

Where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the Second Schedule or in both the Schedules, the matter shall be placed the Disciplinary Committee.

Chapter III of the Company Secretaries (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 prescribes procedure of Investigation related to Procedure to be followed by Director on a complaint; Examination of the Complaint; Mode of Sending Notice; Time limit on entertaining complaint or information etc.

### Board of Discipline

The Board of Discipline shall be constituted by the Council of the Institute under section 21A of the Company Secretaries Act, 1980. The Board of Discipline shall follow summary disposal procedure in dealing with all the cases before it.

Where the Board of Discipline is of the opinion that a member is guilty of a professional or other misconduct mentioned in the First Schedule, it shall afford to the member an opportunity of being heard before making any order against him and may thereafter take any one or more of the following actions, namely:—

- (a) reprimand the member;
- (b) remove the name of the member from the Register up to a period of three months;
- (c) impose such fine as it may think fit which may extend to rupees one lakh.

The Director (Discipline) shall submit before the Board of Discipline all information and complaints where he is of the opinion that there is no prima facie case and the Board of Discipline may, if it agrees with the opinion of the Director (Discipline), close the matter or in case of disagreement, may advise the Director (Discipline) to further investigate the matter.

Chapter IV of the Company Secretaries (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 prescribes Functioning of Board of Discipline; Procedure to be followed by the Board of Discipline; Orders of the Board of Discipline etc.

### Disciplinary Committee

According to Section 21B of the Company Secretaries Act, 1980, a Disciplinary Committee shall be constituted by the Council. The Disciplinary Committee shall consist of the President or the Vice-President of the Council as the Presiding Officer and two members to be elected from amongst the members of the Council and two members to be nominated by the Central Government from amongst the persons of eminence having experience in the field of law, economics, business, finance or accountancy.

The Council may constitute more Disciplinary Committees as and when it considers necessary. The Disciplinary Committee, while considering the cases placed before it, shall follow such procedure as may be specified.

Where the Disciplinary Committee is of the opinion that a member is guilty of a professional or other misconduct mentioned in the Second Schedule or both the First Schedule and the Second Schedule, it shall afford to the member an opportunity of being heard before making any order against him and may thereafter take any one or more of the following actions, namely:—

- (a) Reprimand the member;
- (b) Remove the name of the member from the Register permanently or for such period, as it thinks fit;
- (c) impose such fine as it may think fit, which may extend to rupees five lakhs.

Chapter V of the Company Secretaries (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 prescribes Constitution and functioning of Committee; Allowances to the members nominated by the Central Government; Procedure to be followed by the Committee; Orders of the Committee etc.

### Authority, Disciplinary Committee, Board of Discipline and Director (Discipline) to have Powers of Civil Court

Section 21C of the Company Secretaries Act, 1980 provides that for the purposes of an inquiry under the provisions of this Act, the Authority, the Disciplinary Committee, Board of Discipline and the Director (Discipline) shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, in respect of the following matters, namely:—

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) the discovery and production of any document; and
- (c) receiving evidence on affidavit.

### APPEAL TO AUTHORITY

As per section 22A of the Act the Appellate Authority constituted under sub-section (1) of section 22A of the Chartered Accountants Act, 1949, shall be deemed to be the Appellate Authority for the purposes of this Act, subject to certain modifications that for cause (b) of said sub-section (1), the following clause had been substituted, namely : -

(b) The Central Government shall, by notification appoint two part time members from amongst the persons who have been members of the Council of ICSI for at least one full term and who is not a sitting member of the Council.

Accordingly, any member of the Institute aggrieved by any order of the Board of Discipline or the Disciplinary Committee imposing on him any of the penalties referred to in section 21A(3) and section 21B(3), may within ninety days from the date on which the order is communicated to him, prefer an appeal to the Authority.

The Director (Discipline) may also appeal against the decision of the Board of Discipline or the Disciplinary Committee to the Authority if so authorised by the Council, within ninety days.

The Authority may entertain any such appeal after the expiry of the said period of ninety days, if it is satisfied that there was sufficient cause for not filing the appeal in time.

The Authority may, after calling for the records of any case, revise any order made by the Board of Discipline or the Disciplinary Committee under sub-section (3) of section 21A and sub-section (3) of section 21B and may –

- (a) confirm, modify or set aside the order;
- (b) impose any penalty or set aside, reduce, or enhance the penalty imposed by the order;
- (c) remit the case to the Board of Discipline or Disciplinary Committee for such further enquiry as the Authority considers proper in the circumstances of the case; or
- (d) pass such other order as the Authority thinks fit.

Provided that the Authority shall give an opportunity of being heard to the parties concerned before passing any order.

### **CERTAIN PROVISIONS RELATING TO MISCONDUCT UNDER THE COMPANY SECRETARIES ACT, 1980**

The expression “professional or other misconduct” has been defined under section 22 of the Act. It is deemed to include any act or omission provided in any of the Schedules, but nothing in the referred section shall be construed to limit or abridge in any way, the power conferred or duty cast on the Director (Discipline) under sub-section (1) of section 21 to inquire into the conduct of any member of the Institute under any other circumstances.

Professional misconduct in relation to members of the Institute is broadly structured under Schedule I and Schedule II of the Act:

- (a) Professional misconduct in relation to Company Secretaries in Practice (Part I of the First Schedule);
- (b) Professional misconduct in relation to members of the Institute in service (Part II of the First Schedule);
- (c) Professional misconduct in relation to members of the Institute generally (Part III of the First Schedule);
- (d) Other misconduct in relation to members of the Institute generally (Part IV of the First Schedule);
- (e) Professional misconduct in relation to Company Secretaries in practice (Part I of the Second Schedule);
- (f) Professional misconduct in relation to members of the Institute generally (Part II of the Second Schedule);
- (g) Other misconduct in relation to members of the Institute generally (Part III of the Second Schedule).

The detailed provisions relating to misconduct and disciplinary mechanism are contained in Sections 21, 21A, 21B, 21C, 21D & 22 and the First and the Second Schedules to the Act and the Rules made thereunder.

### Other Misconduct

The Supreme Court in *Council of the Institute of Chartered Accountants of India and Another v. B. Mukherjee [1957 AIR 72 1958 SCR 371]*, after examining the nature, scope and extent of the disciplinary jurisdiction under the provisions of the Chartered Accountants Act, 1949 (which contains provisions analogous to those in the Company Secretaries Act, 1980), observed as follows:- “We therefore, take the view that, if a member of the Institute is found, prima facie, guilty of conduct, which, in the opinion of the Council renders him unfit to be a member of the Institute, even though such conduct may not attract any of the provision of the Schedules, it would still be open to the Council to hold an enquiry against the member in respect of such conduct and a finding against him, in such an enquiry, would justify appropriate action being taken by the High Court.”

The following can be cited as illustrative examples of “other misconduct”:

- i. where a Company Secretary retains the records, books of account and documents of the client and fails to return to the client on request without a reasonable cause;
- ii. where a Company Secretary makes a material misrepresentation;
- iii. where a Company Secretary uses the services of his apprentice(s) for purposes other than professional practice; iv. conviction by a competent court of law;
- v. wrong publicity causing damage to the clients;
- vi. where in the opinion of the Council member brings disrepute to the profession or the Institute as a result of his action whether or not related to his profession;
- vii. member is held guilty by any civil or criminal court for an offence which is punishable with imprisonment for a term not exceeding six months;
- viii. furnishing false declaration to the institute or any regulator; and
- ix. non-compliance with Guidelines issued by the Council of the Institute.

The question what constitutes misconduct also came up for consideration before the Hon’ble Supreme Court of India in the case of *N. G. Dastane v. Shrikant S. Shivade & Anr. [AIR (2001) SC 2028]*. This case was in the context of sub-section (1) of section 35 of the Advocates Act, 1961.

The said provision is extracted herein below:- “Where on receipt of a complaint or otherwise a State Bar Council has reason to believe that any Advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee.”

The Hon’ble Supreme Court of India observed in Paras 16 and 17 of the judgment as under:- “The collocation of the words “guilty of professional or other misconduct” has been used for the purpose of conferring power on the Disciplinary Committee of the State Bar Council. It is for equipping the Bar Council with the binocular as well as whip to be on the qui vive for tracing out delinquent Advocates who transgress the norms or standards expected of them in the discharge of their professional duties. The central function of the legal profession is to help promotion of administration of justice. Any misdemeanor or misdeed or misbehavior can become an act of delinquency, if it infringes such norms or standards and it can be regarded as misconduct.

In Black’s Law Dictionary “misconduct “ is defined as a “transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, its synonyms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement, offence, but not negligence or carelessness.”

In the aforesaid case, the Hon’ble Supreme Court quoted the following passage from the observations of Privy Council in *George Frier Grahame v. Attorney General [AIR 1936, PC, 224]*. “Misconduct envisaged in Section 35 of the Advocates Act is not defined. The section uses the expression “misconduct,

professional or otherwise.” The word “misconduct” is relative term. It has to be considered to the subject-matter and the context wherein such term occurs. It literally means wrong conduct or improper conduct.”

#### **a. Professional misconduct in relation to Company Secretaries in Practice (Part I of the First Schedule to the Act)**

Part I of the First Schedule to the Act deals with professional misconduct in relation to Company Secretaries in practice. It contains eleven clauses in all. The implications of various clauses in Part I are briefly explained herein below:

##### **Clause (1)**

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he - “allows any person to practice in his name as a Company Secretary unless such person is also a Company Secretary in Practice and is in partnership with or employed by him.”

This rule is intended to ensure that the professional work is done by a qualified professional so as to protect the client’s/public interest. The rule permits another person to practice in the name of a Company Secretary in Practice provided such other person is also a Company Secretary in Practice and is in partnership with or is employed by the Company Secretary in Practice in whose name the work is to be carried out.

This clause read with clause 11 of Part I of the First scheduled does not permit PCS to allow any person to practice in his name as a Company Secretary or to allow any person to sign as PCS, unless such person is also a Company Secretary in Practice or is in partnership with or employed by him.

On a question as to how CA / CWA can become partner(s) of PCS, council has opined that though for the time being CA/CWA etc. cannot become partners of a PCS but after the amendments to the relevant provisions, person(s) who are non-members, may become partners of PCS and may be allowed to provide non-attestation services.

Two persons are said to be in Partnership when they work together on mutual faith and agency. Sharing of remuneration does not make them partners. Thus an associate who is not a part of decision making process does not become a partner. Following tests if fulfilled cumulatively may make two persons partners of each other:

- i. Sharing of profits and or losses;
- ii. Taking decisions together;
- iii. Sharing the responsibilities of such decision making; and
- iv. Acting on behalf of each other and binding other person with one own acts of commission or omission.

However, sharing of common infrastructure at same or different geographical location are not relevant at all to decide the relationship.

##### **Clause (2)**

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— “pays or allows or agrees to pay or allow, directly or indirectly, any share, commission or brokerage in the fees or profits of his professional business to any person other than a member of the Institute or a partner or a retired partner or the legal representative of a deceased partner or a member of any other professional body or with such other persons having such qualifications as may be prescribed, for the purpose of rendering such professional services from time to time in or outside India.

*Explanation* — in this item, ‘partner’ includes a person residing outside India with whom a Company Secretary in Practice has entered into partnership which is not in contravention of item (4) of this part.”

This clause does not prohibit a Company Secretary in Practice from sharing fees, commission or brokerage in the fees or profits of his professional business, with any other member of the Institute or a partner or a retired partner or the legal representative of a deceased partner. Such sharing of fees, commission or brokerage in the fees or profits of professional business is also permissible with members of such professional bodies or with such other persons having such qualifications as may be prescribed from time to time. This provision is made primarily to encourage multi-disciplinary partnership.

In terms of clause (2) of Part II of the First Schedule to the Act, a member of the Institute in service shall be deemed to be guilty of professional misconduct, if he being an employee of any company, firm or person, accepts or agrees to accept any part of fees, profits, or gains from a lawyer, a Company Secretary or broker engaged by such company firm or person or agent or customer of such company, firm or person by way of commission or gratification. Accordingly a Practicing Company Secretary cannot share fees with an employee Company Secretary. Therefore, words 'who is in practice' are to be read in Clause 2 of the Part I of the First Schedule, after the word "institute".

The term 'partner' used in this rule would include '*ipso facto*' another Company Secretary in Practice or a member of any other recognised profession under Section 2(2) of the Act. In regard to sharing of fees with the legal representative of a deceased partner it is desirable that the partnership deed contains a suitable covenanting this behalf. In the case of a sole proprietorship firm, on the death of the proprietor of the firm, there cannot be any sharing of fees between the purchaser of the goodwill of the firm and the legal representative of the proprietor. Payment of goodwill is permissible, which can be in installments as provided in the agreement of sale of goodwill. The payment of goodwill shall, in no circumstances be linked with participation in the earnings of the firm of the buyer of the goodwill.

It may appear that this Clause permits sharing of fees by PCS with members of the Institute who are not employed but are practicing as CA / CWA or an Advocate. However, this does not appear to be the intention. The term "Professional Business" used may be understood as professional activities.

CA/CWA may become partners of PCS only for non-attestation services i.e. only for the purposes as contemplated by clause nos. 2, 3, 4 & 5 of the First Schedule and CA / CWA cannot become full-fledged partners as contemplated by Clause 1 of Part I of the First Schedule. That is to say a PCS even if he is allowed to be a partner of a Chartered Accountant, will not be able to sign the Auditors report on behalf of the multidisciplinary firm.

In other words, a CA or CWA who does not hold CP of ICSI, cannot issue Secretarial Audit Report by a multidisciplinary firm even if such CA/ CWA is a partner of PCS for the purposes of Clause 2, 3, 4, & 5 of the First Schedule. Council in its 177th meeting held on 27th November 2007 has passed following resolution:

**"168A. Other Professional bodies.—**

- (1) For the purposes of clauses (2), (3) and (5) of Part I of the First Schedule to the Act, a person has to be member of any of the following, namely:
  - (a) The Institute of Chartered Accountants of India established under the Chartered Accountants Act, 1949;
  - (b) The Institute of Cost Accountants of India established under the Cost and Works Accountants Act, 1959;
  - (c) The Bar Council of India established under the Advocates Act, 1961;
  - (d) The Indian Institute of Architects established under the Architects Act, 1972;
  - (e) The Institute of Actuaries of India established under the Actuaries Act, 2006;
  - (f) The membership of the professional bodies or institutions whose qualifications relating to

Company Secretaryship are recognized by the Council under sub-section (2) of Section 38 of the Act.

- (2) For the purposes of clauses (2), (3) and (5) of Part I of the First Schedule to the Act, the following shall be the persons qualified in India, namely:
- (a) Chartered Accountant within the meaning of the Chartered Accountants Act, 1949;
  - (b) Cost Accountant within the meaning of the Cost and Works Accountants Act, 1959;
  - (c) Actuary within the meaning of the Actuaries Act, 2006;
  - (d) Bachelor in Engineering from a University established by law or an institution recognized by law;
  - (e) Bachelor in Technology from a University established by law or an institution recognized by law;
  - (f) Bachelor in Architecture from a University established by law or an institution recognized by law;
  - (g) Bachelor of Law from a University established by law or an institution recognized by law;
  - (h) Master in Business Administration from Universities established by Law or Technical Institutions recognized by All India Council for Technical Education.”

The resolution amends the Company Secretaries Regulations, 1982. The amendment was notified in the Gazette of India Extraordinary dated 26th of July 2010.

### **Clause (3)**

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— “accepts or agrees to accept any part of the profits of the professional work of a person who is not a member of the Institute:

Provided that nothing herein contained shall be construed as prohibiting a member from entering into profit sharing or other similar arrangements, including receiving any share commission or brokerage in the fees, with a member of such professional body or other person having qualifications, as is referred to in item (2) of this part.”

This is the converse of clause (2) discussed (supra at para 4.3) wherein a Company Secretary in Practice can partake of his profits with other members of the Institute and with members of any other professional bodies specified in this regard or with such other persons having such qualifications as may be prescribed, under clause a Company Secretary in Practice as recipient can enter into profit sharing arrangement with a member of the Institute and/or with a member of such other professional body or other person having qualifications, as is referred to in clause (2).

### **Clause (4)**

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if:

“he enters into partnership, in or outside India, with any person other than a Company Secretary in Practice or such other person who is a member of any other professional body having such qualifications as may be prescribed, including a resident who but for his residence abroad would be entitled to be registered as a member under clause (e) of sub-section (1) of section 4 - or whose qualifications are recognised by the Central Government or the Council for the purpose of permitting such partnerships .”

This clause prohibits a Company Secretary in Practice entering into partnership with any person other than a Company Secretary in Practice or a member of any other recognised profession. Even entering into partnership with persons, who are not members of the Institute, for the purposes of carrying on a business and not the profession of Company Secretaries, would attract the mischief of the clause.

Also, partnership with any other person residing outside India but possessing qualifications recognised by the Central Government or the Council under section 4(1)(e) of the Act, is permitted. The purpose behind clause (4) is that a Company Secretary in Practice should not enter into partnership with any non-recognised professionals. In recognising any other profession for partnership, the compatibility of the other profession with the Company Secretaries' profession would be a relevant factor. The other professions referred to in this clause cannot be any different from those as may be recognised under section 2(2) of the Act. Practising Company Secretary may share the fees or profits of the partnership both within and outside India.

The council has passed the resolution by inserting the following regulation in the Company Secretaries Regulations, 1982.

### Clause (5)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if:

“he secures, either through the services of a person who is not an employee of such Company Secretary or who is not his partner or by means which are not open to a Company Secretary, any professional business.

Provided that nothing herein contained shall be construed as prohibiting any arrangement permitted in terms of items (2), (3) and (4) of this part.”

This clause frowns upon discreditable practices in securing professional work. The clause covers instances of obtaining professional work by unethical means and by means which are not open to a Company Secretary.

Council has issued guidelines for advertisement by PCS. These guidelines were approved by the council in its 178th Meeting held on 29th of December, 2007. A PCS can therefore, within the parameters of the above guidelines issue advertisement / launch his own website and such action on the part of PCS would not be treated as violation of Clause 5 as well as Clause 6 of the Part I of the First Schedule.

Clause 5 of part I of first schedule is very clear that no member in practice should secure any professional business through propagation, etc., the member in practice have to be cautious that any kind of wording or message in the website created by them shall not indicate or imply securing/solicitation of business/client.

However any act of omission or commission beyond the permitted methods as per the guidelines would amount to misconduct. Text of the Advertisement Guidelines is placed as Annexure to this lesson.

**“168B. Membership of Professional body for Partnership** — (1) For the purposes of entering into partnership under clauses (4) and (5) of Part I of the First Schedule to the Act, a person shall be a member of any of the following professional bodies, namely:

- (a) The Institute of Chartered Accountants of India established under the Chartered Accountants Act, 1949;
- (b) The Institute of Cost Accountants of India established under the Cost and Works Accountants Act, 1959;
- (c) Bar Council of India established under the Advocates Act, 1961;
- (d) The Institute of Engineers or Engineering from a University established by law or an institution recognized by law;
- (e) The Indian Institute of Architects established under the Architects Act, 1972;
- (f) The Institute of Actuaries of India established, under the Actuaries Act, 2006;
- (g) Professional bodies or institutions outside India whose qualifications relating to Company Secretary

recognized by the Council under sub-section (2) of Section 38 of the Act.”;

### Clause (6)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if:

“he solicits clients or professional work, either directly or indirectly, by circular, advertisement, personal communication or interview or by any other means: Provided that nothing herein contained shall be construed as preventing or prohibiting:

- (i) any Company Secretary from applying or requesting for or inviting or securing professional work from another Company Secretary in practice; or
- (ii) a member from responding to tenders or enquires issued by various users of professional services a organisations from time to time and securing professional work as a consequence.”

This clause further fortifies the proposition under clause (5) supra about securing clients or professional work. Solicitation of clients or solicitation of professional work or both, are prohibited. Such a solicitation may be direct or indirect and such a solicitation may further be by means of a circular, advertisement, personal communication or interview or any other means. The bedrock of this rule is that a professional should gain recognition by rendering expert services, to a few though in the beginning, who would themselves lead others to him. A true professional should command honour and not demand it. The conduct of the member is noted all the times by the society at large and their ethics and integrity towards the profession itself is sufficient for growth. So, the purpose of this clause is, to ensure that a professional secures work by his credibility, reliability and integrity in the public eyes and not by advertisement adversely affecting the image of the professional and also the profession.

The word ‘solicit’ has various shades of meaning. According to Legal Thesaurus, it means bait, (lure) desire, importune, inquire, lobby, petition, plead (implore), apply (request), pray, pressure, pursue, (strive to gain), urge. ‘Solicit’ means ‘ask for’ or ‘seek’. Means of solicitation may be a circular, advertisement, personal communication or by any other means. The phrase ‘by any other means’ used in this clause would perhaps exhaust other means like telephonic conversation, mail, electronic means and messages/social media or even third party solicitation.

The word ‘indirectly’ used in this clause suggests that even innuendos would not be tolerated under this clause. If the overall message of the alleged act is solicitation of clients or professional work, though this lurks or lies beneath what has apparently been done, clause 6 would stand attracted:

1. Circular or advertisement in newspapers indicating the range of services offered by him.
2. A circular letter offering secretarial services and professional work.
3. Any circular, advertisement or communication which creates an impression that certain professional work would be done much more expeditiously than is normally the case. Like for instance, registration of a company in, say, two days’ time or registration of a charge in one day’s time, etc.
4. Circular, advertisement or personal communication highlighting any provision of any law, to person other than existing clients, which provides for certification/ authentication by a Company Secretary in Practice of any form/return/application/document.
5. Issuing hand bills covering matters in (1) to (4) above.
6. Publication in the telephone directory, name and address in extra bold typeface or opting for more than one listing. However, where separate sections are devoted in the telephone directory (yellow pages, for instance) for a classified list, publishing the name and address by a member in such sub-section in the directory would not be treated as misconduct. But any kind of message or writing which indicates tall claims, supremacy and superiority in professional attainments will tantamount to solicitation of clients, indirectly.

7. Communicating or holding out, as being prepared to provide professional services at fees that are less than reasonable and appropriate in the circumstances, in order to obtain professional work.
8. Communicating or describing himself as a 'specialist' in any branch of law/work or knowingly permitting himself to be so described.
9. A member allowing a company to carry in its prospectus or other circular letters that 'Mr. X a specialist in corporate laws is the adviser to the company' would offend clause (6). However printing the name of Practicing Company Secretary as Secretarial Auditor in Annual Report will not violate the provisions of the Act.
10. Requesting his client(s) to recommend his/their acquaintances to him for professional work.
11. Frequent press announcements or circulars about his not being available for professional work for a certain period at the place whereat he normally has his office.
12. Highlighting or causing to be highlighted in public interviews over the television, AIR, etc. their professional attainments, more than just necessary or warranted by the circumstances of such an interview, making tall claims, indicating supremacy over other professional colleagues, etc. However sending bio data to organizers of the programmes/seminars, etc., where they have been invited as a faculty, is not violative of this clause.
13. Writing to any institution/agency that though, he is in the panel; no work has been allotted to him. Even approaching through a third person is violative of this clause.
14. Approaching any trade association/chamber of commerce/ business forum, communicating his ready availability for rendering any professional service to the constituents of any association or chamber.
15. Sending his profile to persons/companies/firms without any requisition for the same.
16. Including names of other professionals in his profile circulated to various persons.

The Professional Development Committee of the Council of the Institute has opined that listing of services by a Company Secretary with a group for creation of network of affiliates which is non-professional and not a group of company secretaries would amount to commercialization of the profession and therefore such listing would amount to violation of the Code of Conduct.

However, the following would not fall into the mischief of clause (6):

1. publishing in the journal of the Institute or newspaper any change in the professional address;
2. publishing in professional journals, newspapers and magazines in any classified column, any advertisement for recruitment of staff without in any way giving an impression about the services that he can render, or in other manner smacking of solicitation of work;
3. publishing information regarding changes in the constitution of firm, provided the information contained therein is limited to bare facts and consideration given to appropriateness of the area in which the newspaper or magazine is circulating and the number of insertions;
4. sending New Year or any other seasonal greetings without narrating the list of services, professional attainments, supremacy or any kind of indication seeking clients;
5. appearance in AIR, TV or any stage in private capacity as a speaker, actor or otherwise on programmes having no nexus with his profession. Any reference to him only as a Company Secretary and nothing beyond that in such programmes would not offend clause (6);
6. appearance or participation in professional capacity in the AIR/TV or other forums where a reasonable amount of biographical material may be given without in any way referring to the member as specialist in any branch of work;

7. editing/publishing any professional journal, newspaper and magazines;
8. writing articles/comments in professional journals, magazines and newspapers;
9. associating with charitable, other welfare associations and trade associations without in any way using such position to solicit clients/ professional work;
10. writing to his existing clients about implications/interpretations of any law or amendments thereof by way of any circular, newsletter or any personal communication or by way of print/electronic means of communication; The Council of the Institute in a case held that the Conduct of the member in practice by mentioning against his name 'Company Secretary' in the issue of 'Secretarial Aid' a journal edited by him was violative of Clause (6) of Part I of First Schedule to the Act. It was observed that the words 'for further clarification please contact the Editor' was an indirect attempt to solicit professional work; Responding to a specific letter or a follow up of personal discussions and sending a profile of a firm/ individual to specific addresses is not prohibited;
11. Stating the assignments handled by him in his profile. However, the name of the clients should be supplied only against specific request of the client for the same;
12. Issuing advertisement in Chartered Secretary for opening branch or seeking partnership with other members;
13. Issuing advertisement or launching website within the frame work of guidelines issued by the council about advertisement by PCS;
14. Securing professional work from another PCS is now expressly permitted;
15. Responding to tenders or enquires issued by various users of professional services and securing professional work as a consequence is now expressly permitted.

### Clause (7)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if:

"He advertises his professional attainments or services, or uses any designation or expressions other than Company Secretary on professional documents, visiting cards, letterheads or signboards, unless it be a degree of a University established by law in India or recognised by the Central Government or a title indicating membership of the Institute of Company Secretaries of India or of any other institution that has been recognised by the Central Government or may be recognised by the Council.

Provided that a member in practice may advertise through a write up setting out the services provided by him or his firm and particulars of his firm subject to such guidelines as may be issued by the Council."

This clause covers two aspects –

- (i) advertisement of professional attainments or services by a Company Secretary in Practice; and
- (ii) using the designation 'Company Secretary'.

As regards the ban on advertisement of professional attainments or services, almost all the professions all over the world had this type of restriction at least to start with. The idea behind this restriction was that advertisement by professionals is incompatible with the qualities of integrity and independence which a professional is expected to possess, especially when these acts are motivated by a desire for personal gain. The advertisement of professional attainment or services under this clause is completely prohibited except where the Company Secretary in Practice advertises as per the guidelines issued by the council, through a write up setting forth services provided by him or his firm.

A PCS cannot include in his advertisement following particulars like the infrastructure available in his own office, details of Associate PCS, details of his networking in other places within & outside India, infrastructure at such networked offices, number of trainees who have completed training from his office, certain landmark achievements like number of companies incorporated since he started his practice, number of appearances made before CLB/ NCLT, CBDT, Tribunals , Regulatory Authorities, Commissions , number of Foreign Collaborations handled, number of Merger & Acquisitions handled, Number of due diligence carried out etc.

Council is of the view that a PCS can be permitted to allow his clients to use his name in their brochure/ hoardings etc. e.g. Builders invariably write the names of Architects, RCC Consultants, legal advisors on the Board at the construction site. Similarly the name of PCS may also be written. Certain software companies desire to use the name of PCS in their marketing brochure for their products while giving a list of satisfied customers. A PCS is permitted to allow his name to be used as one of the satisfied customers of particular software.

What amounts to advertisement of professional attainments or services is to be decided on a case to case basis, having regard to the attendant facts. For instance, where in the visiting card or name board or letterhead, a member in practice mentions that he is a specialist or expert in company law, tax law, etc. it would amount to advertisement of professional attainments or services.

Where a member in practice furnishes upon a specific request by a prospective client, a list of companies for whom he is a consultant/ retainer or writes his specific subjects of specialisation, it may not be objectionable.

Where in the letterhead or visiting card, a member in practice mentions that he was or is holding directorships in any company; it would be offending this clause.

Advertisement by a Practising member for staff for his office in the press should in no way savour of any advertisement of professional attainments or services. The use of certain adjectives like “a reputed firm”, “a well-known firm”, etc. may be treated as inconsistent with the spirit of this clause. Similarly, announcement in the press by a Practising member in regard to certain attainments like having been named for certain public awards, acquisition of merit in other professional examinations and other recognitions in any important committee, commission, governing body, etc. should be suitably modified so as not to be construed as amounting to advertisement of professional attainments or services. Advertisement for part-time assignments fall under the mischief of this clause.

Circulars or announcement regarding change of address, or change in the constitution of the firm should be very cautiously worded to tell just the minimum necessary facts.

Where a Company Secretary in Practice has been appointed as retainer/consultant by certain companies, it would not be proper to either list the names of such companies in letterheads, visiting cards or signboards or to circulate the list among prospective clients by way of circular. However, including such names, while sending individual profile in response to a specific enquiry is permitted.

Where a Company Secretary in Practice takes up the position of a director in a company, it is incumbent on his part to exercise great care in regard to references in any explanatory statement in notice of the general meeting reappointing the Practising Company Secretary brochure or circular brought out in connection with an issue of securities of the company etc. The member concerned is to ensure personally that laudatory statements in such literature about his professional competence, while highlighting the Board’s competence as a whole, are avoided; otherwise liability under clause (7) would attract.

The Council held a member guilty of professional misconduct for misusing the Institute’s letter head, brochures, circulars, etc. mentioning his name with designation, description and the Practising field other than as prescribed and thus misleading the readers by not mentioning his whole time employment.

This clause also speaks of using the designation ‘Company Secretary’ on professional documents, visiting cards, letterheads, sign-boards, etc. This requirement fortifies the provisions of section 7 of the Act and in fact is an extension of the requirement in regard to the use of proper designation. Designations like Company Law Consultant, Income Tax Consultant, Corporate Adviser, Investment Adviser, Management Consultant etc. are prohibited. The use of descriptions indicating membership of the Institute of Chartered Accountants of India, The Institute of Cost and Works Accountants of India and the Bar Councils is permitted provided members are not holding certificate of practice issued by the Institute or using the description ‘Company Secretary’. The use of the designation “Practising Company Secretary”. “Company Secretary in whole-time practice”, etc. is not violative of this clause.

Where a member in practice had described himself in visiting cards and letter heads as “Company Secretary & Advocate, High Court”, the Council held the member guilty of professional misconduct under this clause.

**Clause (8)**

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if:

“he accepts the position of a Company Secretary in Practice previously held by another Company Secretary in Practice without first communicating with him in writing.”

The primary requirement under this clause is of prior communication with the previous incumbent. This is intended for reasons of professional courtesy. The clause is not intended to prevent a client from changing over to another Company Secretary for his own reasons. The client as of right, has full freedom to change over to another Company Secretary.

It would be desirable for the new incumbent to obtain a letter from the company letting him know the name of the earlier incumbent or that no other Company Secretary has been appointed for the same assignment.

It is expressly clarified that the communication mentioned in this clause does not mean that no-objection or consent of the previous incumbent is a prerequisite of accepting the said assignment.

In regard to certification of Annual Return under Section 92 and for all exclusive attestation assignments, it is incumbent on the Company Secretary; to ascertain if any other Company Secretary had been appointed previously by the company concerned for certification of Annual Return or for issuance of compliance certificate, as the case may be. The appointee shall take positive steps to ascertain if anyone has been engaged earlier, for the same year, for the certification work. In such cases it is not only necessary for the Company Secretary to communicate with the earlier incumbent, but it is desirable to seek his consent in order to uphold the dignity and independence of the profession. It is further clarified that though communication is a must, obtaining consent will not apply in cases of certification of Annual Returns for different years.

It would be necessary that the communication, in order to be effective, shall be by a registered letter or by hand with an acknowledgement so that there is positive evidence of the communication having been complete. In a case under a similar rule of conduct under the Chartered Accountants Act, 1949, the Rajasthan High Court in *J S Bhati v. Council of ICAI* (S.B. Civil Misc. Appeal No. 136 of 1973) observed that mere obtaining a certificate of posting does not fulfill the requirements of clause (8) of Schedule I as the presumption under section 114 of the Evidence Act that the letter in due course reached the addressee cannot replace that positive degree of proof of delivery of letter to the addressee which letters of the law in this case require.

The expression ‘in communication with’ when read in the light of the instructions contained in the booklet ‘Code of Conduct’ cannot be interpreted in any other manner but to mean that there should be positive evidence of the fact that the communication addressed to the outgoing auditor by the incoming auditor reached his hands. Certificate of posting of a letter cannot, in the circumstances, be taken as positive evidence of its delivery to the addressee. The Court, therefore, has expressed the view that the communication by a certificate of posting cannot be taken as a positive evidence of its delivery to the addressee. A communication sent by hand which has been properly acknowledged by the addressee would be effective communication.

With the advent of use of the technology, it would proper communication in this regard made by any other electronic medium viz., SMS, Whats App and such other Messenger apps is also permitted, provided the sender (the PCS taking up the assignment) is able to establish that the message is delivered to the recipient before he or she takes up the assignment. Needless to mention, that a reasonable time should be given to the previous incumbent to offer his response, if any, and it is not just a kind of formality. For sake of better clarity, the new incumbent should express clearly in the communication the details of assignment being taken up by him.

Members have been held guilty of professional misconduct under this clause for having accepted and commenced the certification of Annual Return of a company without first communicating with the earlier incumbent in writing. It has been concluded that mere posting of the letter is not sufficient to comply with the requirements of clause (8) of Part I of First Schedule to the Act, but the delivery of the message to the addressee of the same is essential. Oral communication is no communication as far as this clause is concerned.

To a question about whether communication 'with' contemplates a dialogue, the council is of the view that use of the preposition 'with' instead of 'to' does not make it mandatory for the PCS to obtain 'no objection' from the earlier incumbent. What is critical for PCS (new incumbent) is to prove that he has sent a written communication to the earlier incumbent before accepting a position of PCS.

It has been observed that majority of the Disciplinary cases were in respect of this clause about not sending written intimation by the new incumbent (PCS).

While clarifying the scope of the words "accepting a position of Company Secretary in Practice" Council has expressed a view that need for sending a previous communication to the earlier incumbent arises only in relation to exclusive area of practice under the Act. Therefore, in respect of following it shall not be mandatory (though desirable) to send a prior written communication to the earlier incumbent:

- (a) certifying e-forms for various companies.
- (b) giving Due Diligence Certificate for consortium borrowers.
- (c) holding assignment as retainer for a company or group of companies.
- (d) issuing search reports.
- (e) Issuing certificates as contemplated under SEBI (LODR) Regulation, 2015.
- (f) Giving legal opinion.

In respect of the following, it shall be mandatory to send a prior written communication to the earlier incumbent:

- (i) Signing / Certification of Annual Return.
- (ii) Issuance of Secretarial Audit Report in terms of Section 204 of the Companies Act, 2013.
- (iii) Issuance of Certificate of Securities Transfers.
- (iv) Certificate of reconciliation of capital, updation of Register of Members, etc. as per the Securities & Exchange Board of India's Circular D & CC/Cir-16/2002 dated December 31, 2002.
- (v) Conduct of Internal Audit of Operations of the Depository Participants.
- (vi) Certification of corporate governance under SEBI (LODR) Regulation, 2015.

### Clause (9)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if:

"charges or offers to charge, accepts or offers to accept, in respect of any professional employment, fees which are based on percentage of profits or which are contingent upon the findings or results of such employment, except in cases which are permitted under any regulations made under this Act".

Which determine remuneration based on results. For instance, if the Company Secretary in Practice were to quote remuneration in an Excise Refund case, as a percentage of the final amount of refund that may be ordered by an appellate authority, it would be hit by this clause. The fundamental is that the fee should be more related to the expertise required and the time spent on a particular case without in any way linking the fee with the final results.

### Clause (10)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if:

"engages in any business or occupation other than the profession of Company Secretary unless permitted by the Council so to engage:

Provided that nothing contained herein shall disentitle a Company Secretary from being a director of a company

except as provided in the Companies Act.”

This clause is intended to ensure that a PCS does not engage in vocations which are not compatible with the profession of Company Secretary. This has been provided with a view to ensure the profession develops in its true sense. Pursuant to the Company Secretaries Regulations, 1982, the Council has decided not to issue certificate of practice to members engaged in other professions such as Chartered Accountants, Cost Accountants and Advocates and also to members in employment. The said decision was taken by the Council to give an independent identity and status to the profession and a thrust to the concept of Company Secretary in whole-time practice.

The Council held a member guilty of professional misconduct under this clause for engaging himself in employment while holding a certificate of practice from the Institute.

The Council in another case held a member guilty of professional misconduct under this clause for holding the certificate of practice of both the Institutes, i.e., ICAI & ICSI without the permission of the Council of the latter and also Practicing both the professions on whole-time bases simultaneously.

Regulation 168(2) of the Regulations provides that a Company Secretary may act as a secretary, trustee, executor, administrator, arbitrator, receiver, appraiser, valuer, internal auditor, management consultant or as a representative of financial matters including taxation and may take up appointment that may be made by the Central or any State Government, Courts of Law, labour tribunals, or any authority. From the reading of Regulation 168, it is clear that the various occupations provided in sub-regulation (2) thereof do not require a specific resolution to be passed by the Council.

It is pertinent to refer to Regulation 168(1) which provides that the prior permission of the Council by a resolution is required for a Company Secretary to engage in any business or occupation other than the profession of Company Secretary. The Council has expressly permitted a PCS to take up following vocations:

- (i) Authoring Books and Articles.
- (ii) Holding of Life Insurance Agency License for the limited purpose of getting renewal commission.
- (iii) Holding of public elective offices such as M.P., M.L.A., M.L.C. and others.
- (iv) Honorary office-bearership of charitable, educational or other non-commercial organisations.
- (v) Acting as Justice of Peace, Special Executive Magistrate and the like.
- (vi) Teaching assignment under the Coaching Organisation of the Institute and other Institutes such as the Institute of Cost & Works Accountants of India, the Institute of Chartered Accountants of India, Management Institutes, Universities and any college affiliated to a University, and such other organisation as may be recognised by the Council of the Institute from time to time, so long as the hours during which a member in practice is so engaged in teaching do not exceed average three hours in a day irrespective of the manner in which such assignment is described or the remuneration receivable (whether by way of fixed amount or on the basis of any time scale of pay or in any other manner) by the member in practice for such assignment.
- (vii) carrying out valuation of papers, acting as a paper-setter, head examiner or a moderator, for any examination.
- (viii) Acting as editor of professional journals.

### **Permission to be granted specifically**

Members of the Institute in practice may engage in the following categories of business or occupation, after obtaining the specific and prior approval of the Executive Committee of the Council in each case:

1. Interest or association in family business enterprises even when he does not hold substantial interest in such enterprises.

2. Office of Managing Director or whole-time Director of a body corporate within the meaning of the Companies Act, 2013. The Council may refuse permission in individual cases though covered under any of the above categories.

For the purpose of the above, a member shall be deemed to have a “substantial interest” in a concern:

- (i) in a case where the concern is a company, if its shares (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) carrying not less than 25% of voting power at any time during the previous year, are owned beneficially by such member.
- (ii) in the case of any other concern, if such member is entitled at any time during the previous year, to not less than 25% of the profits of such concern.

### Clause (11)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—“allows a person not being a member of the Institute in practice or a member not being his partner to sign on his behalf or on behalf of his firm anything which he is required to certify as a Company Secretary, or any other statements related thereto.”

This clause further fortifies clause (1) discussed already. It is not permissible for a Company Secretary in Practice to allow any person to sign on his behalf or on behalf of his firm anything which he is required to certify as a Company Secretary or any other statement related thereto. The purpose is not to allow a member to have his judgment and expertise substituted by the judgment of any other person who is not a member in practice or his partner in the firm. To take an instance, the annual return under Section 92 of the Companies Act, 2013 has to be certified by a Company Secretary in Practice himself. It is not possible to have the certification done by a Company Secretary, say, through a power of attorney holder, even though the holder of the power of attorney is an employee (of the Company Secretary) who has been associated with the checking up of various details furnished in the Annual Return.

PCS who is not a partner of another PCS can not sign on behalf of such other PCS on Annual Returns or Secretarial Audit Report or any other certificates.

In e-governance era, a PCS on many occasions attaches his Digital Signature to various forms / statements. Due care has to be taken that such digital signature is attached only by the PCS himself. It would be the exclusive duty and obligation of PCS to prevent any unauthorized use of his Digital signature. PCS is not expected to part with the password of his Digital signature.

### **b. Professional misconduct in relation to members of the Institute in service (Part II of the First Schedule)**

Part II of First Schedule to the Act deals with professional misconduct of a member of the Institute (other than a member in practice) if he is an employee of any company, firm or person.

Part II of the First Schedule recognises the need for a member in employment also to observe a certain code of conduct. To be in ‘employment’ connotes to be in a ‘contract of service’ and not ‘contract for service’. There are four indicia of a contract of service, namely :

- (a) master’s power of selection of his servant;
- (b) payment of wages or other remuneration;
- (c) master’s right to control the method of doing the work; and
- (d) the master’s right of suspension or dismissal.

Lord Denning pointedly observed, “under a contract of service, a man is employed as part of a business, and his work is done as an integral part of the business; whereas under a contract for services, his work although done for the business is not integrated into it but is only accessory to it.”

One important issue which very frequently comes up is, the conflict that may arise between the employer's interest and the interest of the member to uphold professional values and broader public interest. The code of conduct formulated by the Institute originally in 1977 emphasised the importance of a member in employment exercising professional independence in relation to his work as well as his endeavor to provide the highest quality of service attainable by him, without reference to the monetary compensation. The idea being, a member must have courage of conviction to express candidly his considered professional opinion to his employer.

The Royal Commission in its Final Report on legal services submitted to the British Parliament in October, 1979 categorically observed that the standards of professional conduct and integrity which a member of the legal profession in employment has to abide by are the same as those who practice on their own account. Even though the difference is that a salaried lawyer acts for only one client, unlike a lawyer in practice who acts for several clients, the former must uphold the same standards of honour and etiquette, observed the Royal Commission. The Report recognised the continuing conflict between loyalty to the employer and loyalty to the external body enforcing the code of conduct. Nevertheless, whether a member is in employment or in practice, his duty to uphold professional values shall gain precedence over all other exigencies.

Part II and Part III of the First Schedule to the Act specify certain instances of misconduct to which a Company Secretary in employment may stand attracted. It has been mentioned earlier that under section 21 of the Act, the Council's power to direct enquiry is not limited only to those contained in the Schedule to the Act, in view of the fact that the phrase 'other misconduct' used in section 21 is sufficiently broad enough to cover instances not enumerated in the Schedule.

Clause (1) of Part II of the First Schedule provides that a member of the Institute (other than member in practice) shall be deemed to be guilty of professional misconduct, if he, being an employee of any company, firm or person—

“pays or allows or agrees to pay, directly or indirectly, to any person any share in the emoluments of the employment undertaken by him.”

This clause is analogous to clause (2) of Part I of the First Schedule in some respects. A member in employment shall not share emoluments of the employment with any other person, not even a member. Both direct and indirect sharing of the emoluments is prohibited. However, it may be noted that under Part I of the First Schedule, a member in practice can share the fee, commission or brokerage or profits with any other member of the Institute who is his partner.

Clause (2) of Part II of the First Schedule provides that a member of the Institute (who is in service) shall be deemed to be guilty of professional misconduct, if he, being an employee of any company, firm or person—

“accepts or agrees to accept any part of fees, profits or gains from a lawyer, a Company Secretary or broker engaged by such company, firm or person or agent or customer of such company, firm or person by way of commission or gratification.”

This clause vindicates the confidence and trust that an employer reposes in an employee while the latter deals with any outsider on matters relating to business. It is an implied term of any employment that the employee concerned shall not secretly benefit from the employment.

This clause is also analogous in some respects to clause (3) of Part I of First Schedule.

### **c. Professional misconduct in relation to members of the Institute generally (Part III of the First Schedule to the Act)**

Part III of the First Schedule to the Act covers cases of professional misconduct in relation to members of the Institute generally. Under this Part, three specific instances have been categorised as professional misconduct.

Clause (1) of Part III of the First Schedule provides that a member of the Institute whether in practice or not shall be deemed to be guilty of professional misconduct, if he—

“not being a Fellow of the Institute, acts as a Fellow of the Institute.”

This clause prohibits the practice of styling oneself as a Fellow, while in fact he is not a Fellow member. A person is entitled to have his name entered in the Register as a Fellow as per regulation 4(2) of the Regulations. The Fellowship of the Institute suggests a certain degree of status and seniority and obviously any wrongful representation of such seniority amounts to breach of code of conduct.

Clause (2) of Part III of the First Schedule provides that a member of the Institute whether in practice or not, shall be deemed to be guilty of professional misconduct, if he—

“does not supply the information called for or does not comply with the requirements asked for by the Institute, Council or any of its Committees, Director (Discipline) Board of Discipline, Disciplinary Committee, Quality Review Board or the Appellate Authority.”

It is the duty of a member to supply information called for or to supply the requirements asked for by the Council or any of its Committees and other authorities. Non-compliance with this clause would tantamount to breach of code of conduct.

The Council of the Institute in a case of professional misconduct, held a member guilty of professional misconduct under this clause for failure to disclose the fact of holding of the certificate practice of the Institute of Chartered Accountants of India to the Council of ICSI which was required to be made at the time of renewal of Certificate of Practice.

A member of ICSI bound to give any and every kind of information called for him since not providing information is a misconduct under clause (2) of Part III of the First Schedule. It is presumed that the concerned authorities would call only relevant information.

Clause (3) of Part III of the First Schedule provides that a member of the Institute, whether in practice or not, shall be deemed to be guilty of professional misconduct, if he—

“while inviting professional work from another Company Secretary or while responding to tenders or enquiries or while advertising through a write up, or anything as provided for in items (6) and (7) of Part I of this Schedule, gives information knowing it to be false.”

#### **d. Other Misconduct in relation to members of the Institute generally (Part IV of the First Schedule)**

##### **Clause 1 of Part IV**

A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he is held guilty by any civil or criminal court for an offence which is punishable with imprisonment for a term not exceeding six months.

##### **Clause 2 of Part IV**

A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if in the opinion of the Council, he brings disrepute to the profession or the institute as a result of his action whether or not related to his professional work.

Clause 2 of Part IV of the First Schedule provides that it shall be misconduct if in the opinion of the Council, a member of ICSI brings disrepute to the profession or the institute as a result of his action whether or not related to his professional work. Making an exhaustive list of such misconduct may not be possible.

Following may amount to misconduct under Clause 2 of Part IV of the First Schedule;

- Sending an e-mail to number of members (e-groups) criticizing the decisions of the Council in derogatory and filthy language.

- Discussing through e forums failures of the Council/ president/ secretary by using derogatory and filthy language.
- Writing letter(s) in an aggressive, loud and filthy language to the Ministry of Corporate Affairs, about working of ROC offices/ MCA site, inability to upload forms etc.
- Arranging DHARANA/ agitations at the gates of the Govt. Offices/Institute's offices in a manner not befitting a professional.
- Instigating Students or other members by creating a pandemonium in or around Institute's offices by raising issues pertaining to syllabus, training, examination or any other reason what so ever.
- Misusing the confidential data available with the offices of the Institute for personal purposes.
- Inviting Govt. Officers for Chapter's / Regional Council's Programs by spending heavily on their travel & stay arrangements, with an intention to get personal mileage.
- Tampering with the Books of Accounts/ Minutes of the meetings of the Managing Committees of Chapter/ Regional Councils.

**e. Part I of the Second Schedule to the Act Section 21(3), 21(B)(3) and 22) where the matters are to be dealt with by the disciplinary committee constituted by the Council**

Part I of the Second Schedule to the Act deals with ten instances of professional misconduct in relation to members in practice, which require action by a Disciplinary Committee. The implications of various clauses in Part I of the Second Schedule are briefly explained herein below:

**Clause (1)**

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—  
“Discloses information acquired in the course of his professional engagement to any person other than the client so engaging him, without the consent of such client, or otherwise than as required by any law for the time being in force.”

This clause indicates the position of trust and confidence reposed by the client in a Company Secretary in practice. A Company Secretary in Practice in the course of his professional engagement may come into possession of vital information. Such information has to be kept confidential unless consent of the client has been obtained to disclose the same or the disclosure is required by any law. In the case of a sole proprietor client, consent must be from the sole proprietor. In case the client is a partnership firm, consent has to be given by all partners if the partnership deed so provides; if the deed is silent, any partner can give the consent on behalf of the firm in view of his implied authority. In the case of Board-managed companies, the Board has to give the consent unless it has specifically resolved to delegate the power to any executive. Where the company is managed by a managing director, he may give consent.

It is necessary to bear in mind that any communication acquired by a Company Secretary in Practice in the course of his professional engagement on behalf of his client, any communication or any advice given by him to his client in the course and for the purpose of his engagement is a privileged communication and should not be disclosed by him without the express consent of his client. Similarly, the Company Secretary in Practice should not disclose, without written consent of his client, the contents or conditions of any document with which he has become acquainted in the course and for the purpose of his professional engagement.

It is observed these days that PCS retains the digital signature of his client along with the password for the administrative convenience of uploading the forms from the office of PCS. It is suggested that in such a situation PCS should retain a formal letter signed by his client authorising PCS to make use of his Digital signature. The reason being once the forms are uploaded they appear on MCA portal and come to public domain. In order to avoid any future possible controversy, such authority letter would come handy for PCS.

**Clause (2)**

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—“certifies or submits in his name or in the name of his firm a report of an examination of the matters relating to Company Secretarial practice and related statements unless the examination of such statements has been made by him or by a partner or any employee in his firm or by another Company Secretary in practice.”

This clause is intended to imbibe in a member in practice, a higher degree of responsibility and care while certifying any fact or a statement. Either he himself or his partner or any employee of his firm should have examined what is being certified. The words “or by another Company Secretary in Practice” used in this clause envisage a situation where the responsibility for the certification is undertaken by a Company Secretary in Practice, who is neither a partner nor an employee of the Company Secretary concerned, for an examination done by another member in Practice.

This clause prohibits PCS from certifying or submitting in his name a report of an examination of the matters relating to company secretarial practice unless the examination of such statements has been made by him or by a partner or an employee in his firm or by another Company Secretary in Practice. Trainees working in the office of PCS are not to be considered as his employees for the purpose of this item. Reference to “another Company Secretary in Practice” at the end of paragraph refers to any PCS who may or may not be his partner. Thus a PCS would be justified in relying on the search report / examination done by another PCS and such reliance would not violate Clause 1 of the First Schedule.

**Clause (3)**

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—“permits his name or the name of his firm to be used in connection with any report or statement contingent upon future transactions in a manner which may lead to the belief that he vouches for the accuracy of the forecast.”

This clause underlines the duty of a Company Secretary in Practice to exercise utmost care in associating his name with any report or statement about future happenings or contingencies. A Company Secretary in Practice has to clearly disclose in the report or statement, as the case may be, the sources of his information and the premises on which the forecast is based. He shall further take care that he does not vouch for the accuracy of the forecast. Restraint is therefore required in subscribing to reports/statements, the contents of which may or may not turn out to be true.

The future is always uncertain and there is always an element of contingency. PCS can not become a fortune teller. PCS should not certify any possible happening or non happening or give a report about the future e.g. it would be improper for a PCS to certify the future earning capacity, future shareholding pattern, future profitability or similar future figures and numbers. If at all there is any occasion for a PCS to sign such document he should clearly insert appropriate disclaimer clause.

**Clause (4)**

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—“expresses his opinion on any report or statement given to any business enterprise in which he, his firm or a partner in his firm has a substantial interest;”

This clause ensures that a professional has to be independent while expressing any opinion. He should not have any substantial interest in the business enterprise to which the report or statement pertains. That would create a conflict with his duty. Expressing opinion or giving any report with appropriate disclosures about his interest in the report was permitted earlier. However under the new clause there is a total ban on expressing opinion or giving any report about any business enterprise in which he, his firm or a partner in his firm has a substantial interest. ‘Substantial interest’ used in this clause is not limited to financial interest only.

In this connection it may be stated that the Council has, pursuant to Regulation 168 of the Regulations passed a resolution in which ‘substantial interest’ has been defined to mean an interest to the extent of 25%. The same

guideline is relevant under the above clause also. If the business enterprise does not have a share capital, say a sports club, which may be a company limited by guarantee without Capital, the question whether PCS has substantial interest in such Club would be a question of fact.

### Clause (5)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—  
“fails to disclose a material fact known to him in his report or statement but the disclosure of which is necessary in making such report or statement, where he is concerned with such report or statement in a professional capacity.”

This clause deals with the paramount duty of a member in practice towards the user of any statement or report. The clause underlines the need for full and complete disclosure as to make any statement or report with which he is associated, true in every possible respect. The aiding or abetting must be with reference to a material fact known to him. If the member in practice does not know a material fact, or he has no reason to come to know a material fact by any means, there cannot arise any liability under this clause; also where a material fact is known to him but in his considered opinion, there is no reason to disclose them, the onus of defense would be on him to prove that the non-disclosure of the material fact has not made the statement misleading.

The expectation provided in this clause is something similar to the golden rule in respect of prospectus. The report/ statement signed by PCS should contain truth, whole truth and nothing but the truth. Half truth at times is more disastrous. For example: making a statement that company has continuous track record of dividend declaration since incorporation, when the facts are that for last three years dividend was being declared from accumulated profits and not from current year's profit. Making a statement that company has continuous track record of dividend declaration since incorporation would be half truth. The reader would be made to believe that the company has sound financial health. Thus the full facts should be disclosed by PCS by mentioning the fact that company has continuous track record of dividend declaration since incorporation, however since last three years dividend is being declared out of reserves.

### Clause (6)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—  
“fails to report a material misstatement known to him and with which he is concerned in a professional capacity.”

This clause deals with non-disclosure by a member in practice of a material misstatement known to him in any report with which he is concerned.

### Clause (7)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—  
“does not exercise due diligence, or is grossly negligent in the conduct of his professional duties.”

This clause deals with due care that a member in practice has to exercise in the discharge of his professional duties. The words used in this clause “grossly negligent” imply that purely clerical errors or an omission to give more details in any recommended course of action will not fall within the sweep of this clause. What constitutes gross negligence would depend upon the facts and circumstances of each case.

The ICAI in their booklet ‘Code of Conduct’ have quoted the following extract from the judgment of the Karnataka High Court, in reference to an identical clause under the Chartered Accountants Act, 1949:

“It is the duty of an auditor to bring to bear on the work he has to perform that skill, care and caution which a reasonably competent and cautious auditor would use. What is reasonable skill, care and caution must depend on the particular circumstances of each case. An auditor is not bound to be a detective, or, as was said, to approach his work with suspicion or with a foregone conclusion that there is something wrong. He is a watch dog but not a blood-hound. If there is anything calculated to excite suspicion he should probe it to the bottom; but in the absence of anything of that kind he is only bound to be reasonably cautious and careful. Professional misconduct is a term of fairly wide import but generally speaking, it implies fairly serious cases of misconduct of

gross negligence. Negligence per se would not amount to gross negligence. In the case of minor errors and lapses, which do not constitute professional misconduct and which, therefore, do not require a reference to the disciplinary committee, the Council would nevertheless, bring the matter to the attention of its members so that greater care may be taken in the future in avoiding errors and lapses of a similar type“.

In *NemiChand v. Commissioner, Nagpur Division* ILR (1947 Nag 256 at 265 ,AIR 1948 24 at 27) it was held that gross negligence imports high degree of careless conduct.

Where, for instance, a Company Secretary who is not in wholetime practice under Companies Act, 2013, certifies Annual Return pursuant to section 92 of Companies Act, he would be guilty of being grossly negligent under this clause. Similarly, where a member in practice gives a certificate to a financial institution regarding necessary powers of a company and its directors to enter into an agreement without thoroughly verifying the Memorandum and Articles of Association of the Company, he would be guilty of misconduct under this clause. So also failure to check the resolutions as contained in the minutes book while certifying copies of resolutions would attract liability under this clause.

The difference in between the two expressions “Not exercising due diligence” and “being grossly negligent”- is of degree. In both the situations it would amount to professional misconduct.

### Clause (8)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

“fails to obtain sufficient information which is necessary for expression of an opinion or its exceptions are sufficiently material to negate the expression of an opinion.”

The first limb of this clause deals with the duty of a member in practice to obtain sufficient information to warrant expression of an opinion. Issuing of a wrong consumption certificate under the Import Export Regulations for instance, without obtaining all necessary information required for the purpose, would get attracted to this clause.

The second limb of this clause requires that any opinion expressed by a Company Secretary in Practice may be subject to certain exceptions. But, where the exceptions are sufficiently material, he should refrain from expressing an opinion, in other words, the second limb of this clause gives scope for making minor exceptions which are not important /material as to negate the very expression of opinion itself.

### Clause (9)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

“fails to invite attention to any material departure from the generally accepted procedure relating to the secretarial practice.”

This clause deals with the duty of a member in practice to invite attention to material departure from generally accepted secretarial practice. As of now, there have evolved certain widely accepted sound practices in regard to, say, share issue and transfers, share transmission, servicing of corporate securities, meetings procedure and other approvals, which are generally accepted as good secretarial practices. Until the time the standard secretarial practices in respect to any matter are recommended by the Institute for adoption are made mandatory, a member in practice has to, by and large, conform to existing well- recognised secretarial practices and invite attention to departures which are material.

### Clause (10)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

“fails to keep moneys of his client other than fees or remuneration or money meant to be expended in a separate banking account or to use such moneys for purposes for which they are intended within a reasonable time.”

The purpose of this clause is firstly to ensure that the client's money is separately accounted for and secondly such money is specifically used only for the purpose for which it is paid by the client.

Advance received from clients for expenses like traveling, conveyance to be incurred by PCS need not be kept in a separate account, however advance received from a client for payment of Statutory / filing fees, Stamp duty to be paid by PCS on Client's behalf, must be kept in a separate account, in case client has paid advance for certain specific purpose, say for payment of fees and stamp duty for incorporation of the company or for increase in authorized capital such amount should be used in reasonable time. If the decision to incorporate a company or increase in capital is postponed/ cancelled, PCS should promptly return such advance and should not adjust his fees from the amount so received for services rendered, if any, by him, unless such adjustment is authorised by the client.

#### **f. Professional misconduct in relation to members of the Institute generally (Part II of the Second Schedule to the Act)**

Part II of Second Schedule to the Act covers professional misconduct in relation to members of the Institute generally. The implications of the four clauses included in this Part are explained herein, below:

#### **Clause (1) of Part II of Second Schedule**

Provides that a member of the Institute whether in practice or not, shall be deemed to be guilty of professional misconduct, if he—

“contravenes any of the provisions of this Act or the regulations made there under or any guidelines issued by the Council.”

This clause requires every member to pay due obedience to the Act, the Regulations and Guidelines issued by the council from time to time. For instance, a member of the Institute not having a certificate of practice representing that he is in practice (under section 24) or any violation of the rules relating to the conduct of elections (under Rule 42 of the Rules) would become guilty under this Clause; besides becoming liable for prosecution under section 24 of the Act.

The Council of the Institute, found a member guilty of professional misconduct under this clause for contravention of Section 6 of the Act as he certified an Annual Return of a company without holding a certificate of practice.

Following guidelines have been issued by the council so far:

1. Display of particulars on website
2. Approving firm's name
3. Compulsory attendance at PDP
4. Dress Code
5. Issuing Compliance Certificate
6. Maintenance of Register of attestation services
7. Issue of advertisement by PCS
8. Change of Name of a Concern/Firm
9. Guideline for use of own Logo by PCS.

It is necessary for all the members to understand the guidelines and follow the same in spirit and letter. It is also necessary to mention here that contravention of any of the provisions of the Company Secretaries Act, 1980 or the Company Secretaries Regulations, 1982 made there under or any guidelines issued by the council falls within the ambit of clause (1), part II of the Second Schedule to the Company Secretaries Act, 1980 and invites sterner actions.

**Clause (2) of Part II of Second Schedule**

Provides that a member of the Institute whether in practice or not, shall be deemed to be guilty of professional misconduct, if he—

“being an employee of any company, firm or person, discloses confidential information acquired in the course of his employment, except as and when required by any law for the time being in force or except as permitted by the employer.”

The employer and employee relationship is of trust and confidence. This principle is embodied in this clause. The confidential information may pertain to technical secrets, important policy decisions, business strategies or any matter having a bearing on the interest of the employer.

Confidential information is a valuable asset for any employer. Confidentiality has to be maintained about members, customers, employees, suppliers, product mix, future plans, proposals, list of associates, affiliates, stake holders, dealers and financial information. All confidential information must be used for the benefit and best interest of the employer. Employee member must maintain the confidentiality of the information which comes to his knowledge / custody except when disclosure is authorized or legally required. Confidential information includes all non-public information that might be harmful or may have potential to cause harm to the employer, if disclosed.

The confidential information, discussions, documents and data should be dealt with utmost care and should not be shared or passed on to undesirable persons / outsiders under any circumstances, directly or indirectly.

**Clause (3) of Part II of Second Schedule**

Provides that a member of the Institute whether in practice or not, shall be deemed to be guilty of professional misconduct, if he—

“includes in any information, statement, return or form to be submitted to the Institute, Council or any of its Committees, Director (Discipline), Board of Discipline, Disciplinary Committee, Quality Review Board or the Appellate Authority any particulars knowing them to be false.”

This clause covers situation where a member includes in any statement, return or form to be submitted to the Council any particulars knowing them to be false. The purpose of this clause is to ensure that a member submits accurate particulars, as are required to be furnished by him to the Council. It is pertinent to know that the clause is attracted only when the particulars furnished are known to the member to be false.

*Metropolitan Life Insurance Co. vs. S. Adam* that the word ‘false’ has two distinct and well recognized meanings—

- (i) intentionally or knowingly or negligently untrue;
- (ii) untrue by mistake or accident after the exercise of reasonable care.

It is in the former sense that the term ‘false’ is to be understood in this clause. This is abundantly made clear by the qualifying words, ‘knowing them to be false’. The word false itself implies something more than mere untruth; it would even connote an intention to deceive.

Where for instance, while submitting the application for the issue/ restoration of certificate of practice under Regulation 10(1) of the Regulations, a member does not disclose that he is engaged in any business/occupation other than the profession of company secretaries when in fact he was so engaged, this clause would be attracted.

**Clause (4) of Part II of Second Schedule**

Provides that:

“a member of the Institute whether in practice or not, shall be deemed to be guilty of professional misconduct, if he defalcates or embezzles moneys received in his professional capacity.”

This clause covers defalcation and embezzlement of moneys received in professional capacity by a member and not in any other capacity. The professional capacity referred to here would cover situations contemplated under Section 2(2) of the Act and those specifically covered under Regulation 168 of the Regulations. In as much as the Act deals with professional misconduct, logically the misconduct must be something having a nexus, direct in that, with the discharge of professional duties. However, this does not mean that other cases of embezzlement are not misconduct. Section 21 of the Act is wide enough to cover other acts not befitting to the member of the Institute.

### **g. Part III of the Second Schedule**

This part is about other misconduct in relation to members of the Institute generally if a member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he is held guilty by any civil or criminal court for an offence which is punishable with imprisonment for a term exceeding six months.

Part III does not get attracted at the very first instance of being held guilty but it is attracted only after the final appeal, as it may be, is disposed off and the member is held guilty.

It may be observed that this clause does not provide that the offence for which a member is held guilty by any civil or criminal court for an offence which is punishable with imprisonment for a term exceeding six months involves moral turpitude. Therefore even for an imprisonment for a term exceeding six months in an offence which does not involve moral turpitude would attract the consequences.

### **Complaints and Enquiries relating to Professional or other Misconduct of Members-Regulation 15 of the Company Secretaries Regulation, 1982**

Applicable to a complaint or information pending before the Council or any inquiry initiated by the Disciplinary Committee or any reference or appeal made to a High Court prior to 17.11.2006

- (1) Subject to the provisions of this regulation, any complaint received against a member of the Institute under Section 21 shall be investigated, and any enquiry relating to misconduct of such member shall be held, by the Disciplinary Committee.

Provided that if the subject matter of a complaint is, in the opinion of the President, substantially the same as or has been covered in any previous information of complaint received, the Secretary may file the complaint without any further action or inform the complainant, accordingly, as the case may be.

- (2) A complaint under Section 21 shall be made to the Council in the appropriate form, duly verified as required therein.
- (3) Every complaint shall contain the following particulars, namely-
  - (a) the acts or omissions which, if proved, would render the member complained against guilty of any professional or other misconduct;
  - (b) the oral and/or documentary evidence relied upon in support of the allegations made in the complaint.
- (4) Every complaint other than a complaint made by or on behalf of the Central or any State Government, shall be accompanied by a deposit of rupees fifty which shall be forfeited, if the Council, after considering the complaint, comes to the conclusion that no prima facie case is made out and, moreover, that the complaint is either frivolous or has been made with mala fide intention.
- (5) The Secretary shall return a complaint which is not in the proper form or which does not contain the aforesaid particulars or which is not accompanied by the deposit of rupees fifty to the complainant for resubmission after compliance with such requirements and within such time as the Secretary may specify.
- (6) Ordinarily within sixty days of the receipt of a complaint under Section 21 the Secretary shall,-

- (a) if it is against an individual member send particulars of the acts of omissions alleged or a copy of the complaint, as the case may be, to such member at his address as entered in the Register;
- (b) if it is against a firm, send particulars of the acts or omissions or a copy of the complaint, as the case may be, to the firm concerned at the address of the head office of the firm as entered in the Register of offices and firms which a notice calling upon the firm to disclose the name(s) of the member(s) concerned and to send particulars of acts or omissions or a copy of the complaint, as the case may be to member(s).

*Explanation*-A notice shall be deemed to be a notice to all the members who are partner or employees of that firm.

- (7) A member who has been intimated of the complaint made against him under sub-regulation (6) (hereinafter referred to as the respondent) shall, within fourteen days of issue of such intimation or within such further time as the Secretary may allow, forward to the Secretary a written statement in his defence verified in the same manner as the complaint.
- (8) On a perusal of the complaint and written statement in any, the Secretary may call for such additional particulars or documents connected therewith either from the complainant or the respondent, as he may consider necessary or as may be directed by the President, for perusal of the Council.
- (9) Where on a perusal of the complaint, the written statement, if any, of the respondent and other relevant documents and papers, the Council is prima facie of opinion that any member has been guilty of professional or other misconduct, the Council shall cause an enquiry to be made in the matter by the Disciplinary Committee and where the Council is prima facie of opinion that there is no case against the respondent, the case shall be dismissed and the complainant, if any, and the respondent shall be informed accordingly.

Provided that the Council may, if deemed necessary, call for any additional particulars or documents connected therewith from the complainant, if any, or the respondent.

- (10) (i) Every notice issued by the Secretary or by the Disciplinary Committee under this Regulation shall be sent to the member or the firm concerned by registered post with acknowledgement due.
- (ii) If the notice is returned unserved with an endorsement to the effect that the addressee had refused to accept the notice, it shall be deemed to have been served.
- (iii) If the notice is returned with an endorsement indicating that the addressee cannot be found at the address given, the Secretary shall ask the complainant to supply to him the correct address to the member or firm concerned and send a fresh notice to the member or firm at the address so supplied.
- (11) The provision relating to a notice shall apply *mutatis mutandis* to a letter.

#### **Procedure in enquiry before the Disciplinary committee- Regulation 18 of the Company Secretaries Regulation, 1982**

Applicable to the complaint or information pending before the Council or any inquiry initiated by the Disciplinary Committee or any reference or appeal made to a High Court prior to 17.11.2006.

- (1) It shall be the duty of the Secretary to place before the Disciplinary Committee all facts brought to his knowledge which are relevant for the purpose of any enquiry by the Disciplinary Committee.
- (2) The Disciplinary Committee shall have the power to regulate its procedure in such manner as it considers necessary and during the course of enquiry, may examine witnesses on oath and receive evidences on affidavits and any other oral or documentary evidence, exercising its powers as provided in Sub-section (8) of Section 21.
- (3) The Disciplinary Committee shall give the complainant and respondent a notice of the meeting at which the case shall be considered by the Committee.
- (4) Such complainant and respondent may be allowed to defend themselves before the Disciplinary Committee either in person or through a legal practitioner or any other member of the Institute.

- (5) Where, in the course of a disciplinary enquiry, a change occurs in the composition of the Disciplinary Committee, unless any of the parties to such enquiry makes a demand within fifteen days of receipt of a notice of a meeting of such Disciplinary Committee, that the enquiry be made de novo report of the Disciplinary Committee shall be called in question on the ground that any member of the Disciplinary Committee did not possess sufficient knowledge of the facts relating to such inquiry.
- (6) The Disciplinary Committee shall after investigation report the result of its enquiry to the Council for its consideration.

**Procedure in a hearing before the Council- Regulation 19 of the Company Secretaries Regulation, 1982**

- (1) The Council shall consider the report of the Disciplinary Committee and if in its opinion, a further enquiry is necessary, may cause such further enquiry to be made and a further report submitted by the Disciplinary Committee.
- (2) After considering such report or further report of the Disciplinary Committee, as the case may be, where the Council finds that the respondent is not guilty of any professional or other misconduct, it shall record its findings accordingly and direct that the proceedings shall be filed or the complaint shall be dismissed as the case may be.
- (3) After considering such report or further report of the Disciplinary Committee, as the case may be, where the Council finds that the respondent has been guilty of a professional or other misconduct, it shall record its findings accordingly and shall proceed in the manner as laid down in the succeeding sub- regulations.
- (4) Where the finding is that the member of the Institute has been guilty of a professional or other misconduct, the Council shall afford to the member an opportunity of being heard before orders are passed against him in the case. The Council after hearing the respondent, if he appears in person or after considering the representations, if any, made by him, pass such orders as it may think fit, as provided under Subsection (4) of Section 21.
- (5) The orders passed by the Council shall be communicated to the complainant and the respondent.

**Multidisciplinary Firm** – According to Regulation 165A of the Company Secretaries Regulations, 1982 inserted by the Company Secretaries (Amendment) Regulations, 2020- A member in practice may form multidisciplinary firm with the member of other professional bodies as prescribed under regulations 168A and 168B of the Company Secretaries Regulations, 1982, in accordance with the regulating guidelines of the Council for functioning and regulation of such multidisciplinary firm.

*(Cross Referencing: For more details students are advised to study Lesson 7 of the subject "Setting up of Business, Industrial & Labour Laws".)*

## UDIN

The Unique Document Identification Number as governed by the UDIN Guidelines shall verify the authenticity of various documents signed or certified by Company Secretaries in Practice. As per the UDIN Guidelines, a unique number for the identification of documents attested by Company Secretaries in Practice shall be generated at the time of signing the Certificate/ Report which shall mandatorily be mentioned in the Certificate / Report along with the CoP number. UDIN shall be generated at the time of signing of Reports, Returns, Certificates and Other Documents or can be generated seven days in advance of the date of such signing as above.

### What is Unique Document Identification Number (UDIN)?

UDIN is a 17 digit system generated number which is used to verify the authenticity of documents attested / certified by a Company Secretary in Practice. Quoting UDIN on certifications, w.r.t the professional services has been made mandatory w.e.f 1st October, 2019.

**Illustration:** A Certificate is signed on September 25, 2019. In such case, ideally the UDIN should be generated on September 25, 2019 but in exceptional cases, the UDIN may be generated 7 days in advance, i.e., any time during September 18, 2019 to September 25, 2019. Thereby, providing a window of advance seven days for UDIN generation.

The UDIN Guidelines have been issued by the Institute of Company Secretaries of India (“ICSI”) in order to-

- Enable the stakeholders to verify the authenticity of various documents certified by Company Secretaries in Practice;
- Prevent counterfeiting of various attestations / certifications;
- Provide ease of maintaining the Register of Attestation / Certification services rendered by practicing members;
- Ensure compliance of the Guidelines issued by the Institute w.r.t ceilings on the number of the various certification / attestation services that may be rendered by the practitioners;
- Auto-prefill details of Certification / Attestation services rendered by practicing members in of the form for renewal of Certificate of Practice.

It is mandatory to mention UDIN in the Reports, Returns, Certificates and Other documents along with the Certificate of Practice number. In case of e Form-MGT 7 as mentioned in paragraph 3 (b) (xiv) of the ICSI UDIN Guidelines, 2019 or in case of any other e-Form(s), the UDIN shall be mentioned by way of attachment in the optional attachment, unless any specific field for the same is provided by the law.

#### **Consequences of violation**

Any non-compliance with these Guidelines shall render the PCS liable for action under the Company Secretaries Act, 1980 read with First Schedule and Second Schedule to the Company Secretaries Act, 1980.

#### **eCSIN**

The Employee Company Secretary Identification Number as governed by the eCSIN Guidelines shall enable the Institute to identify the appointments and cessations of Company Secretaries. eCSIN is a system-generated unique number for identification of the Company Secretaries employed in a particular company which shall be generated by the Company Secretary at the time of employment as a Company Secretary (KMP or otherwise), as well as at the time of demitting office in any manner. The members in employment with an active membership shall register at the designated website. The eCSIN shall be an eighteen-digit system generated random unique alphanumeric number.

The Guidelines have been made mandatory by the Council of ICSI w.e.f. 1st October, 2019.

- These Guidelines shall be applicable to members entering into any employment irrespective of their designation including the engagement on contractual basis, retainership in the nature of employment, whether in India or Outside India.
- The member shall visit the website, <https://stimulate.icsi.edu/ecsin> or any other designated website as may be approved by the Council and register to create a login id and password by providing the membership number, date of birth, phone number, email id, Aadhaar Number issued by the Unique Identification Authority of India (UIDAI), Permanent Account Number (PAN) issued by The Income Tax Department and such other particulars as may be mandated by the Institute.
- eCSIN shall be generated by the member at the time of issuing the consent letter/acceptance letter or date of appointment and on the date of relieving from the organization.
- eCSIN generated at the time of issuing the consent letter/ acceptance letter /relieving letter shall be quoted along with the ICSI membership number on such letter by members entering into / relieving from any employment as a Company Secretary, KMP or otherwise.

#### **Consequences of violation**

Any non-compliance or defective compliance with these Guidelines shall render the member liable for action under the Company Secretaries Act, 1980 read with First and Second Schedule to the Company Secretaries Act, 1980.

eCSIN shall be mandatorily required at the time of renewal of membership of a member who is in employment to ensure the compliance of Regulation 3 of the Company Secretaries Regulations, 1982.

### ICSI (Guidelines for Advertisement by Company Secretaries), 2020

ICSI (Guidelines for Advertisement by Company Secretaries), 2020 became effective on and from 1st April, 2020 and shall be applicable to all advertisements by members of the Institute rendering any advisory, consultancy or representation services whether holding Certificate of Practice issued by the Council of the Institute or otherwise.

The following activities are permitted for a Company Secretary in Practice as means to advertise:

- (i) Display the scope of work on his/her own website.
- (ii) Creating a visual identity in compliance with the Guidelines for use of Individual Logo issued by the Council of ICSI.
- (iii) Display of Location and décor of the workplace, meeting rooms, etc.
- (iv) Display of Firm name, Logo or any other identity on Uniform, Office/s, office stationary& equipments/ material and providing Training to Staff.
- (v) Professional Updates and Write ups in any mode.
- (vi) Appearing on local radio or television.
- (vii) Giving speeches/lectures at any platform including Seminars, Conferences, training programmes, Workshops, Conventions, etc so organised by any forum.
- (viii) Holding professional seminars, conferences and workshops.
- (ix) Sponsoring any event (cultural, professional or otherwise) or helping with community programmes or doing voluntary work as a professional for charitable organizations.
- (x) Use of social media like Facebook, Instagram, Linkedin, Twitter, Youtube, WeChat, Telegram and Whatsapp or and other media of similar nature.

### Advertisement Restrictions

The Advertisement shall:

- (i) not be in violation of provisions of Company Secretaries Act, 1980;
- (ii) not be false or misleading;
- (iii) not claim superiority over any or all other Company Secretaries;
- (iv) not be indecent, sensational or otherwise of such nature which may bring disrepute to the profession or the Institute (ICSI);
- (v) not contain fabricated or false testimonials or endorsements concerning the Company Secretary;
- (vi) not refer the Company Secretaries in the terms such as “specialists” or “experts”;  
*Explanation:* The advertisements shall not be self-laudatory and not include the words such as “best,” “better” or “cheapest;”
- (vii) not represent that the quality of the professional services to be performed is greater than the quality of professional services performed by other professionals. Statements comparing one professional’s services to that of another are not allowed;

- (viii) not constitute a guarantee, warranty, or prediction regarding the outcome of any professional assignment;
- (ix) in no way indicate that the charging of a fee is contingent on outcome, or that no fee will be charged in the absence of the desired outcome;
- (x) not contain any reference to past successes or results which indicates a guarantee, warranty or prediction of result of future professional assignments. eg. We made M/s. Xxx win the case, Meet the masters;
- (xi) not be designed for “pleasing customers,” which might mislead or eventually harm customers or third parties;
- (xii) not contain any humorous slogans. E.g. Save Rs. Xxxx Come to us, we will tell you how.

The Company Secretary or a firm of Company Secretaries shall not list his/her service(s) on any aggregator website such as Sulekha, Olx, Urbanclap, JustDial, Quikr or any other aggregator of similar category.

The Company Secretary or a firm of Company Secretaries shall not join or project himself/herself/itself as a member of any networking association(s) or any Multi-Level Marketing Association(s) (“MLM”) or any other organisation which require his/her Company Secretary member to add other person as member of the organisation or which require him / her to render such services which are not specifically approved as mentioned in clause 1.2 of this guideline.

The Advertiser shall also include the following Statement of Responsibility and Disclaimer on the Website:  
**Disclaimer:** The contents or claims in the website issued by the advertiser are the sole and exclusive responsibility of the Advertiser. The Institute of Company Secretaries of India does not own any responsibility whatsoever for such contents or claims by the Advertiser.

#### Consequences of non-Compliance

Any non-compliance or violation of these Guidelines, as may be in force from time to time, in any manner whatsoever shall be deemed to be a professional misconduct and the concerned member shall be liable to disciplinary action under the Company Secretaries Act, 1980.

### PROFESSIONAL LIABILITIES

Though a Company Secretary is entitled to enjoy some rights and powers as laid down in the Companies Act, yet his position is not free from liabilities. The Companies Act and other laws related to company management provide the framework of certain liabilities for the Company Secretary.

Professional liabilities in context of Company Secretary means the Company Secretary shall be liable as the officer in default in context of the non-compliances with the provisions of statutes to which he/she is entrusted with.

A Company Secretary may or may not be officer bearer as director, but they will often be accounted for breach of duty in the same manner as Board of Directors. The Companies Act, 2013 specifies certain duties to Board of Directors and Company Secretary. Therefore, as an officer of the company, it is peculiar to work in interest of company and avoid situations leading to conflict of interest and always opt for independent judgment.

The Company Secretary has many statutory and administrative responsibilities, including filing returns and ensuring compliance with the Companies Act. Various sections in the Companies Act, 2013 provide that, where there is a failure of compliance, ‘an offence is committed by every officer of the company who is in default’. If the Company Secretary is the person with main responsibility for the task, he will be the person in default and liable to the fine/penalty.

For instance, default in filing annual return of company within sixty days from the date on which the annual general meeting is held, then **every officer who is in default** shall be liable to a penalty of ten thousand rupees and in case of continuing failure, with further penalty of one hundred rupees for each day during which such failure continues, subject to a maximum of two lakh rupees in case of a company and fifty thousand rupees in case of an officer who is in default. Further, if a company secretary in practice certifies the annual return otherwise than in conformity with the requirements of this section or the rules made thereunder, he shall be liable to a penalty of two lakh rupees.



### Statutory Liabilities

Statutory liabilities of the Company Secretary refer to those that the Company Secretary is legally bound to obey. The followings are some of the statutory liability of Company Secretaries:

- i) Maintenance of all records and documents of the company;
- ii) Arranging a statutory meetings of the company;
- iii) Issuing share certificates, dividend warrants, and bonus share certificates to the shareholders;
- iv) Preparation of minutes of various meetings and maintaining minute books, etc.

### CASE LAW

*In Re Saumil Dilip Mehta v. State of Maharashtra, High Court of Bombay, Writ Petition No. 548 OF 2001 dated October 18, 2001*, In this matter it was held that a director of a public limited company or private limited company can tender his resignation unilaterally and without filling in Form 32 and without sending notice to the Registrar of Companies. It is clear that the filling in of the said Form and the giving of due intimation and information to the Registrar of Companies is the duty of the company secretary and not of an individual director. The said letter has to be moved in the meeting of the directors of the company, it may be ordinary meeting or may be extraordinary or special meeting, as the case may be, and the board of directors have to take a decision - whether the Board is accepting his resignation or not. An intimation should be sent to such director and after such resolution is passed, the company secretary is under the obligation to comply with the legal formalities for giving a finishing touch to the resolution which has been passed in the said meeting of the board of directors. It is for the company secretary to fill in the forms as prescribed and to give due information and intimation to the ROC, as the law requires. Thereafter, it has to be so mentioned in all prescribed registers of the company, accounts and balance sheet of the company and thereafter the said fact is to be brought to the notice of the members of the company as early as possible and at the latest in annual general meeting.

### Contractual Liabilities

The Company Secretary has also to take care of his/her contractual liabilities. The Company Secretary has to enter into a service contracts with company or client. Therefore, the company secretary has some liabilities arising out of his service contract.

Below mentioned are some of the contractual liabilities of the Company Secretary:

- i) Liable for breaching or exceeding its authority;
- ii) Liable for disclosing secret information of the company to outsiders;
- iii) Liable for frauds etc.;
- iv) Liable to abide by all terms and conditions of the service contract;
- v) Protect the interest of the company.

### LESSON ROUND-UP

- The members of the Institute shall be divided into two classes designated respectively as Associates and Fellows.
- The member of the Institute is subject to the Disciplinary mechanism provided for under Chapter V of the Company Secretaries Act, 1980 (the Act).
- Professional misconduct in relation to members of the Institute is broadly structured under Schedule I and Schedule II of the Act.
- On receipt of any information or complaint along with the prescribed fee, the Director (Discipline) shall arrive at a prima facie opinion on the occurrence of the alleged misconduct.
- Where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the First Schedule, the matter shall be placed before the Board of Discipline.
- Where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the Second Schedule or in both the Schedules, the matter shall be placed the Disciplinary Committee.
- According to section 2(1)(c) of the Company Secretaries Act, 1980 “Company Secretary” means a person who is a member of the Institute of Company Secretaries of India.
- As per regulation 2(d) of the Company Secretaries Regulations, 1982 ‘certificate of practice’ means a certificate granted under these or earlier regulations entitling the holder to practise as a Company Secretary.
- The member of the Institute is subject to the Disciplinary mechanism provided for under Chapter V (Misconduct) of the Company Secretaries Act, 1980.

### GLOSSARY

**Associate Member:** The person whose name is entered in the register of members of the Institute of Company Secretaries of India shall be deemed to be the Associate Members

**Fellow Member:** A person, being an Associate who has been in continuous practice in India as a Company Secretary for at least five years and a person who has been an Associate for a continuous period of not less than five years and who possesses such qualifications or practical experience as the Council may prescribe with a view to ensuring that he has experience equivalent to the experience normally acquired as a result of continuous practice for a period of five years as a Company Secretary shall, on payment of fees, be entered in the Register as a Fellow. Such person shall be a Fellow member.

**PCS:** Practicing Company Secretary

**CoP/CP:** Certificate of Practice

### TEST YOURSELF

*(These are meant for recapitulation only. Answers to these questions are not to be submitted for evaluation).*

1. What is the Disciplinary Mechanism in case of misconduct of clause 5 of Part I of First Schedule of Company Secretaries Act, 1980?
2. Write short notes on:
  - (a) Board of Discipline
  - (b) Fellow member
  - (c) Appellate authority

3. What are the Consequences of Non-Compliance of ICSI (Guidelines for Advertisement by Company Secretaries), 2020?
4. Mr. Y is appointed as Company Secretary in ABC Public Limited. Mr. X (Managing Director) of the company would like to know from Mr. Y him about the duties and functions of Company Secretary as per statutory norms. Prepare pointers to describe the duties and functions of company secretary in order to brief Mr. X.
5. Ashima, who is a Practicing Company Secretary is specialized in the areas of Secretarial Audit. On account of receiving many assignments and unable to handle the work alone, she permits Rajiv, her friend who is a Company Secretary but not in practice and who is also a lawyer but not a member of any Bar Council, to conduct the Secretarial Audit and give reports on her behalf. There is no written agreement between Ashima and Rajiv to this effect; however, the oral understanding between both of them is that the fees received from the assignments shall be passed on to Rajiv and Ashima in equal proportion. Check the validity of this arrangement in light of the relevant provisions related to misconduct under the Company Secretaries Act, 1980.
6. A complaint of professional misconduct is filed with ICSI against Ravi, a Practicing Company Secretary. The Disciplinary Committee of ICSI is of the opinion that Ravi is guilty of professional misconduct mentioned in the Second Schedule to the Company Secretaries Act, 1980. The Committee, after affording Ravi an opportunity of being heard, ordered for removal of his name from Register permanently and also imposed penalty of Rs.10 lakh. Is the action of the Committee valid ? What actions can the Board of Discipline (a separate authority) take if it is of the opinion that a member is guilty of professional misconduct mentioned in the First Schedule to the Act, 1980 ?
7. Rama, a practicing company secretary, posted a request on whatsapp group of practicing company secretaries for providing secretarial audit in any company. She also made a similar request on whatsapp to her college friends. Has she committed professional misconduct?

#### LIST OF FURTHER READINGS

- Bare Act- The Companies Act, 2013
- The Company Secretary Act, 1980
- The Company Secretary Regulations, 1982
- ICSI Guidance Note on Code of Conduct for Company Secretaries
- ICSI FAQs on UDIN
- ICSI (Guidelines For Advertisement By Company Secretaries), 2020
- FAQs on ICSI (Guidelines for Advertisement by Company Secretaries), 2020

#### OTHER REFERENCES (Including Websites and Video Links)

- <https://www.mca.gov.in/content/mca/global/en/acts-rules/ebooks/acts.html?act=NTk2MQ==>
- [https://www.icsi.edu/media/webmodules/06072022\\_CS\\_A\\_PREFERRED\\_PROFESSIONAL.pdf](https://www.icsi.edu/media/webmodules/06072022_CS_A_PREFERRED_PROFESSIONAL.pdf)
- <https://www.icsi.edu/member/cs-practice/pcs-not-to-engage/>
- [https://www.icsi.edu/media/webmodules/ICSI\\_Book-1\\_CSAct1980IOPNov2020.pdf](https://www.icsi.edu/media/webmodules/ICSI_Book-1_CSAct1980IOPNov2020.pdf)
- [https://www.icsi.edu/media/webmodules/publications/Guidance\\_Note\\_CodeofConduct\\_CompanySecretaries.pdf](https://www.icsi.edu/media/webmodules/publications/Guidance_Note_CodeofConduct_CompanySecretaries.pdf)
- [https://stimulate.icsi.edu/udin/PDF/2021\\_12\\_06\\_FAQ.pdf](https://stimulate.icsi.edu/udin/PDF/2021_12_06_FAQ.pdf)
- [https://discipline.icsi.edu/Content/DP/documents/Legal\\_Frame\\_Procedure.pdf](https://discipline.icsi.edu/Content/DP/documents/Legal_Frame_Procedure.pdf)

