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INTERNATIONAL BAR ASSOCIATION – PRINCIPLES ON CONDUCT FOR THE LEGAL PROFESSION

AUTHORED BY - SIDDHI MUNDRA

ABSTRACT

The International Bar Association (IBA) – the global voice of the legal profession – is the foremost organisation for international legal practitioners, bar associations and law societies. Established in 1947, shortly after the creation of the United Nations, it was born out of the conviction that an organisation made up of the world’s bar associations could contribute to global stability and peace through the administration of justice.

The IBA has considerable expertise in providing assistance to the global legal community, and through its global membership it influences the development of international law reform and shapes the future of the legal profession throughout the world. From time to time, it had adopted a set of International Principles on Conduct for the Legal Profession based on different conventions which are discussed in detail in the paper.

1. INTRODUCTION

1.1 About IBA

International Bar Association — the global voice of the legal profession is a bar association of law societies and bar associations from worldwide, legal practitioners have also formed a major part of the IBA after 1970 when its membership was opened to them. Since then, the other members of the legal profession like advocates, members of the judiciary, government lawyers, solicitors & barristers, in-house lawyers, legal academicians and law students have become a part of IBA.¹ IBA was founded in 1947² in New York gathering by representatives of 34 national bar associations who were inspired by the vision of the United Nations (UN) and with the aim of supporting the establishment of law and administration of justice worldwide to contribute to

¹“International Respect”. Global Legal Post. 15 October 2012. Retrieved 14th march 2019 at 10:04 p.m.

² <https://elsa.org/international-bar-association/> Retrieved 14th march 2019 at 10:10 p.m.

global stability and peace. Presently, the membership runs to 80,000 individual lawyers, 190 bar associations of the world including law societies³ from around 170 countries.

Its headquarter is located in London, England with regional offices in three countries namely USA, South Korea and Brazil and the current president of IBA is Horacio Bernardes Neto who is a senior partner at law firm Motta Fernandes Advogados (MFA) in Brazil.

IBA has the objective to prompt the development of international law reform and to give a shape to the future of the legal profession throughout the world.

1.2 Structure

The IBA has broadly been grouped in 2 divisions: LPD & PPID.⁴ Under Both the divisions are various committees that are dedicated to specific practice areas which provide regular publications so that the members stay updated and have access to the latest information and leading experts.

- The Legal Practice Division (LPD) &

This division facilitates communication among its members for purpose of exchange of information and views among its members in regards to current practices, law and professional responsibilities concerned in the practice of the profession throughout the world by providing opportunity to all the members to be involved in the division and actively participate through its different sections, fora, committees, etc. in all possible areas of law like Corporate, Criminal, Maritime, Aviation, IPR, Antitrust, Tax, Insolvency, Agricultural, Technology, Environment, etc. and to undertake such related projects as may be approved from time to time by the division's council.⁵

- The Public and Professional Interest Division (PPID)

This Division of Public and Professional Interest undertakes a wide range of activities and projects and constitutes committees that specifically focus on the issues of professional interests throughout the world that are crucial for creating a distinction between any occupation and a

³ IBA - About the IBA. ibanet.org. Retrieved 14th March 2019 at 10:30 p.m.

⁴ IBA - About the IBA. ibanet.org. Retrieved 14th March 2019.

⁵ <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=CE14F6A1-84E5-4E85-B97B-822181F7BC45>
Retrieved 15th March 2019 at 2:30 p.m.

profession and makes the practice of law a profession and not merely an occupation for it requires a certain degree of intellectual skills and competence. The PPID also houses the International Bar Association's Human Rights Institute (IBAHRI) and the Bar Issues Commission (BIC).

1.3 Relationship with other International Organizations

Since 1947, The IBA has been holding a Special Consultative status before the UN General Assembly and the UN Economic and Social Council (ECOSOC). The IBA signed a memorandum of understanding with the OECD i.e. Organization for Economic Co-operation and Development in 2012. It is associated with the OECD and United Nations Office on Drugs and Crime (UNODC) for aiding in the "Anti-Corruption Strategy for the Legal Profession," which is an anti-corruption initiative for legal practitioners. The International Bar Association also partners with other organizations such as the International Federation of Accountants (IFAC) and the International organization of Employers (IOE).

2. Historical perspective of progression towards codification of International Principles

Progression towards development of a common code of professional ethics for the legal fraternity is only recent phenomenon as earlier the profession was self - regulated by individual codes of honour and there were differences in working of various associations responsible for the regulation of profession. The international Bar Association took the initiative of consolidating the core principles shared by lawyers worldwide and attempted for the first time to create a universal code of conduct for the lawyers. It adopted an international code of ethics in 1956.

The IBA International Principles is the 21st century version of a set of ethics for the legal profession first introduced more than 50 years ago, with the precursors to the latest edition as the 'IBA International Code of Ethics' (1956 and 1988).⁶

Proposal for counsels representing before the ICC

ICC was established in July 2002 in Rome, Italy after years and years of dialogue, that's why 2002 is a significant year in the progression of international law and in turn legal profession globally. As during the same time, the legal practice has grown by metes & bounds due to the

⁶ L. Hardenberg, Report on the Revision of the International Code of Ethics of the International Bar Association, 5 Int'l B.J. 124 (1974).

multidisciplinary areas of law lawyers are involved in, interjurisdictional activities and due to the globalization of the profession. And this gives all the more reasons for a need of standard common ethics and code of conduct for the international courts. But universally accepted norms couldn't be laid down because dealing with the contradictory nature of professional duties in common and civil law poses a serious challenge.

According to Rule 8 of the ICC RPE (i.e. the ICC Rules of Procedure and Evidence); a Professional code of conduct has to be drafted and adopted for the Counsels to be, which would be formulated on the basis of a proposal forwarded by the Registrar.⁷ And according to Rule 20(3) of ICC RPE can take the assistance of any for preparation of proposal with any independent organization representing counsels and legal associations. Thus, in consideration of these rules R. 8 and R. 20(3) the registrar of ICC consulted the International Bar Association was purpose of preparation of draft code to be put forth as proposal. It was drawn by IBA by incorporating its expertise of members from all over the globe through an extensive and rigorous efforts for a transparent and consultative process and was finally submitted before the director of Common Services at the ICC on 20th Feb. 2003 in The Hague.

The core principles reflected in the proposed code of IBA are based on the codes of International Criminal Tribunals of Yugoslavia and Rwanda. It consists of 5 sections namely: 1. Preliminary; 2. General Obligations of Counsel to Clients; 3. Conduct Before the Court; 4. Duty of Counsel to Others; and 5. Maintenance and Integrity of the Profession; which were agreed upon by all the parties but disputed in regards to the content of each heading.⁸

The IBA has always attempted to promote and encourage the practices that are best for legal practitioners globally. It was high time to overcome multijurisdictional differences and outline a set of principles that are best suited for practice of counsels before the ICC and serve the purpose of setting a universal standard.

⁷ Rule 8(1) ICC RPE

⁸Martha Walsh, The International Bar Association Proposal for a Code of Professional Conduct for Counsel before the ICC, 1 J. Int'l Crim. Just. 490 (2003).

3. International Principles on Conduct for the Legal Profession and their Analysis

The gathering pace of globalization and increase in cross-border transactions has led to the Code of Ethics being revisited and republished, resulting in 2011 publication of Principles on Conduct for the legal profession adopted at WARSAW.⁹

Developed for practicing lawyers across the globe, the publication provides lawyers with a framework to carry out their professional duties in a manner consistent with upholding the dignity and respect of the profession in relation to their clients. The aim, through fostering a climate of understanding about the national and international rules that govern the conduct of lawyers, is that the ideals and integrity of the legal profession will be promoted worldwide. A thorough process with input from representatives of the legal profession from all continents has produced these 10 core principles which should be common to all lawyers.

1. Independence

A lawyer is always supposed to maintain his/her independence and according to the principle, should be afforded the protection that such independence offers in providing the clients with an unbiased advice and individualistic representation. A lawyer should exercise an unbiased and independent professional judgment in advising a client, including the likelihood of success or failure of the client's case. Clients are entitled to expect independent, unbiased and candid advice, irrespective of whether or not the advice is to the client's liking.

Let's discuss certain circumstances or situations where there are chances of curtailment and impairment of a lawyer's independence in which a lawyer's independence. Such as: -

- involvement of the lawyer in a business transaction with a client without any proper disclosure and in absence of client's consent;
- where the lawyer becomes involved in a business, occupation or activity whilst acting for a client and such an interest takes or is likely to take precedence over the client's interest;
- knowingly acquiring an ownership, possessory or security interest adverse to the client unless otherwise authorised by law; and

⁹ https://www.ibanet.org/documents_on_the_regulation_of_the_legal_profession.aspx Retrieved 19th April 2019 at 9:45 p.m.

- holding or acquiring a financial interest in the subject matter of a case which the lawyer is conducting, whether or not before a court or administrative body, except, where authorised by law, for contingent fee agreements and liens to secure fees.

An advocate holds a unique place in the administration of Justice¹⁰ and the functioning of the Rule of Law so he should act for the client in a professional capacity which is free from control or interference by any other person. If a lawyer is not guaranteed independence and is subject to directions of others, especially those in power, it will be difficult for the lawyer fully to protect his clients. Therefore, the guarantee of a lawyer's independence is an essential requirement for the protection of citizens' rights in a democratic society.

It is the responsibility of the regulatory bodies to ensure full independence of practicing lawyers and also functioning of the profession in a manner that is in accordance with and flourishing of the Rule of Law. For that purpose, a proper review system should be in place to look - over the decisions of the Bars. There is an ongoing debate as to the extent to which governmental and legislative interference with the administration and conduct of the legal profession may be warranted.¹¹ Bar associations and legal practitioners should aim for encouraging the respective governments and regulatory bodies to avoid challenges with the Rule of Law and tackle any conflicts for preservation of true independence of the profession. For some jurisdictions, few types of activities and the handling of certain matters by members of the bar is considered incompatible with their independent practice; for others the same activities are not disputed at all. For example, employment of a lawyer admitted to the bar; by any other lawyer or a private party is prohibited in some, while it is allowed in other jurisdictions. Among those which permit the employment of an admitted lawyer, the privileges of a lawyer like protection of independence and confidentiality are acknowledged by some jurisdictions only in those cases where the client with whose relations are in question is his own client and not of his employer, while the others acknowledge the privilege and grant the protection also for the clients of the employer and the work performed for the employer. A universally accepted framework for determining proper conduct in the event of conflicting or incompatible rules has yet to be developed, although certain jurisdictions have adopted conflict of law principles to determine which rules of professional conduct apply in cross-border practice.

¹⁰ CEO & Vice chairman, Gujrat Maritime Board v. Patel Gandu Paba AIR 1999 Guj 34 para 9.

¹¹ www.ibanet.org/Document/Default.aspx?DocumentUid=. Last accessed 19/04/19 at 5:30 p.m.

2. Honesty, integrity and fairness

A lawyer should be maintaining the highest standards of honesty, integrity and fairness all the time towards its clients, towards the court, the colleagues and towards all those people who come into his/her professional contact.

A lawyer shall not knowingly make a false statement of fact or law in the course of representing a client or fail to correct a false statement of material fact or law previously made by the lawyer.¹² Lawyers have an obligation to be professional with clients, other parties and counsel, the courts, court personnel, and the public.

A lawyer who appears before or becomes otherwise engaged with a court or tribunal must comply with the rules applied by such court or tribunal.

3. Conflicts of interest

A lawyer should be careful enough to prevent creation of a situation in which the interests of the client conflict with the interests of the lawyer himself, or another lawyer in the same firm he is working, or any other of his/ his firm's clients. Exception to this rule is if such transaction arising conflict of interest is permitted by law, the rules/ code of professional conduct, or, the client himself authorizes.

Trust and confidence in the legal profession and the rule of law depends upon lawyers' loyalty to clients. Rules regarding conflicts of interest vary from jurisdiction to jurisdiction. Generally, a lawyer shall not represent a client if the representation involves a conflict of interest. A conflict of interest exists if the representation of one client will be directly adverse to another client.

In some jurisdictions, certain potentially conflicting situations may be permitted subject to proper disclosure to and, to the extent permitted by applicable law or ethics rules, consent by all parties involved, provided always that disclosure may be made without breaching confidentiality obligations. If a conflict becomes apparent only after the lawyer's work has commenced, some jurisdictions require the conflicted lawyer to withdraw from the case in its entirety and in respect of all clients concerned; others require withdrawal from representing one client only, but not all of them.

¹² Supra note 12.

4. Confidentiality/professional secrecy

Duty of confidentiality is more important in lawyering than any other profession as the lawyer acts as an alter ego of the client.¹³ A lawyer should always maintain confidentiality and secrecy regarding the cases and affairs of their present or former clients, as this affords trustworthy environment between the lawyer and client. This principle can be breached only when the law requires for public interest or when allowed by the law or code/ rules of professional conduct of a country.

The principles of confidentiality and professional secrecy involve two aspects. First, it is contractual, ethical and statutory duty of the lawyers to keep the secrets of their clients confidential. The statutory duty is in the form of privileged communication between attorney and client; and, there are also certain obligations on the part of the lawyers under the rules of professional conduct which obliges the relationship between client and counsel and keeps the interest of clients above all. Most jurisdictions respect and protect such confidentiality obligations by affording lawyer-client communications special protection. Thus, lawyers are exempted from testifying before the courts and other public authorities as to the information the lawyer has gathered from clients. Second, there are certain conspicuous situations where the lawyers are not granted the same protection as the principles of confidentiality and professional secrecy of attorney-client privilege cease to exist in full or in part. For example, the protection of confidentiality could not be afforded by the lawyers when assisting and abetting any illegal act of their clients. Some jurisdictions also allow or require a lawyer to reveal information relating to the representation of the client to the extent the lawyer reasonably believes it necessary to prevent reasonably certain crimes resulting, for example in death or substantial bodily harm, or to prevent the client from committing such a crime in furtherance of which the client has used or is using the lawyer's services.

The extent to which clients may waive the right to confidentiality is subject to differing rules in different jurisdictions. There is, however, no universally accepted solution for those cases where the rules contradict each other (for instance secrecy protection versus reporting obligation), although certain jurisdictions have adopted conflict of law principles to determine which rules of professional conduct apply in cross-border practice.

¹³YASHOMATI GHOSH, *Legal Ethics and the Profession of Law*, 33 (Edition 2014, Lexis Nexis Publications).

5. Clients' interest

For a lawyer his client's interests should be paramount, he should serve the client with fidelity, loyalty and diligence provided it is not intersecting with his duties towards the court, his colleagues and not superseding the interests of justice and observance of the law, and not against the ethics. They should deal with their clients free of the influence of any interest which may conflict with a client's best interests; and with commitment and dedication.

6. Lawyers' undertaking

Any agreement undertaken by a lawyer during the course of their practice has to be honoured in a timely fashion till the fulfillment of said agreement, or till such time that they are released or excused. A lawyer's undertaking is a personal promise, engagement, stipulation and responsibility, as well as a professional and legal obligation. A lawyer must therefore exercise extreme caution when giving and accepting undertakings. A lawyer may not give an undertaking on behalf of a client if they do not have a prior mandate,

7. Clients' freedom

Clients have the liberty to be represented by the lawyer of their wish and a lawyer shall respect such freedom of choice of a client. Until and unless the law prevents a lawyer in terms of his discharge of professional conduct that he is bound to follow he shall be free to reject or take any case as he feels fit. The client may issue an instruction or mandate to the lawyer, instructing the transfer of all papers and files to another lawyer. The lawyer is under an obligation to comply with the instruction or mandate, subject to any lawful right of retention or lien.

8. Property of clients and third parties.

If property of a client or any third party is being held by a lawyer in his trust, he shall keep it independent from that of his own assets or property and he shall keep an account of it by all fair means and honesty. Upon receiving funds or other property in which a client or third person has an interest, the lawyer should promptly notify the client or third person

9. Competence

Any work undertaken by a lawyer shall be done in a timely fashion and with competence. No such work shall be undertaken by a lawyer which he reasonably believes cannot be executed in the same manner. A lawyer is presumed to be knowledgeable, skilled, and capable in the practice

of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf.

10. Fees

If a matter requires a lawyer to charge for his intellectual labour and he believes that his charge is reasonable for the labour done, he can right fully do so. He shall not charge for a service which is unreasonable.

The basis for the claim of a lawyer to fees for services performed may be contractual or statutory. The lawyer shall make a clear and transparent arrangement on fees with the client jointly with the giving and taking of instructions. If permitted by law or applicable rules of professional conduct, such arrangement may contain an agreement on the limitation of the lawyer's liability. Where permitted, a lawyer may require the payment of reasonable deposits to cover the likely fees and expenses as a condition to commencing or continuing his or her work. As mentioned in Principle 7, the lawyer may have a lawful right of retention or lien if the client instructs the lawyer to transfer all the papers and files to another lawyer. If a lawyer engages or involves another lawyer to handle a matter, the responsibility for such other lawyer's fees and expenses shall be clarified among the client and the lawyers involved beforehand. In the absence of such clarification and depending on applicable law the lawyer so having involved another lawyer may be liable for the latter lawyer's fees and expenses.

4. IBA International Principles on Social Media Conduct for the Legal Profession

International principles on Social media Conduct for legal profession has a purpose behind all its principles that is its assistance to Bar association and attorney regulatory bodies globally which primarily aims at promotion of platforms such as social media conduct with in the professional legal career of a lawyer.

This satisfies the rules of professional responsibility which are relevant and are a standard approach to a civil process. The significance of such social media rules on conduct is that it would in turn promote justice administration, by engagement in public dealings and debates as social media provides vast access to resources and a great platform to reach larger audience. It opens to entry gate to discourses, discussion and research data as such real-time updates connecting all the

practitioners on same wavelength globally. Social media with such qualities comes with cons too. This reflects how social media platforms can be subject to misuse which would give rise to illegitimate disciplinary concerns and other illegal conducts. It important to keep in mind the professional responsibility while the use of social media platforms in a manner which is in sync with a lawyer & its duties and responsibilities at the same time emphasizing on the need of justice administration. Thus, the use of social media should be in compliance with the obligations on the part of lawyer under the codes of professional ethics, and consistent with the view of justice administration.

In February 2012, Legal Projects Team of IBA, the (IBA LPT) had produced a report related to social media connection to legal profession named “The Impact of Online Social Networking on the Legal Profession and Practice”, after a thorough survey and research by the members. And it was found out that maximum members were in favour of development of certain guidelines by the either the individual bar associations, or, the IBA itself relating to the use and impact of social media sites on the legal profession. Thus, the favor team and policy committee of Bar Issues Commission formed a Working Group¹⁴ for the formulation of a set of principles, governing the conduct of legal practitioners when using social networking sites. As we very well know that social media comes with its pros & cons; thus, poses both the opportunities and the challenges for lawyers. It is aimed to make bar associations and other regulatory organisations aware of the challenges that could be faced but at the same time not negatively progressing, rather promoting, and encouraging social media use in a professionally responsible manner. For the guidance of the bar associations, a set of six principles has been formulated on social media conduct for legal profession around which the bar associations and regulatory bodies should revolve to deal with the issues and outline their own rules.

1. Independence

A legal practise requires liberty of professional independence. It is pertinent to note that bar association and regulatory bodies does everything to ensure that lawyers remain devoid of pressures so that they are not bias in extending advice and representation. Networking has become easy because of social media platforms. Given, client’s judges and lawyers have access and agency because of such platform. Lawyers are required to prioritize profession over personal

¹⁴ Working Group consisted of the following member: Anurag Bana (IBA LPT, Working Group Chair); Máximo Luis Bomchil (Argentina); Simone Cuomo (CCBE, Europe); Alice Hawker (IBA LPT); Robert Heslett (England); Tatsu Katayama (Japan); and Steven M Richman (USA).

engagements on social media as entering into an online relationship can cause professional implications for it being public. It is important for a lawyer to keep in mind the implication of any content or comments being posted online as it reflects the same professional liberty that is required in practise.

2. Integrity

Every public dealing on social media or offline that a lawyer engages in is expected to have highest order of integrity.

Bar associations and regulatory bodies should stimulate and encourage their members to understand the impact that social media creates and implications of the same on one's reputation. Online actions spread in seconds and are impossible to be controlled or monitored for example, if an online post which is malicious in nature can impair a lawyer's professional reputation inevitably because it would keep trending leading to more people reading and wide scale sharing in a span of time over the Internet, at the same time, it may become difficult to repair the damage so done to the practitioner's reputation and standing. Thus, malicious, defamatory, alligators, accusatory comments and posts and lead to inevitable and irreversible damage to a practitioner's image. This may amount to lack of confidence even if the standing context remains private.

3. Responsibility

To understand use: Every social media user has a specific setting on a website and this mostly applies incases of all website. It is not necessary that just by adoption of a privacy setting accounts are deem to be protected and are safe. In addition, legal professional should keep in mind the complication of a every post they do and at the same time due to structural problems monitoring or trending of a post cannot be stopped. Result of which a practitioner heavily pays for the damage that he suffers. Therefore, mindful usage of social media is necessary. It should be reminded to professional that any viral information on social media could be coloured and used by either of the parties in litigation.

To clarify use: Social media is used for quick dissemination of short messages, thus the right tone of context becomes difficult to convey. Legal practitioners should be careful as they ought not to do or say something online that they wouldn't do or say in front of a crowd.¹⁵ They need

¹⁵ <https://www.iadclaw.org/events/webinar-social-media-policies-for-law-firms-why-you-need-them-and-what->
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to be regularly reminded that incorrect use or abuse of online networking sites can open gates to any sort of discrimination and harassment claims or infringement of privacy allegations as well as quick exposure to claims for defamation, libel, and other torts. There are rules and codes, rather say restrictions applicable for practicing promotion, advertising or solicitation which also affect social media use. Thus, those rules should also be adhered to online.

Conflicts of interest: Conflicts of interest are not always limited to client's representation or part's interest. It doesn't necessarily have to be ethical conflicts; social media can also give rise to political issues with clients if they take up a position or post something that is contrary to the standing of their clients. Thus, Lawyers need to be sensitive and vigilant while using social media.

4. Confidentiality

The relationship between a client and a lawyer is structured on pillars of trust and faith.¹⁶ So it is important that the public perceives that the lawyers can be trusted with private and confidential information. Lawyers must keep in mind and be reminded by the regulatory bodies from time to time that the platform provided by the social media is not a proper one for dealing with client data or other confidential or any secret information unless they believe and are capable of protecting the information so received in compliance with their ethico-legal and professional obligations. Principle of confidentiality must be taken care of even more when using social media as any minute sharing of information can breach the privacy of client. For instance, geographical location can indicate towards professional connection with a client who might not want to be publicized as being involved with the lawyer and gotten into any scenario that needs legal assistance. Posting of any hypothetical facts or anonymous legal questions may indirectly reveal confidential information.

5. Policy

When a lawyer is opens himself to the use of social media, it is important that he must be given clear instructions and proper guidance on its appropriate use by his employers for which Bar associations and regulatory bodies can direct law firms incorporate in letters of employment coherent policies and guidelines on social media conduct of lawyers; supplemented by induction

they-should-contain/ last accessed on 19/04/19 at 6:30 p.m.

¹⁶ YASHOMATI GHOSH, Legal Ethics and the Profession of Law, 32 (Edition 2014, Lexis Nexis Publications).

seminars and timely trainings to educate employees on new and emerging risks in this area. Bar associations and regulatory bodies should specifically advocate for clear parameters by law firms on whether and how employees are allowed to use social media on the firm's behalf or otherwise in a work-related capacity. An effective social media policy will ensure that firms project a consistent, trustworthy and dignified image online, as well as help comply with laws and regulations pertaining to them.

