

# U4 Expert Answer



## Integrity issues related to lawyers and law firms

### Query

**Please provide us with an overview of integrity issues related to lawyers and law firms**

### Purpose

I need advice on how to research and select a law firm that I can work with and recommend to others.

### Content

1. The role of lawyers
2. Factors that create integrity risks
3. Ethics and integrity safeguards
4. References

### Summary

There are four core principles regarding integrity that guide legal practice: independence, confidentiality, avoiding conflicts of interest, and maintaining professional integrity. A variety of issues have emerged that risk undermining the integrity of the legal profession. These ethical challenges relate to characteristics that are particular to legal practice, such as: attorney-client privilege, the role of lawyers as intermediaries, outsourcing legal counsel, and the globalised nature of contemporary law firms.

The factors that create integrity risks relate to the pressure and incentive some lawyers and law firms have in turning a profit for their clients; the undermining of their independence; the potential for abuse of attorney-client privilege; weak industry-wide anti-corruption standards; and weak internal policies and controls within law firms. Some lawyers also lack awareness and knowledge of anti-corruption provisions.

There are a variety of ethical and integrity safeguards – both voluntary and compulsory – that can guide the legal profession through these risks. While there are different regulatory approaches, most jurisdictions will apply a combination of government and industry regulations that sets integrity safeguards. These include disclosure requirements, codes of conduct, due diligence procedures, conflict of interest provisions and anti-corruption training. Assessing the existence and extent of these measures will also enable practitioners to ascertain whether a law firm is sufficiently protected against corruption.

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## 1 The role of lawyers

The legal profession plays an important role that is fundamental to any democracy. The right to legal counsel and representation is enshrined and protected by international law (World Bank 2012). Like all individuals and professionals, it is obvious that lawyers should not engage in corrupt activities. However, as defenders of justice, their involvement in corruption can be particularly consequential (Arnold and Porter 2013).

The perception that lawyers and law firms are involved in corruption has become relatively widespread. According to a joint survey by the International Bar Association (IBA), the Organisation for Economic Cooperation and Development (OECD) and the UN Office on Drugs and Crime (UNODC), of 642 legal professionals from 95 jurisdictions, roughly half consider corruption to be an issue in the legal profession both in their home and neighbouring jurisdictions (IBA, OECD, UNODC 2010).

### Common principles of integrity

In order to understand the factors that threaten the integrity of legal professions and give rise to corrupt activities, one must first understand the core principles of integrity that are fundamental to legal practice.

While regulatory and organisational frameworks vary significantly from jurisdiction to jurisdiction, most experts agree on the standard principles of integrity that underline the legal profession. The IBA has created a list of 10 [International Principles on Conduct for the Legal Profession](#). These include:

- Independence. A lawyer shall exercise independent, unbiased professional judgement when advising a client, including in relation to the likelihood of success of the client's case (IBA 2011). This independence is both protective (a lawyer should be protected from outside pressures that impair professional judgement) and self-disciplinary (lawyers should not impair their professional judgement by pursuing personal interests or succumbing to outside pressures) (Fasterling 2009).
- Confidentiality. A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct (IBA 2011).
- Conflicts of interest. A lawyer shall not assume a position in which a client's interests conflict with those of the lawyer, another lawyer in the same firm, or another client, unless otherwise permitted by law, applicable rules of professional conduct, or, if permitted, with the client's authorisation (IBA 2011).
- Professional integrity. A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards their clients, the court, colleagues and all those with whom the lawyer comes into professional contact (IBA 2011).

### Characteristics of legal practice

It is argued that there are certain characteristics that are unique to the legal profession that put lawyers at risk of involvement in corruption.

#### *Attorney-client privilege*

This privilege exists to "protect a client's ability to access the justice system by encouraging complete disclosure to legal advisers without the fear that those communications may prejudice the client in the future" (Arnold and Porter 2013). It is seen as central to the legal profession and is also one of the IBA's common principles. However, this privilege also means that lawyers can become aware of their clients' illegal and corrupt activities. In the absence of disclosure requirements that make it mandatory for lawyers to report corrupt practices (and, in some cases, illegal to inform the client of their suspicion), corrupt practices may, in some cases, go unpunished.

#### *Lawyers as intermediaries*

Another feature is the role of lawyers as intermediaries. For example, a client may request lawyers to set up a legal structure that appears lawful, but which is actually used to launder money (Ethic Intelligence 2012). The relationship to public authorities can also give rise to concern. In France, for example, a lawyer was disciplined for having offered a bribe – on the client's behalf – to an official of the tax administration to obtain access to his client's file in order to clear it (Arnold and Porter 2013).

The scope of this problem is significant. More than a fifth of respondents to the above-mentioned survey of legal professionals in 2010 said they have or may have been approached to act as an agent or middleman in a transaction that could reasonably be suspected to involve corruption (IBA, OECD, UNODC 2010). Nearly

a third said a legal professional they know has been involved in such a transaction (IBA, OECD, UNODC 2010).

### *Outsourcing legal advice*

In-house legal counsel normally has one client and acts as the guardian of risk in the business (Legal Source 360 2011). In the context of changing laws, in-house lawyers often outsource more complex or specialist matters to an external firm (Legal Source 360 2011). However, many in-house lawyers are growing concerned about the advice sought from external legal counsel. In a 2013 follow-up survey to the 2010 survey, the IBA, OECD and UNODC surveyed 63 senior in-house legal and compliance counsels in 20 different countries. The results revealed that more than 80% of respondents consider external lawyers pose a certain level of risk of bribery and corruption (IBA, OECD, UNODC 2013).

### *Globalised nature of law firms*

As law firms grow in size and cross national borders they face challenges as well as opportunities, as lawyers become exposed to a variety of jurisdictions. Experts argue that many practical and professional problems arise in globalised legal practices, in particular in terms of ethics (Etherington and Lee 2007). As there are a variety of regulations and regulatory approaches internationally, difficulties can arise when trying to determine the applicability of different laws (Griffiths-Baker and Moore 2012). At global firms, lawyers have to be aware of and comply with the different rules in every country (IBA 2011). However, these different rules can be contradictory and create confusion and uncertainty amongst lawyers and law firms (Griffiths-Baker and Moore 2012).

## 2 Factors that create integrity risks

There are a variety of factors that give rise to corrupt activities and create an environment conducive to corruption.

### **Lack of anti-corruption awareness**

One of the major problems cited by studies on the matter is the lack of awareness of a) the international anti-corruption provisions among legal professionals and b) the risk that lawyers could be complicit in corrupt transactions.

Nearly 40% of respondents of the above-mentioned 2010 IBA-OECD-UNODC survey had never heard of the major international instruments that make up the international anti-corruption regulatory framework, such as the OECD Anti-Bribery Convention and the UN Convention Against Corruption (IBA, OECD, UNODC 2010). The 2013 survey similarly showed that many clients are not confident in their lawyers' anti-corruption knowledge and expect a higher degree of anti-corruption knowledge and awareness (IBA, OECD, UNODC 2013). This can create a high level of risk for corruption as lawyers may not be aware of international obligations on issues such as foreign bribery of public officials, and clients are thus left ill-advised.

In the past, this lack of awareness has also been used as a defence against corruption charges. For example, in the USA, a lawyer was charged with conspiracy to violate the Foreign Corrupt Practices Act (FCPA). He allegedly paid and authorised the payment of bribes to officials in Azerbaijan and drafted the legal documents used for the payments (Arnold and Porter 2013). The lawyer was charged according to the FCPA as it existed before amendments in 1998, so he was able to defend himself by arguing he had not been informed that the FCPA applied to his conduct as a non-resident foreign national (Arnold and Porter 2013).

In particular, it appears that anti-corruption knowledge is not trickling down to the more junior and younger employees (IBA, OECD, UNODC 2010). Partners showed a level of awareness more than five times higher than associates, indicating that anti-corruption information within firms may not be disseminated to the firm's lower ranks (IBA, OECD, UNODC 2010).

### **Economic incentive**

Another factor arguably conducive to corruption concerns economic incentives. Nicola Bonucci, Chair of the IBA Anti-Corruption Committee, explains "in today's difficult economic climate, some law firms may tend to cross legal lines to obtain business" (Ethics Intelligence 2012). He argues that these benefits are only short-term, however.

Fasterling (2009) argues that in the current climate there is a great amount of competition both within and between law firms for lucrative clients. This can conflict with the core values of legal ethics (Fasterling 2009). The 2010 IBA-OECD-UNODC survey reveals that nearly 30% of respondents claim they have lost business to corrupt law firms or individuals who have

engaged in international bribery and corruption (IBA, OECD, UNODC 2010). This appears to be a particular problem for emerging economies. The survey asked participants whether refusing to pay bribes might reduce the chances of foreign companies or investors conducting business in their country. Between 60-80% of respondents in emerging economies such as Russia, India, Mexico, China, Ukraine and Nigeria responded “yes”. In contrast, between 85-100% of respondents from more advanced economies such as Switzerland, Canada, Norway, Hong Kong, Denmark, Spain, UK and USA said no (IBA, OECD, UNODC 2010).

Some argue that the interests of clients and lawyers have become too closely aligned in contemporary commercial legal services (Griffiths-Baker and Moore 2012). Lawyers are under pressure to create top value for clients (Fasterling 2009). It is argued that this pressure may lead lawyers to find ways to circumvent laws and standards. For example, experts suggest that the advice sought by companies from commercial lawyers often relates to restrictive market practices (Mescher 2008). Mescher (2009) also argues that often both in-house and external lawyers give counsel to commercial clients that only takes into consideration the client’s commercial interests rather than the broader foundation of professional ethics that one expects and requires from lawyers.

## Compromised independence

Another component of the ethical challenges facing the legal profession is when the independence of lawyers – one of the key common principles of legal practice – is compromised. Lack of independence may put lawyers at risk of undue influence and cause them to act in a way that is not ethically sound.

The IBA provides a list of scenarios in which a lawyer’s independence will or may be at risk or impaired (IBA 2011):

- when the lawyer is involved in a business transaction with a client without proper disclosure and client consent
- when the lawyer is involved in a business occupation or activity whilst acting for a client and such an interest may take precedence over the client’s interest
- when the lawyer knowingly acquires an ownership, possessory or security interest adverse to the client (except where authorised by law)

- when the lawyer holds or acquires a financial interest in the subject matter of a case which the lawyer is conducting (except where authorised by law)

The risks to the independence of lawyers go beyond the individual actions of lawyers. If the administration of the legal profession is affected by undue or improper influence, whether from the government, the courts or otherwise, this can also undermine the independence of legal professionals (IBA 2011).

## Relationship to judiciary

The proximity of some law firms to the judiciary and public authorities is also recognised as a threat to both the independence of lawyers and of the judicial system. The results from the 2013 IBA-OECD-UNODC survey reveal that clients are concerned about how external legal professionals foster their relationships with judges, courts, prosecutorial services and court clerks, particularly in cases where the client is being represented before these authorities (IBA, OECD, UNODC 2013).

Some respondents expressed concerns about the lobbying and quasi-lobbying practices of their legal advisers (IBA, OECD, UNODC 2013). For example, in the Global Corruption Report: Judiciary, a case from the US reveals that in many states plaintiffs’ firms make contributions of more than US\$200,000 to candidates in judicial races (Schotland 2007). This may pose a risk to both the independence of the judiciary and to the integrity of the law firms in question.

The IBA-OECD-UNODC survey from 2013 also reveals that the risk of close proximity between lawyers and public authorities/judiciary appears to be particularly high in the energy/natural resources, pharmaceuticals and healthcare, technology and communications sectors (IBA, OECD, UNODC 2013).

## Misuse of attorney-client privilege

Attorney-client privilege is seen as a cornerstone of legal practice. However, in the context of corruption scandals, there is an ongoing debate about the extent of this privilege and whether it assists in covering up corrupt activities. In recent years, there have been some regulatory moves towards curbing this privilege when related to illegal/corrupt activity. There are now many jurisdictions with legal obligations relevant to the reporting of corruption. Most of these relate to anti-money laundering legislation (AML) and corporate

governance laws. In the European system, the Third AML Directive from 2005 requires financial operators including lawyers to report any suspicious or unusual transactions or activities, and also includes offenses such as “tipping off” a client when investigations are underway (Arnold and Porter 2013). Aside from AML regulations, the US has strong reporting obligations under the Sarbanes-Oxley Act of 2002 that applies to public companies trading on a US exchange (Arnold and Porter 2013).

However, in some countries such regulations are absent as they are seen to greatly restrict attorney-client privilege. In fact, some jurisdictions actually make this kind of reporting a criminal offence, or a breach of professional duties where it relates to a client, such as in Argentina (Arnold and Porter 2013). In Brazil, local legislation makes any party breaching professional secrecy criminally liable, and violations can lead to fines and administrative sanctions, including the loss of practicing licenses (Arnold and Porter 2013). Even within the EU, in member states such as France, Italy, Germany and Bulgaria, there have been some conflicts between the Third AML Directive and national laws that establish professional duties of secrecy (Arnold and Porter 2013).

Many bar associations are also opposed in principle to the scope of legislation that infringes on the attorney-client privilege (IBA 2011). However, it is generally agreed that a lawyer cannot invoke confidentiality in circumstances where the lawyer acts as an accomplice to a crime (IBA 2011).

### Weak standards within the industry

In addition to the “hard law” set by legislation, bar associations can also play a significant role in combatting corruption. In many jurisdictions, membership in the local bar association is mandatory, which means that lawyers wishing to practice in the jurisdiction must adhere to the association’s guidelines on professional behaviour (Arnold and Porter 2013).

However, only 43% of respondents in the 2010 IBA-OECD-UNODC survey realised that their bar associations provide some kind of anti-corruption guidance for legal practitioners (IBA, OECD, UNODC 2010). Of these, only a third said that such guidance specifically addresses the issue of international corruption (IBA, OECD, UNODC 2010). In response, the IBA created an [anti-corruption guide for bar associations](#) in 2013 with a variety of guidelines on how

bar associations can improve their anti-corruption practices.

### Weak internal policies and controls

In addition to the absence of national legislation and bar association standards, weak internal policies and controls within law firms can pose a significant risk to the integrity of law firms. Without these controls, the lack of awareness of anti-corruption legislation and the pressure to produce profits cannot adequately be addressed.

Here the results of the two surveys by the IBA, OECD and the UNODC provide revealing snapshots of the situation in many law firms. Less than 40% of respondents said anti-corruption was a priority at their law firm and almost a third of respondents said that their firms do not have a clear and specific anti-corruption policy (IBA, OECD, UNODC 2010). Similarly, 65% of respondents admitted that they do not have a policy for monitoring the anti-corruption compliance of existing legal counsel (IBA, OECD, UNODC 2013).

Clients also appear to fall short in carrying out due diligence of external legal counsel. More than two-thirds of respondents said their law firms had not been subject to anti-corruption or anti-money laundering due diligence conducted by foreign clients (IBA, OECD, UNODC 2010). Instead, results also show that much of the legal profession still largely relies on networks when seeking to hire external legal counsel, with nearly 80% of respondents relying on recommendations made by colleagues and 63.5% on recommendations made by other external counsel (IBA, OECD, UNODC 2013). Without proper vetting and due diligence mechanisms, clients are unable to assess the existence of conflicts of interest, undue influence and anti-corruption awareness, which leaves them at risk.

## 3 Ethics and integrity safeguards

There are a variety of approaches for safeguarding the integrity of the legal profession. While the approaches vary in their obligations and nature, their assessment can provide practitioners a way to ascertain the extent to which a law firm in a given jurisdiction is sufficiently protected from corrupt activity.

## Emerging trends

The literature reveals that the landscape has changed in recent years and there is greater emphasis on the importance of ethics and integrity in the legal profession. Businesses and governments are increasingly assessing it as they would any other sector that is exposed to corruption.

The IBA-OECD-UNODC survey from 2013 noted some improvements in internal controls over the past few years. For example, almost two-thirds of clients who responded to the survey reported an increase in pre-retention due diligence during the last five years, while almost half revealed an increase in monitoring due diligence (IBA, OECD, UNODC 2013).

Experts note that clients have been the driving force in bringing about these improvements. By increasing their demands and scrutiny, clients have helped raise standards of anti-corruption compliance (IBA, OECD, UNODC 2013).

The 2010 IBA-OECD-UNODC survey also revealed that the issue of tackling corruption is a priority for legal professionals in low and mid-income countries. According to the results, dealing with corruption and foreign bribery is a top priority for law firms in Africa, Latin America and the Middle East – more than in any other regions (IBA, OECD, UNODC 2010). Similarly, the respondents from these three regions also had the highest amount of positive responses to the question of whether the respondent's law firm has a clear and specific anti-corruption policy (IBA OECD UNODC 2010).

## Holding the legal profession to account using government safeguards

As mentioned, the regulatory framework surrounding the legal profession is incredibly varied. In certain jurisdictions, the bars have regulatory autonomy, while in others legal practice is administered by the judicial branch of government and/or governmental bodies or regulatory agencies (IBA 2011). There is also disagreement regarding the extent to which the government should interfere with the administration and conduct of the legal profession. Many agree that a balance between government regulations and self-regulatory systems is necessary (OECD 2007).

In any case, regulations, whether issued by the government or the legal profession, generally cover (OECD 2007):

- qualitative entry restrictions
- compulsory membership to a professional body
- reserved tasks: legal advice and exclusive rights to appear in court coupled with compulsory legal representation
- identification of appropriate standards of professional conduct and the encouragement of adherence to those standards
- investigation of complaints and the administration of discipline with respect to legal practitioners, including expulsion from legal practice

These national regulations are important for assessing whether a) the legal profession can be held to account and b) what standards are in place to safeguard integrity within the profession.

Regarding the regulation of corrupt activities, in many jurisdictions even where the lawyer is not directly responsible for the act of corruption but facilitates or otherwise provides assistance for a corrupt act, the lawyer can be liable as an accessory or accomplice (Arnold and Porter 2013). In the majority of countries surveyed by Arnold and Porter (2013) bar associations set codes of conduct that prohibit lawyers from infringing the law or facilitating an infringement of the law. In Mexico and the USA bar associations expressly forbid lawyers from engaging in bribery and corruption (Arnold and Porter 2013).

Moreover, in the context of multinational business transactions and globalised firms operating in a variety of jurisdictions, every lawyer is called upon to observe applicable rules of professional conduct in both home and host jurisdictions when engaging in the practice of law outside the jurisdiction in which the lawyer is admitted to practice (IBA 2011). Therefore international law firms are especially pressed to examine whether the entire organisation complies with anti-corruption rules in every jurisdiction in which it is established or engaged (IBA 2011).

## Holding the legal profession to account using industry safeguards

In addition to setting regulations on corrupt behaviour, bar associations (and similar bodies) also play an important role in setting standards on integrity and good ethical practice. In the majority of cases, membership of the local bar association is mandatory, therefore lawyers that wish to practice must adhere to the rules set out in the code (Arnold and Porter 2013). The bar association can therefore also play a key role in regulating – and thereby reducing – corrupt behaviour. The standards set by local bar associations are also an important tool for assessing whether corruption risks are being effectively addressed and mitigated.

In addition to adhering to industry standards, experts agree that law firms should have internal controls and compliance systems that are adapted to the size of the company, type of operation, country of operation and the other countries they are associated with (Ethic Intelligence 2012). Clients can also do their part by carrying out due diligence and reviewing whether the law firm in question has the necessary internal safeguards and policies in place.

### Codes of conduct

In 2011, the IBA set up a generally accepted framework to serve as a basis on which codes of conduct may be established by the appropriate authorities for lawyers (IBA 2011). In addition to the principles of independence, confidentiality, conflicts of interest and professional integrity, the [code](#) also covers: clients' interest, lawyers' undertaking, clients' freedom, property of clients and third parties, competence, and fees. While the IBA's principles are not meant to replace or limit a lawyer's obligation under applicable laws or rules of professional conduct, they are meant to provide a basis for lawyers within different jurisdictions (IBA 2011). The existence of a code of conduct within a law firm similar to the IBA code is therefore a good indication of adequate internal standards for tackling corruption and promoting integrity.

Examining the local bar association's code of conduct is another good way of measuring the respective legal industry's anti-corruption safeguards. The IBA also maintains that bar associations should adhere to a rigorous code of conduct. The IBA recommends that bar associations consider reviewing their codes of conduct to reflect their condemnation of lawyers who engage in corrupt practices (IBA 2013).

### Due diligence

Effective and thorough due diligence can also serve as a useful way to detect and prevent engagement in corrupt activities. This due diligence is mutual: it involves due diligence on the part of clients when choosing law firms and from the law firms when they agree to work with clients.

Experts argue that due diligence carried out by law firms is especially relevant when it comes to the role lawyers can play as intermediaries. Due diligence is particularly important when lawyers are required to participate more actively, rather than simply provide legal advice (Ethic Intelligence 2012). In other words, lawyers must distinguish between their role as advisors and the more active role of setting up legal structures, for example, which in the worst case could be used for illegal activities (Ethic Intelligence 2012).

Given the rising anti-corruption expectations among clients, experts note that legal professionals must not only develop the ability to exercise due diligence on prospective clients, but also learn to embed the client's standards and policies in theirs (IBA, OECD, UNODC 2013).

The IBA-OECD-UNODC 2013 survey lists a variety of methods firms use when carrying out due diligence on external legal counsel (in order of the percentage of respondents who selected the method):

- requiring a special agreement to abide by your own company's anti-corruption principles
- inserting an anti-corruption clause in the retainer agreement
- requesting an ethics code containing anti-corruption provisions
- requesting a specific anti-corruption policy
- requesting a gifts and hospitality policy

The IBA-OECD-UNODC 2013 survey also lists a variety of methods that clients use to supervise their legal counsel:

- performing regular background checks
- requesting periodic certification of compliance with domestic and extra-territorial legislation
- requesting certification of training in anti-corruption matters

- period-based assessments carried out by liaison lawyers or general counsel

### *Conflict of interest policies*

Rules regarding conflicts of interest vary from jurisdiction to jurisdiction. The definition of what constitutes a conflict also differs. Generally, a lawyer should not represent a client if the representation involves a conflict of interest (IBA 2011).

The IBA generally defines a conflict of interest as a situation in which the representation of one client will be directly adverse to another client; or there is a significant risk that the representation of one or more clients will be limited by the lawyer's responsibilities to another client, a former client, a third person or by the lawyer's personal interests (IBA 2011). Moreover, a lawyer must not exercise any undue influence intended to benefit the lawyer in preference to a client (IBA 2011).

However, in some jurisdictions, certain potentially conflicting situations may be permitted subject to proper disclosure and, to the extent permitted by applicable law or ethics rules, consent by all parties involved – providing disclosure is possible without breaching confidentiality obligations (IBA 2011). The differences in national rules on conflicts of interest need to be taken into account in cross-border legal practice. A universally accepted framework for determining proper conduct in the event of conflicting or incompatible rules has yet to be developed (IBA 2011). Instead, some jurisdictions have started to go for a “choice-of-law” approach that gives parties the ability to determine which professional conduct applies in cross-border practice (Griffiths-Baker and Moore 2012). However, this continues to be an area that is widely discussed (Griffiths-Baker and Moore 2012).

### *Anti-corruption training*

Anti-corruption training within the legal profession is of particular importance considering the results of the IBA-OECD-UNODC 2010 and 2013 surveys, which revealed a significant lack of anti-corruption knowledge and awareness among legal professionals. As identified by the 2010 survey, anti-corruption knowledge and awareness does not appear to trickle down to junior staff.

Training and education are therefore seen as key safeguards against corrupt practices. This is noted in the IBA's guide for bar associations. It states that educating legal professionals about the risks of

corruption and ways of combating it must be at the heart of every bar association's anti-corruption strategy (IBA 2013). This responsibility, however, also rests with law firms directly as they too are called on by the IBA, OECD and UNODC to undertake awareness-raising and training activities (IBA, OECD, UNODC 2010). The presence of active training and education measures is therefore also a valid way of assessing a firm's integrity safeguards.

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