

ICCA Congress 2010

International Code of Ethics for Lawyers

Practicing Before International Arbitral Tribunals

Applicable Ethics Rules

Rule 1. This Code shall prevail over national ethics or other standards for the practice of law before international arbitral tribunals. (CCBE Rule 1.4 and 1.5 Field of application *Ratione Personae/Ratione Materia*; See also IBA Int'l Code of Ethics Rule 1)]

- *This Code provides a guide to international arbitration practitioners as to the ethical conduct expected in international arbitration, aiming to ensure greater fairness in arbitral proceedings. Furthermore, to the extent conflicts between different State legal systems arise in international arbitration, these rules aim to mitigate such conflicts by providing a consensus as to the appropriate ethical rules drawn from the differing practices of civil and common law states and the exigencies of international arbitration.*

General Principles

Independence

Rule 2. In the discharge of their professional duties, lawyers shall preserve their independence from their client. (IBA Int'l Code of Ethics Rule 3; CCBE General Principle 2.1 - Independence)

- *The meaning of “independence” differs between civil law practice and American common law practice. This rule reflects an understanding of independence more closely related to that held in civil law jurisdictions than in the U.S. In both practices, a lawyer’s representation of a client should be motivated by concern for the client and the interests of justice, rather than personal motives. However in U.S. practice, independence connotes a general separation of the legal profession from government, and contemplates that lawyers will have almost total loyalty to the client and the client’s interests. By contrast, in civil law systems, lawyers are regarded as “quasi-government*

agents,” and independence refers more to a lawyer’s relationship to the client and other attorneys. This difference becomes evident by comparing the preambles of two prominent ethical codes: the Preamble to the ABA Model Rules of Professional Conduct, which emphasizes a lawyer’s duty to his or her client, and the Preamble to the CCBE, which refers to a lawyer’s obligations to society.

An example of this different approach can be drawn from Rule 2.1.1 of the CCBE, upon which this rule is based. That Rule states that a lawyer should “be careful not to compromise his or her professional standards in order to please the client, the court or third parties.” Although U.S. practice is not directly in conflict with this rule, presumably U.S. practice would not hold as strict a view on what constitutes a “compromise” of professional standards as a civil law court would, as is evident, for example, from the greater permissiveness of creative advocacy in U.S. practice.

The lawyer must in any case retain enough independence from his or her client that the lawyer will not be swayed to violate his or her ethical duties to the tribunal in order to ingratiate himself to the client or obtain other personal gain.

Personal Integrity

- Rule 3. Lawyers shall at all times maintain the dignity of their profession and act with honor and integrity. (IBA Int’l Code of Ethics Rule 2; CCBE Rule 2.2)
- *As international arbitration has grown in popularity as an effective dispute-resolution mechanism, there has been an accompanying call for greater transparency and fairness. Trust in international arbitration and its practitioners require that a lawyer abstain from behavior that discredits not only arbitral practice but the very institution. A lawyer’s personal honor, honesty, and integrity must be beyond doubt. For the lawyer, these traditional virtues are professional obligations.*

Confidentiality

- Rule 4. All communications between attorney and client relating to the subject matter of the lawyer’s representation are privileged and may not be disclosed without the client’s express or implicit permission, except to the extent they relate to future conduct that may be criminal or fraudulent. In-house attorneys are

included within the scope of this Rule. (CCBE General Principle 2.3.1 and 2.3.2 - Confidentiality)

- *It is the essence of a lawyer's function that the lawyer should be told by his or her client things that the client would not tell to others, and that the lawyer should be the recipient of such information on the basis of confidence. Confidentiality is therefore a primary and fundamental right and duty of the lawyer. A lawyer should not reveal any information relating to his or her representation of the client, unless the client gives informed consent, disclosure is permitted to prevent future criminal or fraudulent conduct by the client, or when otherwise required by the law of the jurisdiction in which the lawyer is licensed.*

Legal systems take different views on the extensiveness of the duty of confidentiality. For example, in France, the notion of "professional secret" protects information communicated by the client to his or her attorney, but an attorney is not bound to keep confidential his or her communication to the client. The common law duty of confidentiality is much broader, and Islamic law imposes an even higher duty, requiring protection of all information relating to such representation, not just attorney-client communication.

Legal systems also differ in their treatment of confidentiality obligations in the face of client wrongdoing. Even within the U.S., the practice among the states varies significantly. Most European legal systems do not address the issue, and the CCBE, though it acknowledges the problem, does not expressly recognize the tension between obligations to disclose wrongdoing and maintaining client confidences.

Rule 5. Any oral or written communication between lawyers representing the same party or parties with similar interests in the case or similar cases shall be accorded a confidential character and be privileged as far as the arbitral tribunal is concerned. (IBA Int'l Code of Ethics Rule 5; CCBE Rule 5.3 Correspondence between Lawyers See also CCBE Commentary)

- *In addition to the duty to maintain client confidences, some states impose other confidentiality obligations. For example, communications between lawyers, even including opposing counsel, are regarded as confidential. In France, when a lawyer receives a communication marked "confidential," the lawyer must keep it confidential, even from his or her own client. By contrast, in the United States or the United Kingdom, not disclosing confidential*

communications from opposing counsel to one's client could conflict with the lawyer's duty to keep his or her client informed. This rule requires that confidentiality be maintained only as to communications between counsel either representing the same parties or parties with similar interests.

Rule 6. Lawyers should never disclose, unless lawfully ordered to do so by a proper Court with jurisdiction or as required by Statute or in a lawsuit with the client, what has been communicated to them in their capacity as lawyers even after they have ceased to be the client's counsel. This duty extends to their partners, to junior lawyers assisting them and to their employees. (IBA Int'l Code of Ethics Rule 14; CCBE General Principle 2.3.2 - Confidentiality)

- *The duty of confidentiality is not limited in time, and subject to the same conditions as discussed in the Commentary to Rule 4. States' treatment of post-representation confidentiality varies considerably. In the U.S., a lawyer may not accept employment of a new client if the matter is "substantially related" to a matter involving the former client, and the old and prospective clients are "materially adverse." The prospective client may waive the conflict, but the lawyer has little discretion to do so.*

European practice affords the lawyer more discretion. For example, the CCBE only forbids a lawyer from accepting a new client if there would be a "risk" of breaching the former client's confidences, or if the lawyer's knowledge of the former client gives an unfair advantage to the new client. It is within the lawyer's discretion to assess the risk and prospect of unfair advantage.

As international arbitrations often involve large law firms, it is important that the duty of confidentiality extend not only to the lawyer's partners and junior lawyers assisting him or her, but also the legal support staff.

Relations with Clients

Acceptance and Withdrawal

Rule 7. A lawyer should never consent to handle a case unless: (a) the client gives direct instructions, or (b) instructions are given in any other permissible manner. (IBA Int'l Code of Ethics Rule 9; CCBE Rule 3.1.1 Acceptance and Termination of Instructions)

- *This rule is designed to ensure that a relationship is maintained between lawyer and client, and that the lawyer in fact receives instructions from the client. The rule omits language from both the IBA and CCBE rules that permits a lawyer to act in a case that has been forwarded by another lawyer or assigned by a competent body without express permission of the client.*

Regarding cases forwarded by another lawyer, the omission of this language shows a distinction between European and U.S. practice. In European practice, the lawyer has more of a prerogative in handling a client's case, and in some countries, this extends so far as to permit substitution of counsel without the knowledge or consent of the client. American practice requires that a lawyer show more deference to his or her client's decisions. In U.S. practice, a lawyer could not substitute counsel without informing the client and obtaining permission, and therefore a lawyer could not consent to handle a case forwarded by another lawyer, unless the referring lawyer is acting on instructions from the client.

A lawyer may consent to handle a case based upon instructions from the client given through a duly-authorized intermediary. It is the responsibility of the lawyer to satisfy him- or herself as to the authority of the intermediary and the wishes of the client.

Rule 8. It is improper for lawyers to accept a case unless they can handle it in a timely manner and with due competence. (IBA Int'l Code of Ethics Rule 4; CCBE Rule 3.1.3 Acceptance and Termination of Instructions)

- *It is imperative, particularly when a lawyer represents a foreign client, that the lawyer understand that the client must depend on him or her much more than in the case of a lawyer from his own country. A foreign client may request the lawyer's representation in an international arbitration that may involve the law of the client's state, with which the lawyer may be unfamiliar. Alternatively, a foreign client may be unfamiliar with the law and practice of the lawyer's state, and request the lawyer's assistance in a proceeding in which that law is relevant. Under either scenario, the lawyer must be aware of either his/her or the client's lack of familiarity with the relevant law, and either refuse to accept the case or enlist the assistance of other lawyers in order to provide the client with competent and efficient representation.*

The lawyer must also take into consideration the pressure of other work, and be candid with the client about his or her ability to handle the case in a timely manner and competently.

Rule 9. Lawyers shall render legal assistance to their clients with reasonable care and diligence. They shall at all times give clients a candid opinion on any matter. (IBA Int'l Code of Ethics Rule 10(a); CCBE Rule 3.1.2 Acceptance and Termination of Instructions)

- *A lawyer must undertake personal responsibility for fulfilling the client's instructions, and keep the client informed as to the progress of the matter with which the lawyer has been entrusted.*

This Rule does not necessarily require that the lawyer show the high degree of deference to the client's decisions as is common in American practice. However, although the lawyer may exercise more of a prerogative in his or her handling of the client's case, the lawyer must keep the client informed and be candid with the client on the status and/or outlook for the client's case. The lawyer must also be candid with the client in explaining the limits of his or her representation, and any ethical obligations that may limit what the client requests of the lawyer.

A lawyer cannot avoid responsibility by delegation to others. However, this Rule does not prevent a lawyer from seeking to limit his or her legal liability to the extent that it is permitted by the relevant law governing the attorney-client relationship.

Rule 10. The loyal prosecution or defense of a client's case may never cause advocates to be other than perfectly candid, subject to any legal right or privilege to the contrary, which clients choose to exercise. (IBA Int'l Code of Ethics Rule 10(d); CCBE General Principle 2.2 - Trust and Personal Integrity)

- *A relationship of trust can only exist if a lawyer's personal honor, honesty and integrity are beyond doubt. For a lawyer these are professional obligations.*

American and European practice differ in their views of client loyalty. In Europe, the lawyer tends to be seen as more akin to an officer of the court. According to the Declaration of Perugia, the lawyer's duties extend not only to the client, but also to:

[T]he client's family and other people towards whom the client is under a legal or moral obligation; the courts and other authorities before whom the lawyer pleads his client's cause or acts on his behalf; the legal profession in general and each fellow member of it in particular; and the public, for whom the existence of a free and independent but regulated profession is an essential guarantee that the rights of man will be respected.

From the European perspective, the lawyer's duty of candor applies not only to the client, but also to the court and arguably to the other parties listed above.

American practice takes a somewhat different view of client loyalty, casting the lawyer as a strategist and lobbyist for the client, rather than a quasi-official of the Court. Thus the lawyer's duty of candor extends more narrowly to the client. For example, the American lawyer may "urge any possible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail."

This Rule requires a greater duty of candor than that required under the American rule. This is also reflected in Rule 22 below, limiting the creativity of a lawyer's advocacy to "reasonable" constructions of a law.

Rule 11. Lawyers shall at any time be free to refuse to handle a case. (IBA Int'l Code of Ethics Rule 10(b))

- *A lawyer is under no obligation to accept a case. However, a lawyer should not decline representation simply because a client or cause is unpopular, or community reaction is adverse. A lawyer should decline to represent a client if the case is frivolous and intended to merely harass or maliciously injure another or is part of a fraudulent or criminal scheme. Likewise, a lawyer should decline employment if his or her intensity of personal feeling about the client or case may impair his or her effective representation.*

Rule 12. Lawyers should only withdraw from a case during its course for good cause, and if possible in such a manner that the client's interests are not adversely affected. Good cause includes lack of timely payment of invoices by the client, the client's failure to provide honest and timely information to the lawyer, or the client's failure to provide documents ordered to be produced by the arbitral tribunal. (IBA Int'l Code of Ethics Rule 10(c); CCBE Rule 3.1.4)

Acceptance and Termination of Instructions; CCBE Rule 3.5 Payment on Account)

- *As noted in Rule 11, a lawyer has the right to refuse to represent a client in the first place, but once the lawyer agrees to represent the client, he or she has an obligation not to withdraw without reasonably attempting to protect the client's interests. A lawyer should give the client due notice of his withdrawal, suggest employment of other counsel, deliver to the client all documents and property to which the client is entitled, cooperate with subsequently employed counsel, and otherwise endeavor to minimize the possibility of harm. The lawyer should also refund to the client any compensation not earned during the employment.*

Conflict of Interest

Rule 13. Lawyers should never represent conflicting interests in an arbitral proceeding without the prior informed consent of the client. Conflicting interest refers to the specific parties to the arbitral dispute. A lawyer may never use confidential information of a client or its affiliates against that client or its affiliates in subsequent arbitral proceedings. This Rule also applies to all lawyers in a firm. (IBA Int'l Code of Ethics Rule 13; CCBE Rule 3.2.1 and 3.2.2 Conflict of Interest)

- *This issue has in fact come up before an arbitral tribunal. In an unpublished ICSID decision, the tribunal had to consider a request to disqualify claimant's counsel on the grounds that counsel had previously represented the respondent in a related proceeding. The tribunal's analysis focused largely on its power to rule on an allegation of misconduct, however, it concluded that it could only disqualify counsel if there was clear evidence of prejudice, and denied the request to disqualify counsel.*

This case is more illustrative of the need for a clear rule than a guide for what the rule should be. Civil law and common law systems adopt different approaches to conflicts of interest. In civil law countries, conflicts of interest are often viewed as a matter of personal ethics, while in common law countries they are more often a matter of law. Reflective of this difference, the CCBE focuses on situations concerning the lawyer's independence from the client, and less on conflicts of interest. (Krystinik p. 9)

Furthermore, in civil law systems, the lawyer often has more discretion to determine whether a conflict in fact exists. By

contrast, in common law systems, the lawyer has little discretion to determine if there's a conflict, but still may represent two or more clients in the same matter, if he or she discloses the potential conflict and the clients consent to the representation.

Rule 14. Lawyers should not acquire a financial interest in the subject matter of a case which they are conducting. Neither should they, directly or indirectly, acquire property that is the subject matter of an arbitration in which they are representing a party as counsel. A contingent fee does not constitute a financial interest in the subject matter of the case. (IBA Int'l Code of Ethics Rule 12; CCBE Rule 3.3.1 and 3.3.2 Pactum de Quota Litis)

- *A lawyer should not acquire any interest in a case that could put the lawyer's personal interests in conflict with the best interests of the client. As discussed in Rule 18 below, contingency fees are permitted in international arbitration, subject to the rules of the jurisdiction governing the attorney-client relationship.*

Fee Arrangements

Rule 15. Lawyers' fees should, in the absence or non-applicability of official scales, be based on a consideration of the amount involved in the controversy and the interest of it to the client, the time and labour involved, the novelty and difficulty of the matter, and all other relevant personal and factual circumstances of the case. (IBA Int'l Code of Ethics Rule 17(c); CCBE Rule 3.4 Regulation of Fees)

- *A lawyer should put the interest of his or her client and the exigencies of justice before his or her right to compensation. The lawyer should fully disclose his or her fees to the client, such fees shall be fair and reasonable, and shall also be consistent with the law and professional rules to which the lawyer is subject.*

The reasonableness of fees depends on a number of factors, including the time and labor required, the novelty and difficulty of the questions involved, the skill required, the likelihood that employment of the lawyer precludes other employment, the fee results obtained, the time limitation imposed by the client or circumstances, the nature and length of the professional relationship with the client, the experience, reputation and ability of the lawyer(s) performing the services, and whether the fee is fixed or contingent.

Rule 16. Lawyers may require that an advance deposit be made to cover their fees and expenses, but the deposit should be in accordance with the estimated amount of their charges based on the probable expenses and labour required. (IBA Int'l Code of Ethics Rule 16; CCBE Rule 3.5 Payment on Account)

- *Requests for advance deposits should be made on the basis of good faith estimates of fees and expenses to be incurred.*

Rule 17. The Lawyer's right to ask for an advance deposit of fees or expenses, to demand payment of out-of-pocket expenses and commitments, or to be paid on a periodic and timely basis, failing payment of which they may withdraw from the case, should not be exercised at a moment at which the client may be unable to find other assistance in time to prevent irreparable damage being done. (IBA Int'l Code of Ethics Rule 17(b); CCBE Rule 3.5 Payment on Account; CCBE Rule 3.1.4 Acceptance and Termination of Instructions)

- *If a lawyer requires an advance deposit which the client agrees to but fails to pay, or if the client fails to timely make agreed periodic payments, the lawyer has the right to withdraw. However, the lawyer should not exercise this right in a manner or at a time that will impede the client's ability to find other legal assistance. As noted in the Commentary to Rule 12, the withdrawing attorney must give the client due notice of his withdrawal, suggest employment of other counsel, deliver to the client all documents and property to which the client is entitled, cooperate with subsequently employed counsel, and otherwise endeavor to minimize the possibility of harm.*

Rule 18. Lawyers may charge their fees on a contingent basis to the extent permitted by the law that governs the attorney-client relationship. Such contingency fees should be reasonable under all of the circumstances of the case, including the risk and uncertainty of compensation or collection. (IBA Int'l Code of Ethics Rule 18)

- *Civil and common law systems have traditionally differed in their rules regarding contingency fees. Most civil law countries prohibit such arrangements, believing contingency fees compromise the lawyer's independence and encourage speculative litigation. In the U.S., however, such fees are permissible, subject to some ethical restrictions. The CCBE leans towards the civil law approach, but permits a form of contingency fees when bar-approved fee schedules may be used to supplement a lawyer's fee, if the lawyer turns out to be successful. Contingency fee arrangements have become increasingly accepted outside common-law jurisdictions. The view*

taken here is that contingency fees may be necessary to prevent an injustice from being done by the inability of a client to fund a legitimate and meritorious claim.

Relations with the Tribunal

Rule 19. Lawyers shall always maintain due respect towards all members of the arbitral tribunal. (IBA Int'l Code of Ethics Rule 6; CCBE Rule 4.3 Demeanour in Court)

- *In international arbitration, respect must be shown towards all members of the tribunal. Furthermore, the client must keep in mind the necessary balance between the pursuit of his client's best interest, and the respect that must be shown to the arbitral tribunal. A lawyer must never deliberately mislead any or all of the arbitrators or act in any other manner conveying disrespect.*

Rule 20. Lawyers may not have any *ex parte* communications with any members of the arbitral tribunal about the merits of the case, except when the opposing party or its counsel have failed to attend a hearing either in person or by telephone. (CCBE Rule 4.2 Fair Conduct of Proceedings - See also CCBE Commentary)

- *In adversarial proceedings, a lawyer must not attempt to take unfair advantage of his or her opponent by discussing the merits of the arbitration with one or more of the arbitrators outside of the arbitral proceedings. If a lawyer needs to contact one of the arbitrators, he should first inform the counsel of the opposing party.*

This Rule does not follow the approach of some jurisdictions in which ex parte communications with arbitrators are not banned. In China, it is not only permissible but probable that an arbitrator may act as a mediator in the same case in which he or she presides as the ultimate arbitrator.

U.S. litigation practice has traditionally required almost absolute restrictions against ex parte communication with judges or arbitrators on the merits of a case, in contrast to European informal practice, in which fraternization between the lawyers and arbitrators is more common.

Rule 21. Lawyers shall never knowingly make false factual representations to the arbitral tribunal. (IBA Int'l Code of Ethics Rule 6(2); CCBE Rule 4.4 False or Misleading Information)

- *A lawyer must never knowingly mislead the tribunal. This requirement is necessary in order to ensure trust between the arbitrators, arbitration counsel, and the parties. Such trust requires transparency and honesty.*

In some states (such as Mexico and Saudi Arabia) a lawyer may make statements to the tribunal about the facts, even if this statement is not supported by any known evidence. This Rule suggests that a lawyer should avoid factual representations based on speculative evidence or a lack of evidence. Furthermore, a lawyer must not make a factual representation if he or she knows or believes it to be false.

Pleadings and Presentation of Evidence

Rule 22. Lawyers may argue any construction of a law, a contract or a treaty that they believe is reasonable.

- *This Rule attempts to balance differing American and European practices. American practice permits more zealous advocacy and greater creativity in arguing the interpretation of a law. A lawyer may even be “ethically impelled” to “urge any possible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail.” Creativity is limited only by strategic considerations, credibility concerns and the stricture against wholly frivolous arguments.*

By contrast, in European practice, creative arguments that are not, in the lawyer’s opinion, likely to prevail, would be considered professionally irresponsible and possibly sanctionable.

This Rule is not as permissive of the American standard allowing “any possible construction,” and limits a lawyer to arguments he or she believes are reasonable. Limiting frivolous and unreasonable arguments is necessary to ensure efficiency and integrity in arbitral proceedings.

Rule 23. In an arbitral proceeding, lawyers should not knowingly contend, argue for or examine a witness in order to establish the existence of facts that they know or believe not to be true.

- *A lawyer must never knowingly mislead the tribunal. The integrity and effectiveness of international arbitration requires transparency and efficiency. Arguments and examinations seeking to establish facts known or believed to be false undermine these*

two essential elements of international arbitration, and thus must be avoided.

Rule 24. The taking of evidence shall be conducted on the principle that each party shall act in good faith. Lawyers may not assist a party or a witness in giving false evidence to the arbitral tribunal, whether in oral testimony or in written witness statements.

- *This Rule raises an issue about attorney confidentiality obligations in the face of client perjury, or a client's threat to commit perjury. Most European codes do not include an obligation that an attorney disclose a client's intention to commit perjury. However, European attorneys are generally required to disclose unlawful conduct or potentially unlawful conduct by a client.*

In the U.S., there is relatively little agreement among the states regarding the scope of attorney confidentiality obligations in this situation. Under this Rule, the lawyer must make a good faith effort to ascertain the truthfulness of his or her client's statements, as well as that of any witnesses. If the lawyer learns that any of these statements are false, the lawyer must seek the truth from the client or witness and seek to persuade them not to give false evidence. If the client or witness persists in giving false testimony, the lawyer should not assist them in doing so, should seek to withdraw from the case, or should reveal any known falsehood to the arbitral tribunal, unless the information is privileged.

Rule 25. Lawyers may communicate with a witness about facts and documents within the knowledge of that witness and about the witness' potential testimony, but lawyers may not directly or indirectly seek to influence witnesses to give testimony that is not accurate or true.

- *This topic is one of the instances of differing national practice most frequently cited in discussions of a need for an ethical code in international arbitration. In American practice, it is expected and perhaps even ethically required that a lawyer assist a witness in preparing testimony. In stark contrast, in Germany, attorneys are generally prohibited from engaging in any pre-testimonial communication with witnesses in judicial proceedings. Continental practitioners tend to perceive witness preparation as "coaching," which diminishes the reliability of a witness.*

The relative informality of international arbitration as compared to litigation encourages conversation outside the hearing, which would make the German approach seem unnatural, and perhaps even impossible. On the other hand, arbitration values such as openness and efficiency should discourage behavior in witness

preparation that might facilitate deceit and increase the time and expense of the arbitration.

This conflict may not be as much of an issue in current practice, as more international arbitration practitioners have become accustomed to witness preparation. For example, German practitioners have professionally re-oriented and developed a new norm of professional conduct that treats pre-trial communications between witness and counsel as ethically permissible in the international arbitration context.

Rule 26. Lawyers may not conceal, or advise a client to conceal, documents that are ordered to be produced by the arbitral tribunal. Lawyers have a duty to the arbitral tribunal to be honest with it and the opposing party and counsel with respect to documents that are requested by the opposing party or ordered to be produced by the arbitral tribunal.

- *Discovery and the exchange of information is, like witness preparation, another area of major difference between civil law and common law countries. Discovery is far less common in European practice and often viewed as a “fishing expedition” wasteful of both time and money.*

This Rule takes no position on the scope of discovery or document exchanges. Nor does it address the grounds on which a party may refuse to produce a document requested by the arbitral tribunal or an opposing party. But it does require that a party make an honest refusal to produce a document that can be judged on its merits, and not conceal or attempt to conceal documents in an effort to mislead the tribunal and/or the opposing party as to their existence or relevance.

Relations Between Lawyers

Rule 27. Lawyers shall treat their professional colleagues, including opposing counsel, with courtesy and respect. (IBA Int’l Code of Ethics Rule 4; CCBE Rule 5.1.2 Corporate Spirit of the Profession)

- *International arbitration lawyers should recognize one another as professional colleagues and act fairly and courteously towards them. Because international arbitration lawyers hail from numerous and largely divergent legal systems and cultural backgrounds, all must keep in mind that no single State’s legal system governs international arbitration, and differences in practice and misunderstandings may often reflect differences in legal culture rather than attempts to act unethically. Although*

the rules proposed here seek to mitigate these differences, the effort must be reinforced by respectful behavior among international arbitration practitioners.

Rule 28. It is improper for lawyers to communicate about a particular case directly with the opposing party whom they know to be represented in that case by another lawyer without the latter's knowledge or consent. (IBA Int'l Code of Ethics Rule 7; CCBE Rule 5.5 Communication with Opposing Parties)

- *This rule reflects a generally accepted principle, based on the need to prevent any attempt by a lawyer to take advantage of an opposing lawyer's client by communicating to that client without his or her lawyer's knowledge, and to promote the smooth conduct of business between lawyers. If a lawyer does mistakenly communicate with an opposing lawyer's client, the lawyer should inform that client's lawyer as soon as possible of the communication and its content.*

State practice differs when the adverse party is a corporation. For example, a lawyer wanting to communicate with employees of an adverse corporate party that the lawyer knows is represented by counsel may do so in the United Kingdom, but it is absolutely prohibited in the U.S. German lawyers would also have to refrain from such contact, whereas Mexican lawyers would likely feel free to do so, although Mexican law is silent on the issue.