13(a) Roles and Obligations of the Legal Profession

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Role of Legal Professionals

Corruption is an incredibly broad topic; as such, there are a multitude of situations in which lawyers may encounter corrupt acts, both domestically and internationally. However, the focus of this seminar is on international corruption, and the problems that arise from transnational business transactions. The speaker should limit their discussions of domestic bribery and focus on those activities that are germane to international corruption.

Lawyers regularly advise their clients of the risks associated with transnational business transactions; however, they must remember that lawyers face the same risks, whether acting individually or collectively.

*Lawyers acting in their own interest:*

This is the most direct, and, therefore, least likely scenario. However, lawyers should be particularly aware of this possibility when contracting with local counsel in areas where corruption is well documented. An example of this situation includes (i) a law firm that pays a bribe to a foreign officer to obtain a license to establish a branch in that foreign jurisdiction or (ii) a law firm in country X with connections to the US that pays a bribe to a local government official to obtain a construction permit to build their offices.

*Acting as an intermediary for the benefit of his/her client:*

- Lawyers are most likely to become involved in international corruption in their capacity as intermediaries, acting on behalf of their client.
- Lawyers are one of the preferred intermediaries in money laundering and facilitation transactions—not only do they possess the ability and knowledge to set up shell corporations, trusts and partnerships, but in an investigation, clients may try to rely on the attorney-client privilege to shield otherwise discoverable evidence.
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- Be sure to point out that in many jurisdictions, the lawyer’s knowledge (or lack thereof) is irrelevant and/or can be implied from the objective factual circumstances.
- Furthermore, the client’s efforts to shield himself from corruption by exploiting his relationship with his legal counsel will not be successful.

**Failing to engage in sufficient due diligence:**

As service providers, lawyers are subject to the due diligence inquiries of their clients who will require, as part of their internal compliance plan, that lawyers are taking the appropriate precautions to avoid corruption. Similarly, lawyers must perform their own due diligence inquiries for local counsel, contractors, experts etc...that they employ. Clients may also require a lawyer to perform due diligence on an agent or intermediary that the client wishes to retain. Failure to do this properly may result in the client hiring an agent that commits bribery.

**Acting at the direction of a public official:**

Particularly in countries where corruption is prevalent, some public officials may be so accustomed to receiving bribes and they will request advantages as a prerequisite for doing business.

Alternately, a lawyer may be asked to employ a particular intermediary at the request of the foreign government. This may occur at any point in the principal-intermediary relationship, even after the original agreement is signed.

Acting at the direction of a public official is not a defence.

To get a better idea of how intermediaries are used in bribery, participants could be encouraged to look at the OECD’s Typologies Report on this subject.
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**Examples of Anti-corruption Instruments lawyers are subject to:**

<table>
<thead>
<tr>
<th>Anti-Corruption Instrument</th>
<th>About</th>
<th>Case Study</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Foreign Corrupt Practices Act (FCPA)</strong></td>
<td>The most commonly enforced piece of extraterritorial legislation is the Foreign Corrupt Practices Act (FCPA). The FCPA is a United States federal legislative instrument known primarily for addressing accounting transparency requirements under the Securities Exchange Act of 1934 and bribery of foreign officials.</td>
<td>In February 2009, Jeffrey Tesler, a lawyer from the United Kingdom, was indicted and charged with one count of conspiracy to violate the FCPA and ten counts of violating the FCPA. Houston-based business KBR and three partners formed a joint venture and hired Tesler as an agent to bribe high level Nigerian governmental officials in order to obtain business in Nigeria. Because of Tesler’s bribes the companies won $6 billion in contracts between 1995 and 2004 to build natural gas processing facilities in Nigeria. In 2012, Tesler was sentenced to twenty one months in prison, fined $25,000, and ordered to forfeit $149 million that he held in a dozen bank accounts in Switzerland and Israel after pleading guilty to violating the FCPA.</td>
</tr>
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| **UK Bribery Act** | The UK Bribery Act came into force on 1 July 2011 to combat bribery in the United Kingdom and internationally. The Act has a near-universal jurisdiction, allowing for the prosecution of an individual or company with links to the United Kingdom, even if the crime occurred in another jurisdiction. | Because the UK Bribery Act came into force in 2011 - with no retroactive effect - there has yet to be anyone in the legal profession charged under it. However, under the Prevention of Corruption Act of 1916—the anti-bribery law that existed prior to the UK Bribery Act—legal professionals faced severe penalties for bribery offences. For example, in 2005, barrister Riccardo Nadi was sentenced to serve four and a half years for bribery acts. Nadi worked as a barrister for the Association of British Travel Agents (ABTA) to expose corruption in the Travel Industry. However he set up two fake firms, to launder £962,005 which he siphoned off from ABTA by making insurance claims for holidays that did not exist. |

*Please see Annex 1 for alternative case scenarios.*

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Examples of Sanctions under Bar Disciplinary Measures

A. American Bar Association (ABA)
Disbarment is state specific in the United States. A lawyer can be disbarred in one jurisdiction, while still being a member of the bar in another. However, if a state has adopted the American Bar Association's Model Rules of Professional Conduct, disbarment in one state is grounds for disbarment in another. The ABA does not list any additional penalties for acts of corruption. This is primarily due to reliance on state bar rules as well as federal and state anti-corruption laws.

B. England & Wales Bar Standards Board
The Bar Standards Board regulates barristers called to the Bar in England and Wales and ensures Code of Conduct compliance. The Code of Conduct contains no provisions directly addressing corruption. However, corruption violations can still be prosecuted by the Bar Standards Board if they are in violation of section 301(a).

301. "A barrister must not:

(a) engage in conduct whether in pursuit of his profession or otherwise which is:
(i) in violation of dishonest or otherwise discreditable to a barrister;
(ii) prejudicial to the administration of justice; or
(iii) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute"

If a barrister is found to be in violation of the Code of Conduct the Bar Standards Board can formally refer it to a disciplinary tribunal for consideration. Disciplinary tribunals are arranged by the Council of the Inns of Court (COIC), which appoints the members of disciplinary tribunals and arranges the hearings. Tribunal panels can be made up of

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5 Ibid.
6 Ibid.
barristers, lay individuals, and judges. After a decision had been rendered by the Tribunal the Bar Standards board publishes findings on their internet website.

The Bar Standards Board website shows no recent decisions on barristers faced with corruption charges. However, the website is updated daily and new case information can be found at www.barstandardsboard.org.uk/.

C. Mexican Bar Association (Barra Mexicana Colegio de Abogados, A.C.)
The Mexican Bar Association’s Code of Ethics states that “lawyers who bribe a public official or an ancillary to the administration of justice lack honour and professional ethics.”7 In addition, the Code places a duty on lawyers who record an event of corruption to make it known to the Bar Association. Although the Mexican Bar Association specifically denounces bribery and creates a duty for lawyers to report corruption, they provide no sanctions for non-compliance.

D. Japan Bar Association (Japan Federation of Bar Associations)
The Japan Bar Association’s Code of Ethics states that an attorney “shall not promote any fraudulent transactions” and contains disciplinary measures for members who do promote such transactions.8 However, they do not publicly disclose disciplined members. Individuals who want to request information on particular members are required to send a letter to the Bar Association requesting information on that member and detail why the information is necessary.

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Lawyers as Intermediaries

Intermediary as defined in the OECD *Typologies on the Role of Intermediaries in International Business Transactions* is a person who is put in contact with or in between two or more trading parties. In the business context, an intermediary usually is understood to be a conduit for goods or services offered by a supplier to a consumer. Typical intermediaries in an international business transaction include agents, sales representatives, consultants or consulting firms, suppliers, distributors, resellers, subcontractors, franchisees, joint venture partners, subsidiaries, and other business partners, including lawyers and accountants.

**Why use an intermediary?**

- Local intermediaries can help companies successfully navigate the myriad of cultural, legal, financial, taxation and accounting complexities associated with multijurisdictional business operations.
- Intermediaries allow companies to have direct representation in a multitude of countries and markets, without the added expense of establishing an independent office.
- In some instances, there will be a limit on the number of expatriates that a company can employ, necessitating the use of intermediaries for staffing deficiencies.
- Some local customs and/or laws requires the employment of a local agent for any transactions in the local market.

**Risks of using an intermediary:**

Often an intermediary can be useful asset. However, the delegation of legitimate authority can also give rise to opportunities for corrupt activities. In some instances, the intermediary will conceal their corrupt acts from their principal; in other instances, the principal may employ an intermediary in an attempt to distance themselves from the corrupt act.
A Principal's liability for the actions of an intermediary:

Generally speaking, a principal will be liable for the acts of their intermediary. The speaker should emphasize that in many jurisdictions, even where the intermediary acts without the knowledge of the principal, the principal can still be held liable for the corrupt acts of their intermediary.

Why is this important for lawyers?

This is important for lawyers in two senses: Firstly, lawyers and law firms often use intermediaries, especially when conducting business in other jurisdictions. As mentioned above lawyers can be held liable for the actions of their intermediary – including bribery and corruption.

Secondly, lawyers themselves are necessary intermediaries in international business transactions. As intermediaries, a lawyer's risk of being involved in corruption or related offences may be heightened in a number of ways:

- Acting at the direction of a client
- Acting at the direction of a public official
- Failing to engage in sufficient due diligence
- Acting directly in their own interest

In both these instances lawyers face serious sanctions for acts of corruption, including:

- Criminal sanctions
- Civil sanctions, including financial sanctions
- Disciplinary sanctions imposed by the relevant bar association or regulatory body
- Reputational damage
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In addition to personal liability and/or collective liability for their firm, lawyers risk exposing their clients to both criminal and civil sanctions if they fail to avoid corrupt behaviour.
Enterprise Anti-Corruption Policies

Corruption is not a victimless crime—it impoverishes local economies, undermines democratic institutions, compromises the rule of law, and facilitates other threats to human security such as human trafficking, organized crime, and terrorism.

Taking steps to prevent corruption is the best defence, therefore it is essential that lawyers develop their own anti-corruption programme to safeguard both their financial and reputational assets.

Recall, under the UK Bribery Act 2010, the only defence to the corporate offence of failure to prevent bribery is a showing that the corporation had adequate procedures in place to prevent the bribery.

**Developing an Organisation’s Anti-Corruption Programme:**

The OECD’s good practice guidance on internal controls, ethics and compliance is a good reference for law firms in developing compliance programmes. A model anti-corruption programme should provide for the following:

**Responsibility for the programme:**

- Who will draft the programme? Implement the program? Train staff?
- Associates should sign a statement of personal support for the programme; additionally this statement should be shared with clients and business partners as well as published on the firm website.

**Compliance function:**

- A senior partner should be made responsible for ensuring that the company complies with its anti-corruption programme.
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• Consider internal ombudsmen for anonymous reporting and early intervention in scenarios where there is a threat of corrupt activity.

Employment procedures:
• New hires should be vetted to ascertain as far as it is reasonable that they are the type of person who is likely to comply with the firm’s anti-corruption programme; consider asking employees to agree to a criminal background search.
• Internal disciplinary procedures for employees who commit a corrupt act.

Gift and hospitality policy:
• Hospitality is an accepted and routine practice for engaging clients, networking, and developing business relationships; however, the firm should put in place sufficient guidance and limits to avoid excessive gifts or payments that could be construed as bribes.

Training:
• A member of the senior management team should be in charge of training associates and support staff on the firm’s anti-corruption programme.
• When possible, the firm should provide in-house training on the basic principles of applicable anticorruption statutes, as well as in relation to maintaining fair and accurate books, records and accounts.

Documented due diligence and risk assessment:
• This is particularly important when engaging local counsel and/or local agents.
• The compliance program should provide guidance for the selection and supervision of intermediaries, such as local counsel, required local agents, etc...
• Some of the areas to be checked include (1) sources of capital, beneficial owners and political connections, (2) status of the firm, including how long
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it’s been open, (3) whether the agent is affiliated with the World Bank or other blacklists.

• Due diligence review of all intermediaries, regardless of the size or scope of their involvement, should be clearly documented; documentation should be routinely reviewed over the course of the relationship to ensure that the scope, nature or necessity of a given intermediary’s involvement has not substantially changed so as to warrant a new agreement.

• All agents should contractually agree in writing to comply with the firm’s anti-corruption code and should receive materials explaining their responsibilities under both the firm’s policy and the relevant international regulations.

• Be aware that in some jurisdictions, local counsel and agents may be reluctant to submit to a full due diligence review. Familiarize yourself with local customs so that you can anticipate any such reluctance and develop a strategy in advance to effectively communicate your objectives.

• Learn as much as possible about the local legal culture, particularly in geographic areas identified as corruption risks.

• The OECD Typologies on Intermediaries in Bribery contains information on due diligence that should be undertaken when dealing with intermediaries and agents.

• It is also useful to consider using the FCPA opinion procedure as part of the due diligence process.

Decision-making process:

• The firm should consider a decision-making process whereby the decision process and the seniority of the decision-maker is appropriate for the value of the transaction and the perceived risk of corruption.

Publication of anti-corruption code to business partners and clients:

• Make this available at the outset of the relationship and consider posting it on the firms’ website. Seek a reciprocal commitment from business partners and clients.
Adoption of anti-corruption programme by subsidiaries, business partners and where possible, clients:

- The firm should make sure that all branches adopt an anti-corruption programme that is equally stringent.
- The firm should ensure as far as it is reasonable that clients have an anti-corruption programme in place—in other words, “know your client”.

Financial controls:

- The firm should have in place financial controls that minimize the risk of corrupt payments.

Detection and reporting procedures:

- The firm should implement a routine internal audit as well as random checks.
- The firm should have internal, and where possible, confidential reporting by employees at all levels, and where appropriate, business partners and clients willing to report breaches of the law or professional standards or ethics, in good faith and on reasonable grounds.
- The firm should implement procedures for internal investigation of suspected corruption.
- The firm should consider ombudsmen, whistle-blower protection etc.

Facilitation payments:

- Remind participants that the UK Bribery Act will not allow exceptions for facilitation payments.
- Guidelines should emphasize that even where allowed under the FCPA facilitation payments are generally illegal under the local law of most foreign countries.
- Where payments are allowed, firms should develop a list of acceptable payments as well as explicit accounting instructions; any payment that’s not on the list should require explicit approval from senior management responsible for implementation of the firm’s anti-corruption programme.
Guidelines on what to do when confronted with Corruption

A law firm’s compliance structure should include explicit instructions for what to do when faced with corruption. Where appropriate, these guidelines should account for the seniority of the decision-maker.

Transparency International and the Global Infrastructure Anti-Corruption Centre (GIACC) have published guidelines for the infrastructure, construction and engineering sectors. These guidelines include instructions for both preparatory steps individuals and organizations can take prior to commencing work on a project, as well as possible action steps when faced with a corrupt situation. Whereas the guidelines and preparatory steps will differ for legal organizations, these guidelines may be instructive.
Red Flags, Whistle-Blowing and Reporting Obligations

Red Flags

Several international anticorruption organizations have published ‘red flags’ for identifying potential corruption, including:

- Excessive fee or commission to agents, particularly where the agents specific function or position is unclear.
- Subcontractors or consultants that add little, if any, value.
- Payments to third parties, third countries, offshore accounts, or requests for payments in cash.
- Refusal to sign FCPA certification upon request.
- Refusal to agree in writing to the firm’s internal anti-corruption code and monitoring activities.
- Country has a reputation for corruption, according to corruption indices such as the CPI.
- Excessive requests for expense reimbursement.
- Foreign official, customer or other third party recommends the use of a particular agent or subcontractor

Whistle-blowers

Whistle-blowers serve an important role in combating misconduct, fraud and corruption. Statistical studies have shown that whistle-blower tips account for anywhere between 43% and over 70% of detections of offences leading to prosecution.

Legal protections for whistle-blowers, however, remains fragmented, despite the fact that nearly every international anti-corruption instrument includes specific protections for whistle-blowers. Some governments chose to enact stand-alone
whistle-blower protection acts, such as the United Kingdom and Japan. Others have incorporated such provisions in their anti-corruption laws, labour laws, criminal codes or other legislation. Many countries offer no protection at all. Recent progress has been made, as the G-20 countries have pledged to enact and implement whistle-blower protection laws as part of a global Anti-Corruption Plan laid out at the Seoul Summit in late 2010.

Factors to be considered in implementing whistle-blower protection include:

- Whether the protections should extend to public and private sector employees;
- Whether reporting can be made anonymously;
- The scope of actions that are reportable;
- Whether internal reporting, where available, should be mandatory;
- Providing financial incentives; and
- Types of remedies available to whistle-blowers who are retaliated against.

The development of whistle-blower protection in the United States offers an interesting example of financial incentives for whistle-blower reporting. The Sarbanes-Oxley Act 2002 (‘SOX’) established uniform federal protections for financial fraud whistle-blowers who are employees of companies registered with the Securities and Exchange Commission (‘SEC’). The Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (‘Dodd-Frank Act’) amended SOX to include a financial incentive scheme for employees reporting directly to the SEC.

Under this ‘bounty programme,’ the SEC may grant a reward to one or more whistle-blowers (including non-US parties) who voluntarily provide the SEC with original information that leads to a successful SEC action resulting in sanctions of US$1 million or more. The SEC has the discretion to award an amount of no less than 10%, but no more than 30%, of the sanctions collected. Interestingly, an employee who forgoes available internal reporting procedures is not precluded from collecting an award, though the SEC may in its discretion, reduce the amount of the award granted.
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**Reporting**

Lawyers have no specific reporting obligations. However, there are different obligations in anti-money laundering cases in certain jurisdictions. For more information on these different obligations please visit www.anti-moneylaundering.org.

***TO ADD TO ANNEX:

**Discuss the following three alternate scenarios:**

A multinational business, based in Norway, enlists a Norwegian law firm to assist with the acquisition of a Peruvian oil field. In an attempt to avoid excessive expenses and administrative complications, the Norwegian law firm enlists local counsel in Peru to handle all facets of the acquisition, including the bidding, licensing, agreement drafting, etc.... During the course of the acquisition, the Peruvian law firm pays a bribe to an employee in the office of the Official of Mining.

a) **The Peruvian law firm has no contacts with the United States.**

Note that, Peru is a Party to the UNCAC and IACAC and has enacted offences of both domestic and foreign bribery. The domestic bribery offence is contained in Articles 397 and 398 of the Criminal Code of Peru and provides specifically: “If the person who offers, gives, or corrupts is an attorney at law or a member of a law firm, the penalty shall be shall be not less than five nor more than eight years of imprisonment, disbarment under sections 1, 2, 3 and 8 of the Criminal Code, and a fine of 180 to 365 days’ pay.”

b) **The Peruvian law firm has a satellite office in the United Kingdom.**
In addition to sanctions under local implementing legislation, under the UK Bribery Act 2010, the corporate offense of failure to prevent bribery applies to any “relevant commercial organization,” which includes “any corporate or partnership, wherever incorporated or formed, which carries on business in any part of the United Kingdom.” The only defence to this allegation is a showing of “adequate procedures” to prevent the corrupt activity; if the Peruvian law firm cannot show that sufficient measures were in place to prevent the payment of the bribe, it could incur liability.

For this offence, it is irrelevant whether the briber has any close connection to the UK so long as the firm meets the definition of a “relevant commercial organization.”

c) The Peruvian law firm establishes a trust from which to pay expenses associated with the work from the Norwegian firm. Although the trust is located in Peru, it is common practice for the bank to route any outgoing wire transfers through a bank in the United States, and occasionally use an email server located in the United States for customer communication.