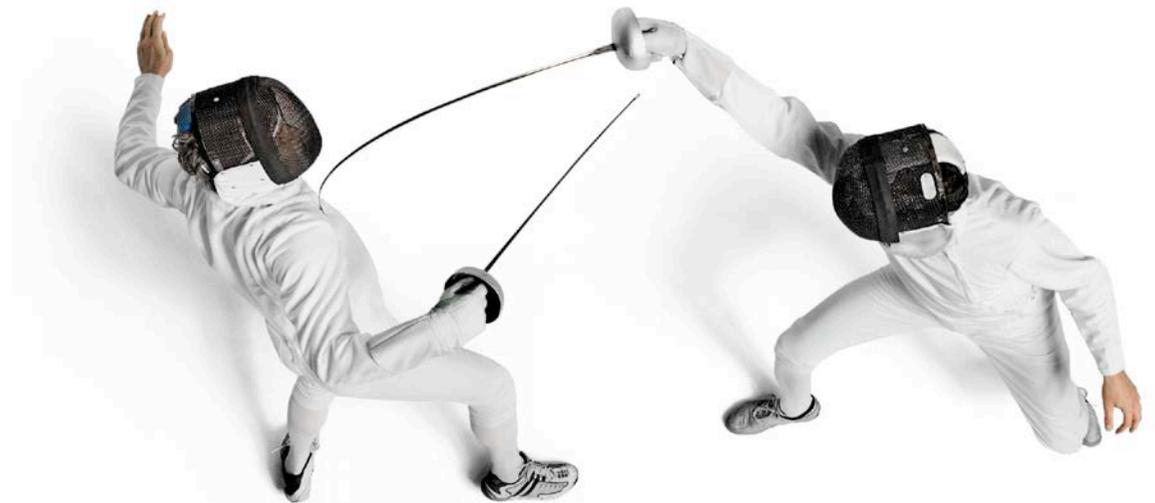

Counsel's Duties in International Arbitration

ASA Below 40
8 November 2013
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My Personal Top 3 Annoying Conducts of Counsel

- Repeatedly filing unsolicited submissions
- Submitting evidence which was obviously forged by the party the counsel was representing
- Intimidating counterparty's witnesses in cross-examination

Potential Sources of Counsel's Duties

- National rules of conduct
 - Lawyer's home jurisdiction (Home Bar Rules)
 - Seat of the arbitration (Seat Bar Rules)
 - Place where hearings physically take place (Hearing Place Bar Rules)
- National civil and criminal law
- Transnational rules of conduct
 - Code of Conduct for European Lawyers
 - IBA Principles on Conduct for the Legal Profession
 - IBA Guidelines on Party Representation
- Arbitration rules (annex to new LCIA Rules on party representation)

IBA Guidelines: Creating a Level Playing Field or Just Adding an Additional Layer?

- The IBA Guidelines aim to resolve the uncertainty as to the rules governing party representation
- But: The IBA Guidelines **cannot** (and do not pretend to) displace applicable mandatory rules of conduct

What is the Practical Effect of the IBA Guidelines?

- **Practical effect:** If the national rules of conduct are less strict, or do not apply at all, the IBA Guidelines will raise the applicable standard
- **No practical effect:** If the national rules of conduct are stricter, the IBA Guidelines have no impact and therefore do not create a level playing field

Example: Witness Preparation in International Arbitration

- Relaxed standard in the US: “A lawyer may suggest choice of words”
- Rather strict standard in England and Wales for barristers: “A barrister must not ... rehearse, practise or coach a witness in relation to his/her evidence”
- Arbitration friendly approach in Switzerland and France
- Relaxed standard under the IBA Guidelines: “A party representative may ... discuss and prepare [the witness’s] prospective testimony”
- Practical effect: IBA Guidelines **do not** create a level playing field between a US lawyer and a barrister
- Wouldn’t the **better solution** be to lobby for an exemption for arbitration proceedings in the national rules of conduct?

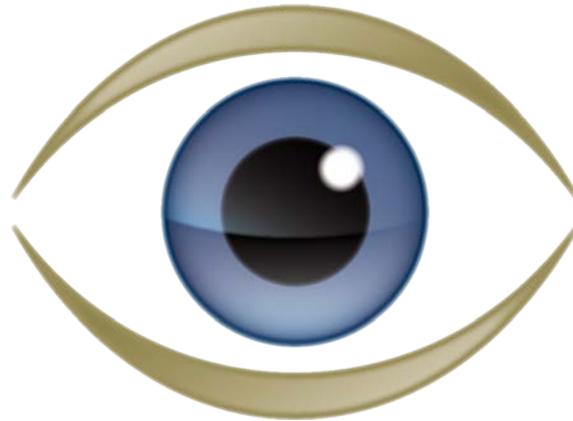
IBA Guidelines: Duties in a Nutshell

- Party representation (decline representation if this creates a conflict of interest of the already constituted arbitral tribunal)
- Communications with arbitrators (no *ex parte* communication)
- Submissions to the arbitral tribunal (no knowingly false submission)
- Information exchange and disclosure (need to preserve, search and produce documents)
- Witnesses and experts (lawyer may assist in preparation of witness statements and expert reports and may meet and interact with witnesses and experts to prepare testimony)
- Overall assessment: Most provisions are uncontroversial, but some are very problematic

Do the IBA Guidelines Resolve Problems – Or Just Further Complicate Arbitration?

- **Useful?** The IBA Guidelines may help an inexperienced party (e.g. from a developing country) represented by an inexperienced lawyer or in-house counsel to become familiar with best practices in international arbitration
- **Useless?** Are the lex arbitri, the arbitration rules and/or procedural orders not sufficient to deal with misconduct by counsel?
- **Harmful?** Will the IBA Guidelines not result in more procedural motions – and thereby make arbitration more time-consuming and costly?

Thank you for your attention



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