The Guide to Evidence in International Arbitration - First Edition

Party and Counsel Ethics in the Taking of Evidence
Nearly every arbitration involves the taking of evidence. The applicable procedures affect what evidence is introduced and how. This can, and often is, outcome determinative. Thus, procedural questions around the process for taking evidence are some of the most common and the most important in arbitration.

The Guide to Evidence in International Arbitration draws together a group of highly experienced practitioners who address the issues surrounding evidence in international arbitration, from the strategic, cultural and ethical questions it can throw up to the specifics of certain situations.
Summary
INTRODUCTION

The taking of evidence – be it through documents, witness testimony or other means – is the foundation on which all arbitral awards are constructed. Ethical violations can taint evidence, or the process by which it is taken, and undermine the credibility of the arbitral process.

Globally, there are fundamental differences in how attorneys, arbitrators and parties approach the taking of evidence. These differences are grounded in a myriad of domestic legal systems of regulation and legislation, legal education and enforcement, which naturally apply in domestic settings, but which may or may not apply, or be readily enforceable, in international arbitration.

Certainly, there is no lack of rules in this area. National ethical and procedural rules determine such matters as whether and to what extent attorneys may speak with prospective witnesses or are required to produce unfavourable documents, and whether there is a process whereby parties can obtain documents or other evidence from each another or third parties. Once an international component is included, the applicable rules may include those of the jurisdictions where the attorneys are licensed, those where the dispute is pending, and those where the parties or potential evidence may be located. In addition to mandatory rules promulgated by the legislature and regulating authorities, a body of soft law has been developed for international arbitration in recent years that, again, may or may not apply.

Thus, the key challenge in taking evidence in international arbitration is not the lack of regulation. Rather, it is the variance among national ethical and procedural rules, the lack of clarity regarding their application and enforceability in arbitration, and a lack of consensus as to the desirability or necessity of applying other international standards and guidelines.

Documents typically pass through a number of party and counsel hands before reaching the arbitral tribunal, and witness evidence is frequently filtered and distilled into written witness statements, which may replace live testimony altogether in some cases. Thus, the credibility and reliability of the arbitral process depend on the integrity, accuracy and reliability of all the party and counsel hands through which evidence passes before it is submitted to the tribunal.

We first survey the problem, identifying typical ethical issues that arise in connection with taking evidence. We also survey the landscape of national ethical rules and then review various international rules, standards and guidelines relevant to the taking of evidence in international arbitration.

Finally, we develop a brief catalogue of suggestions on how to maintain appropriate ethical standards in each arbitration. Our suggestion is to focus on pragmatic instructions in the context of the taking of evidence in individual arbitrations.\footnote{[2]}

Raising ethical issues consistently in discussions among tribunals and party representatives will, over time, contribute to the organic development of a common culture of ethical expectations in international arbitration. The ethical expectations of individual arbitrators are more likely to be more effective in garnering respect and deterring guerrilla tactics than further proliferation of soft law instruments. Finally, fostering and bolstering the ethical conduct of arbitral proceedings is critical and our collective responsibility in light of the ‘acknowledged phenomenon that international arbitration carries with it not only fact-finding and law-making functions, but also a governance function’.\footnote{[3]}
THE (UN)ETHICAL APPROACHES TO THE TAKING OF EVIDENCE?

To the untrained eye, the taking of evidence in international arbitration may appear to be the Wild West: a field of practice where there are no discernible, mandatory rules on taking evidence or on party or counsel conduct in doing so. Experienced arbitration counsel, however, know otherwise. This field of practice has developed its own language, rules and guidelines – practitioners speak of ‘requests for production’ instead of ‘discovery’, refer to ‘relevance and materiality’ and remind one another to abide by the ‘spirit’ embodied in international arbitration.

The proliferation of international arbitration as a means of dispute resolution in recent years has led to even greater diversity among the parties and their counsel. This welcome development, however, may result in a clash of cultures and expectations. Routine practices for some may appear inappropriate or even unethical to others. This is particularly the case for those who are used to practising domestically, be it in litigation or arbitration, as they may continue to act in accordance with their usual (domestic) practices. Written submissions, for example, may take their form and substance from domestic rules and the taking of evidence may proceed as usual in those jurisdictions. In the United States, for example, domestic arbitration may apply the same discovery techniques as court litigation – including depositions and interrogatories. This would be anathema in traditional civil law jurisdictions and, likewise, is not routine in international arbitration.

In these circumstances, questions often arise as to the ethical role of counsel and the parties in taking evidence. Predominantly, these questions focus on two types of evidence – documentary and witness – as well as their scope and timing.

Where counsel actively aids or abets in ethical violation, there is likely to be broader agreement on the reprehensibility of the counsel’s actions. More controversial is the extent to which counsel can or should be held responsible for a failure to prevent, or for tolerating, ethical violation by clients.

For reference purposes, we identify the following examples of actions that may arise in international arbitration. Depending on your position, they range from rather innocuous to inappropriate and unethical or illegal:

• Handling of document production:
  • lack of cooperation with opposing counsel in relation to document production;
  • failure to search diligently for documents requested;
  • withholding documents ordered to be produced;
  • misuse of document production to burden or oppress the opposing party or delay proceedings;
  • submission of documents subject to without prejudice or settlement privilege;
  • requests for documents covered by attorney–client or similar privileges; and
  • failure to supplement production when additional responsive documents are (or should have been) discovered.

• Improper handling of witness evidence:
  • speaking with and preparing a witness;
• ‘coaching’ of witnesses in advance of testimony;
• allowing or encouraging a witness to use notes during testimony;
• conferring with witnesses regarding their testimony during hearing recesses;
• presentation of false or misleading witness statements;
• failure to ensure the appearance of witnesses within counsel’s control;
• intimidation of witnesses; and
• badgering or disrespectful treatment of witnesses.

• Lack of candour to tribunal:
  • late production of previously withheld evidence for the purposes of surprise or
    ambushing opposing counsel;
  • failure to disclose adverse law in written submissions or oral hearings, or a
    misstatement of the law;
  • presentation of or reliance on factual evidence known or suspected to be
    inaccurate; and
  • *ex parte* communications of evidence outside the official record.

• Misuse of evidentiary tools for the purpose of driving up costs or delaying the
  proceedings:
  • insisting on official translations as opposed to ‘convenience’ translations;
  • requiring translations of documents that are not the official language of the
    proceedings, even in instances where all participants speak that language;
  • advising a witness to testify with the use of an interpreter even if they would be
    comfortable testifying in the language of the proceedings, for the sole purpose
    of lengthening the witness’s examination (i.e., ‘burning’ the opponent’s time);
    and
  • advocating for a lengthy document production phase when the parties already
    have access to the relevant documents.

• Illegal procurement of evidence by theft, hacking, etc.
• Actions to falsify the factual record:
  • destruction or shredding of potentially harmful documents or other evidence;
    and
  • submission of forged, adulterated or incomplete (and, therefore, misleading)
    documents.

The term ‘guerrilla tactics’ has come to signify the more extreme of these actions. On the
other hand, even a mere lack of cooperation or collaboration can affect the process of taking
evidence.

ETHICS AS THEY APPLY TO TAKING EVIDENCE UNDER NATIONAL REGULATION
The natural starting point for any discussion on ethics as they apply to the taking of evidence are the national rules that apply to the attorneys and the parties. Inevitably, these are the rules with which both are most familiar and that shape their approach to counsel ethics and the taking of evidence. Whereas there is broad consensus that national rules on taking evidence do not apply in international arbitration, many ethical rules do. However, given the different standing of an arbitrator as opposed to a judge, the involvement of teams of counsels from multiple jurisdictions and the fact that the seat may be in yet another jurisdiction, enforcement of those national rules by arbitrators or in relation to international arbitration raises complex challenges. [6]

Generally, national rules on taking evidence can be divided into two legal traditions: those of the common law and civil law jurisdictions. [7] Rules of privilege largely follow these legal traditions, with common law jurisdictions recognising vast privileges in light of the extensive discovery and disclosure process of those jurisdictions, whereas civil law jurisdictions’ privileges are more limited given the curtailed evidence taking in those jurisdictions. [8]

The United States is a common law jurisdiction with arguably the most extensive discovery. The process is lawyer-driven and permits the taking of evidence of any ‘nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case’. [9] Requests for ‘any and all documents related to . . .’ are commonplace, and discovery is not limited to information that is admissible in court.

In contrast, many civil law jurisdictions do not permit party-initiated or other forms of discovery. [10] Rather, evidence-taking in the inquisitorial system is subject to strict judicial oversight, with parties having little to virtually no right to demand relevant materials from their opponent. The taking of evidence in litigation or investigations in these jurisdictions is considered the sole prerogative of the state, and pretrial discovery is largely precluded. [11] Where it is permitted, a court order is usually required and will be granted only if the applicant can name the document, identify its contents in sufficient detail, establish possession by the other party and establish that legal grounds for production are present. [12]

Similar distinctions exist between the two legal traditions and witness evidence. Since the taking of evidence is party-driven in common law jurisdictions, attorneys and their clients are expected actively to search out potential witnesses and will meet with those individuals before they are called to give evidence. Opposing counsel may choose to question those individuals during depositions before trial during the discovery process. [13] In contrast, many other jurisdictions preclude attorneys from speaking with witnesses or coaching them before trial, and it has been demonstrated that such interactions can interfere with memory. [14]

The ethics rules that apply in these jurisdictions are no less diverse than their rules on taking evidence. Some jurisdictions have adopted an all-encompassing approach, whereby the rules apply irrespective of the situation, and others have not. Some professions are self-regulating and require attorneys to report their colleagues’ failure to comply with applicable rules, [15] while at the other end of the spectrum – some prohibit active involvement. [16] Generally, the more expansive the evidential rights, the more expansive the corresponding ethical duties tend to (and need to) be.

The American Bar Association’s Model Rules of Professional Conduct (the ABA Model Rules), [17] for example, emphasise the integrity of the legal profession through honesty and trustworthiness while still mandating the zealous representation of the client. They provide an ethical framework for the practice of law, and apply to a lawyer’s professional services.
to clients and to the lawyer’s business and personal affairs irrespective of whether they are external counsel or in-house attorneys. These Rules apply broadly and encompass statements made to those who are not the client, tribunal (court) or opponent.

A US lawyer thus has a duty of candour towards the tribunal, which prohibits offering evidence the lawyer knows to be false, making false statements, and failing to disclose legal authority even if it is adverse to the client’s position.

With respect to tangible evidence, US lawyers are required to take appropriate remedial measures – including disclosure – if they come to know of the falsity of material evidence that was presented to the court. A similar rule applies with respect to witness evidence. US lawyers are required to take reasonable remedial measures – including disclosure – if they know that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct concerning adjudicative proceedings. The duty of candour is so important that it enables lawyers to refuse to offer evidence that they reasonably believe to be false.

Opposing parties and their counsel must be treated fairly under both the US Federal Rules of Civil Procedure and ABA Model Rules. They must, for example, be supplied with documents responsive to legitimate requests for production (again, even if unfavourable), and individuals who potentially possess discoverable information must be identified at the outset. Furthermore, lawyers may not make frivolous discovery requests or sow confusion by alluding to a matter that they do not reasonably believe is relevant or that will not be supported by admissible evidence. Lawyers may not request that persons refrain from voluntarily giving relevant information to another party.

US lawyers have an ethical obligation to prepare witnesses adequately, which includes the ethical obligation to prepare the witness to testify truthfully. Generally, the objective of witness preparation is twofold: to familiarise the witness with the proceedings (i.e., what to expect) and to help the witness communicate effectively. Preparation sessions with sample direct and cross-examination questions are common.

In contrast to these all-encompassing ethical rules, most civil law jurisdictions apply more limited rules. For example, some jurisdictions’ rules apply only to attorneys practising law in their home jurisdictions. These rules do not extend to personal life or to work outside the jurisdiction of licensure. It is probable that they do not require the production of unfavourable evidence because the duty is on the client. In some of these jurisdictions, in-house attorneys are not considered ‘lawyers’ for the purposes of the extension of privilege to attorney–client communications.

Where the US rules require attorneys to report other attorneys’ non-compliance with ethical rules, other jurisdictions, such as Germany, require that alleged breaches of ethical duties be raised personally and on a strictly confidential basis.

Some jurisdictions prohibit attorneys from speaking with witnesses before their testimony, whereas others have modified this traditional approach and now permit attorneys to meet with witnesses and discuss their testimony, refreshing their recollection based on documents.

European lawyers are additionally subject to the Code of Conduct of the Council of Bars and Law Societies of Europe (CoC-CCBE) in all contacts with lawyers of other Member States or in all professional activities in another Member State. Article 4.5 of the CoC-CCBE extends any duties that counsel may have toward courts and judges to arbitrators. In terms of the
law to be applied, counsel is required to abide by the rules of conduct applied by the courts or tribunals of the relevant Member State before which they appear, irrespective of whether that is the jurisdiction of their licensure. Thus, in an intra-EU international arbitration, counsels may be subject to both their national ethical rules, the CoC-CCBE and the national ethical rules at the seat of the arbitration.

In terms of substance, the CoC-CCBE does not contain any extensive regulation of the taking of evidence. Principle (b) and Rule 2.3 concern the duty of the lawyer to keep clients’ matters and all information that becomes known to the lawyer in the course of professional activity confidential and to respect professional secrecy. Principle (d) and Rule 2.2 require lawyers to maintain the dignity and honour of the legal profession and their own integrity and good repute. Principle (h) requires professional courtesy among colleagues and, for the proper administration of justice, acting in such a way that the lawyer ‘can be trusted to speak the truth, to comply with professional rules and to keep his or her promises’, to ‘deal in good faith with each other and not to deceive’. Rule 4.4 specifically forbids a lawyer from giving false or misleading information to the court. ‘Misinformation’ in this context could presumably constitute misstatement of either fact or law (although this is not clarified in the explanatory notes). Rule 5.3 draws attention specifically to different understandings that may be attached to certain correspondence, including without prejudice. Finally, in terms of sanctions and enforcement, Rule 5.9 requires a colleague on becoming aware of an ethical violation to ‘draw the matter to the attention of that colleague’ (presumably in confidence). The CoC-CCBE does not include a catalogue of measures that may be taken to enforce the rules, presumably because the rules are based on the premise that enforcement will be handled under the applicable rules of the court and responsible bar societies.

As can be seen by these anecdotal examples from national laws and the CoC-CCBE, the differences in the ethical rules applicable to counsel are significant and can be highly relevant to the taking of evidence. This makes applying, let alone enforcing, national ethical rules in international arbitration both confusing and challenging, in particular where counsel teams are composed of lawyers subject to different national rules.

**ETHICS UNDER INTERNATIONAL RULES, STANDARDS AND GUIDELINES**

In this section, we review a variety of non-national ethical canons. We focus narrowly on the provisions relevant to the taking of evidence. A comparison of the key approaches of these canons to key evidentiary issues is included in table form in the Annex to this chapter.

**EARLY ETHICAL CANONS FOCUSING ON ARBITRATOR ETHICS**

Early ethical canons focused on arbitrator ethics rather than counsel ethics. These include the 1977 ABA Code of Ethics for Arbitrators and the International Bar Association (IBA) Rules of Ethics for International Arbitrators of 1987. Only in more recent years have efforts focused on regulating party and counsel behaviour, including in relation to taking evidence. Along the same lines, the 2011 IBA International Principles on Conduct for the Legal Profession address general duties of counsel, including a duty to maintain the ‘highest standards of honesty, integrity and fairness towards the lawyer’s clients, the court, colleagues and all those with whom the lawyer comes into professional contact’. However, they provide no specific rules in relation to taking evidence.

The IBA Rules on the Taking of Evidence in International Arbitration (the IBA Rules) were first issued in 1983[35] and have undergone three revisions since. Unlike the other ethical canons discussed in this section, the main focus of the IBA Rules has always been the taking of evidence rather than the conduct of the arbitration generally.[36] Perhaps for this reason, however, the IBA Rules contain more detailed provisions intended to maintain ethical standards in respect of taking evidence than other canons. Unlike other IBA instruments, this was always conceived of as a body of rules rather than guidelines.

The 1983 IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration included in Article 4.6 an initial version of what has become the adverse inference provisions in the current Articles 9.6 and 9.7.[37] In broad strokes, the 1983 Rules allowed parties to seek production of listed documents (not categories of documents) and foresaw submission of witness testimony by any person and by means of written witness statements.[38] The 1983 Rules also introduced the norm that it was proper for counsel to have contact with witnesses and potential witnesses (this rule has been expanded over the years and is now embodied in Article 4.3).[39] The 1983 Rules did not contain a full catalogue of grounds for exclusion of evidence, but did foresee the right of the arbitral tribunal to curtail witness examination by counsel.[40] Article 4.9 foresaw questioning first by the arbitral tribunal. Article 4.10 was presumably intended to secure a right of counsel to conduct cross-examination but at the same time protect against any abuses by expressly empowering the arbitral tribunal to limit such examination in Article 4.10. Article 7(d) also empowered the arbitral tribunal to ignore a witness’s evidence if the witness failed to appear without good cause.

The 1999 IBA Rules on the Taking of Evidence in International Commercial Arbitration retained these ethical rules, expanded on them and introduced numerous additional ethical safeguards. Notably, this expansion of ethical rules went hand-in-hand with an expansion of the scope of document production available in arbitration. Under the 1999 IBA Rules, document requests could be made for 'narrow and specific' categories of documents.[41] This broadening of the scope of document production has been criticised as an Americanisation of arbitration. However, in fairness, the expansion of corresponding ethical obligations must also be attributed to this same development. As discussed above, the broad powers of discovery in the US system have contributed to the development of correspondingly strict ethical rules regarding attorney conduct.

The new ethical safeguards in the 1999 IBA Rules included Article 3.11, which required that all documents submitted conform with the originals (now Article 3.12(a)). New Article 3.12 (now Article 3.13) provided for confidentiality of documents produced in the arbitration. Article 4.3 expanded on the previous rule regarding the right to interview witnesses and potential witnesses. Importantly, the 1999 Rules introduced the Article 9 grounds for exclusion of evidence, in particular where the evidence sought was irrelevant, immaterial, burdensome, duplicative, subject to legal impediment or privilege, commercial or technical confidentiality. All these grounds were intended to limit potentially abusive tactics. Articles 9.4 and 9.5 (today Articles 9.6 and 9.7) more fully defined the power of the arbitral tribunal to take adverse inferences in the event of failure to produce requested evidence.

The 2010 IBA Rules on the Taking of Evidence in International Arbitration again retained these protections and introduced four important additional rules intended to strengthen ethical controls. First, an express duty of good faith was imposed on the parties (and by agency their counsel) in Preamble 3. This duty did not expand the substantive scope of obligations
under the IBA Rules but instead placed ethical limits on the exercise of all rights under the IBA Rules. Second, the new Article 2 introduced an evidential case management conference. At this conference, parties and arbitrators can align expectations around how the taking of evidence should take place. The items to discuss could include the need for, or the manner of preparation of, witness statements, the scope of document requests, the level of cooperation expected among counsel, the potential need for preservation of evidence, among other things. Third, and importantly, the 2010 IBA Rules laid the groundwork for exclusion of evidence on the basis of broadly defined legal privileges (Article 9.4). The scope of Article 9.3 (Article 9.4 in the 2020 version) extends to both the settlement or without-prejudice privilege (Article 9.4(a)) and the attorney–client or litigation privilege (Article 9.5(b)). Fourth, the 2010 revision strengthened the sanctions available by adding the possibility of cost sanctions in Article 9.7 (Article 9.8 in the 2020 version). Additionally, the 2010 revision expanded and refined the rules on witness interviewing, production of originals and confidentiality.

The 2020 IBA Rules again maintained all previous ethical rules and safeguards from the previous versions. The most important innovation from an ethics perspective was the introduction of a specific ground for excluding illegally procured evidence (new Article 9.3). Illegal procurement of evidence is arguably one of the most unethical and unfair acts. Although national procedural rules may contain doctrines for addressing such a situation (e.g., the ‘fruit of the poisonous tree’ doctrine), the applicability of such evidential doctrines in arbitration is questionable. Thus, the 2020 IBA Rules closed an important gap.

THE HAGUE PRINCIPLES

The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals (the Hague Principles), published in 2010, were intended to provide counsel with:

practical guidance in order to resolve the ethical questions which can arise in reconciling counsel’s duties to the court and to their client . . . mindful of the special challenges faced by counsel in proceedings before international courts and tribunals in view of the non-national context in which they operate and differing national ethical rules.

Notably, the Hague Principles take the position that the tribunal has an inherent power and duty to secure that proceedings are conducted fairly and with equality by making procedural and other orders or decisions concerning the role and conduct of counsel. Thus, although by their terms the Hague Principles apply only to proceedings with state parties (see definition of ‘international court or tribunal’ in Article 1.2), there is in principle no reason that this useful instrument could not be adopted in proceedings among private parties.

The provisions of the Hague Principles relating to the presentation of evidence are set forth in Section 6. These include an obligation to present evidence in a ‘fair and reasonable manner’, an obligation to ‘refrain from presenting or otherwise relying upon evidence that he or she knows or has reason to believe to be false or misleading’ (Article 6.1). Like the IBA Rules, the Hague Principles clarify that counsel may engage in ‘pre-testimonial communication with a witness, subject to such rules as the international court or tribunal may have adopted’ (Article 6.2). Finally, the Hague Principles include a duty to comply with procedural rules when presenting evidence (Article 6.3), as well as the rules and orders of the tribunal or applicable law regarding confidentiality of the proceedings (Article 6.4).
duties to treat others with respect, courtesy and dignity (Article 7.1) and to endeavour to cooperate effectively with opposing counsel (Article 7.2).

The Hague Principles do not include any directions in terms of sanctions or enforcement. However, the statement in the Preamble that the tribunal has an inherent power and duty to secure that proceedings are conducted fairly and with equality suggests that tribunals not only can but should take action to enforce the standards. However, this remains rather abstract, as do many of the rules themselves.[45]

On balance, the Hague Principles have a substantial scope of application and appear to avoid particularly controversial positions. As such, they successfully stake out middle ground and may also prove useful in international commercial arbitration.

THE IBA GUIDELINES

The IBA Guidelines on Party Representation in International Arbitration (the IBA Guidelines) of 2013 were intended to provide additional guidance for the specific context of international arbitration. On the whole, the IBA Guidelines have met with a lukewarm reception in the international arbitration community. This is likely to be because of the detailed nature of certain of the ethical duties, many of which are perceived to be strongly prescriptive and reminiscent of the US system.

Guidelines 9 to 11 concern submissions to the arbitral tribunal. Along the lines of some of the other canons, these impose a duty to refrain from any false submissions of fact and to correct them promptly should they occur. However, the IBA Guidelines go much further in relation to potentially false witness evidence. Pursuant to Guideline 11, a counsel must:

- advise the person to testify truthfully;
- take reasonable steps to deter the person from submitting false evidence;
- urge the person to correct or withdraw the false evidence;
- correct or withdraw the false evidence; or
- withdraw as counsel if the circumstances so warrant.

This regime is reminiscent of US rules for avoiding suborning perjury (i.e., causing or allowing a witness to lie under oath), which is illegal.

Guidelines 12 to 17 concern information exchange and disclosure. Guideline 12 contains one of the most controversial provisions, namely the requirement that counsel inform the client of the need to preserve documents in advance of arbitration. Guideline 13 prohibits using document requests for improper purposes. Guideline 14 requires counsel to explain the consequences of a failure to produce to the client. Guideline 15 is probably the most controversial in the entire IBA Guidelines, requiring counsel themselves to take ‘reasonable steps to ensure that: (i) a reasonable search is made for Documents that a Party has undertaken, or been ordered to produce; and (ii) all non-privileged, responsive Documents are produced’. Again, while in line with US discovery practice, such a rule goes well beyond a counsel’s role in civil law countries without discovery procedures. Guideline 16 is also difficult, as it places responsibility on counsel to ensure that parties do not suppress or conceal any documents. All these Guidelines are based on the assumption that document production will take place, which is not an assumption that many practitioners consider appropriate.
Guidelines 18 to 25 cover witness and expert evidence. These rules are considerably more detailed than the IBA Rules on Evidence and fairly prescriptive. Among other things, counsel must ‘identify himself or herself, as well as the party he or she represents, and the reason for which the information is sought’ (Guideline 18). Although unlikely to offend, this rule is rather prescriptive and strongly reminiscent of the formalised Upjohn warnings typical of US practice. The admonition that counsel should seek to ensure that a witness statement reflects the witness’s own account (Guideline 20) is in line with the IBA Rules, stating that counsel ‘may assist’ witnesses and experts in the preparation of statements or reports. Guideline 22, on the other hand, appears somewhat heavy-handed, requiring that counsel should ‘seek to ensure that an Expert Report reflects the Expert’s own analysis and opinion’. Although counsel bears some responsibility, some would consider that this responsibility rests primarily with the expert rather than counsel. Guideline 25 goes so far as to define specific types of expenses of witnesses that may be reimbursed.

The 2013 IBA Guidelines have not been as well received or as broadly accepted as some other IBA instruments, probably because the level of detail and the extent of the mandates diverge so strongly from practice in civil law countries.

ETHICAL GUIDELINES IN THE 2014 AND 2020 LCIA RULES

The 2014 Rules of the London Court of International Arbitration (LCIA) included a well thought-out regime for introducing and enforcing both party and counsel ethics in arbitration. First, the 2014 LCIA Rules included a broad good faith requirement similar to that included in the 2010 IBA Rules. Second, the 2014 LCIA Rules include specific guidelines for counsel. Both of these elements were introduced in 2014 and remained unchanged in the 2020 update. Although the LCIA has not published statistics regarding this ethics regime, the fact that the system was not modified in the 2020 Rules suggests that it has not created problems.

The guidelines become applicable to counsel by means of a duty imposed on parties to commit counsel to apply them. Specifically, parties are to make compliance with the ethical rules a condition of counsel’s representation of the party in the arbitration (e.g., in an engagement letter). Article 18.6 foresees a procedure for handling ethical complaints. After consultation with the parties, counsel must be given a reasonable opportunity to answer the complaint. The tribunal is empowered to determine whether the violation took place. Finally, Article 18.6 outlines the catalogue of sanctions that the tribunal may take, at its discretion. These include written reprimands, written cautions as to future conduct or any other measure necessary to enable the tribunal to fulfil its duties.

The specific rules of conduct are set out in the Annex to the LCIA Rules, ‘General Guidelines for the Authorised Representatives of the Parties’. They include several rules relating to ethics in the taking of evidence. In particular, counsel is prohibited from knowingly (1) making ‘any false statement’ to the tribunal or the institution, (2) procuring or assisting in the preparation of, or relying on, any false evidence, and (3) concealing, or assisting in the concealment of, any document (or any part thereof) that is ordered to be produced.

The 2020 LCIA Rules used the same method to extend duties of confidentiality to third parties involved in the arbitration. Article 31.1 contains duties of confidentiality with respect to non-public documents produced in the arbitration that are broadly equivalent to the scope of Article 13.3 of the IBA Rules. The mechanism used to extend the duty to third parties is the same employed in 2014 to impose ethical duties on counsel. To this end, a sentence was
added to the end of Article 30.1, imposing a duty on the parties to "seek the same undertaking of confidentiality from all those that it involves in the arbitration, including but not limited to any authorised representative, witness of fact, expert or service provider." [53]

By contrast, the Rules of the International Chamber of Commerce (the ICC Rules) are much lighter in terms of ethical obligations and do not direct these specifically to counsel. Pursuant to Article 22.5, the parties undertake to "comply with any order of the arbitral tribunal." [54] Given that the ICC Rules do not otherwise regulate the taking of evidence directly, the orders referenced in Article 22.5 would be likely to include orders regulating the taking of evidence.

**THE PRAGUE RULES**

The Rules on the Efficient Conduct of International Arbitration (the Prague Rules) were issued in 2018 with the purpose of offering a more civil law-oriented framework for taking evidence in arbitration. [56] They are noticeably lighter on ethical standards and safeguards than the IBA Rules, despite covering a broader spectrum of issues.

Although the provision does not reference ethics directly, the case management conference required by Article 2 is an important safeguard in aligning expectations regarding the taking of evidence.

In respect to production of documents, Article 4.7 states that "submitted or produced documents are presumed to be identical to the originals unless disputed by the other party", in which case the arbitral tribunal may order the submitting party to produce the original. However, there is no affirmative obligation in the Prague Rules equivalent to Article 12(a) of the IBA Rules that copies submitted must confirm to the originals.

The Prague Rules extend confidentiality to the same scope of documentation as under the IBA Rules (all documents submitted or produced). [57] However, the grounds for permitted disclosure are more limited under the Prague Rules (i.e., only if "required of a party by the applicable law"). [58]

Unlike the IBA Rules and the LCIA Rules, the Prague Rules do not directly address the situation in which a witness whose appearance has been ordered fails to appear. [59]

**THE ICCA GUIDELINES**

The most recent effort to canonise ethical obligations in international arbitration are the International Council for Commercial Arbitration's Guidelines on Standards of Practice in International Arbitration, released in March 2021 (the ICCA Guidelines). The ICCA Guidelines consciously take a more moderate position than the 2013 IBA Guidelines on a number of controversial points. Indeed, the introduction states that the ICCA Guidelines are needed because "existing instruments do not fully reflect the specific setting, blend of cultures and situations in which international arbitration is employed." [60]

Notably, the Guidelines place a strong emphasis on integrity, respect and civility, courtesy and professionalism, including respect of diversity and cultural backgrounds. Guideline II.D requires counsel to refrain from activities intended to obstruct, delay or disrupt the arbitration process. Although these general behavioural requirements may facilitate the ethical taking of evidence, the ICCA Guidelines are notably light on specific rules regarding taking evidence. The one exception is Guideline II.C, which specifically forbids counsel from making knowingly false submissions of fact and imposes a duty to correct such submissions.
Another interesting aspect of the ICCA Guideline approach is the scope of application. Guideline I.E requires counsel to ensure that the individuals under their supervision also follow the precepts of the Guidelines. Along the same lines, Guideline IV.A applies to expert and fact witnesses, who shall not knowingly make any false submissions to the arbitral tribunal.

The ICCA Guidelines do not contain any specific sanctions or sanction mechanism. Instead, Guideline III.B generally requires arbitrators to ensure that all participants ‘conduct themselves in a courteous and respectful manner throughout the proceedings’.

OVERVIEW OF ETHICAL CANONS IN RELATION TO THE TAKING OF EVIDENCE

In the Annex to this chapter, we include a high-level comparison of the ethical canons discussed above on key issues relating to the taking of evidence.

OBSERVATIONS AND RECOMMENDATIONS

There have been numerous attempts by the arbitration community to define the ethical obligations of counsel and other participants in the arbitral process as they relate to the taking of evidence. Although these efforts have picked up in the past 15 years, ethical canons have had a mixed reception, and it is fair to say that there is no broad consensus as to which approach is the most suitable to regulating the taking of evidence in international arbitration. The difficulty stems in part from an underlying lack of consensus regarding the appropriate scope of the taking of evidence, in particular document production. An ethical canon that is based on active counsel involvement in taking evidence will typically include additional ethical safeguards (e.g., the IBA Guidelines). By contrast, a set of rules such as the Prague Rules, which is based on a tribunal-led process, may reasonably take a lighter approach. These different attitudes and approaches are in turn shaped by strong differences in the way domestic legal systems regulate attorney ethics, emphasise ethics in legal education and enforce ethical norms through legal or bar association process.

As discussed above, national ethical rules offer unreliable and sometimes ineffective protection in international arbitration. It can be unclear which national ethical rules apply, multiple regimes can apply in the case of international teams, international arbitrations frequently take place outside the respective jurisdictions, and arbitrators may lack the knowledge or power to enforce national ethical rules in international arbitration. Additionally, the applicability of different national ethical rules can cause disparity or insufficient protection.

For these reasons, we recommend that participants in an international arbitration consider in each case whether additional ethical and procedural rules will aid in creating common expectations, closing potential gaps, levelling the playing field and generally protecting the truth-seeking function of the taking of evidence. This may entail including rules and procedures in the terms of reference or procedural orders, or it could entail agreeing to the application of international rules or codices such as those discussed above. Over time, it is hoped that this consistent attention to ethical standards will facilitate the evolution of a common understanding within the arbitration community of baseline ethical standards.

Based on the premise that all participants owe a duty of good faith, we therefore make the following recommendations (while also noting that each case is unique and may benefit from other approaches):

EARLY CONSULTATION ON THE TAKING OF EVIDENCE
Early consultation facilitates early discussion of the participants’ expectations and the proposed approaches to documentary, witness and expert evidence, particularly if participants may come from different legal traditions.

One key issue to address at the earliest possible stage is whether steps should be taken to safeguard the accuracy of witness memory[^61] or to preserve documentary or other evidence.

However, as the potential scope of the evidence may be unclear at the time of the first case management conference, and the participants may be more focused on issues affecting the overall organisation of the proceedings, it may make sense to readdress the necessary scope, procedures and ethical safeguards at later junctures in the proceeding.

**INCLUSION OF CLEAR RULES IN PROCEDURAL ORDERS**

Adopting clear procedures on how evidence will be taken in procedural orders records the tribunal’s ethical expectations; the clearer the procedure is, the less room remains for inappropriate (or unethical) manoeuvring and ambush. Issues to consider addressing include, among others:

- what evidence must be produced when: inclusion of clear time limits and a cut-off date for the production of new evidence is helpful;
- the format for witness evidence: will parties proceed with summary ‘offers’ of witness evidence (as is common in many civil law jurisdictions), or should that evidence be set out and submitted in witness statements? Clarifying this at an early stage can level the playing field and avoid information imbalances; and
- ethical limitations on the scope of evidence and the manner of its presentation: for example, that copies must conform to originals, that all evidence presented must have been lawfully obtained, defining the scope of legal privilege, among other things.

**ADOPTION OF BINDING RULES**

There have been numerous calls for the adoption of binding ethical rules.[^62] Adopting a set of ethical rules as binding adds additional clarity and puts all parties on clear notice that violations may trigger specific consequences or sanctions. Participants have historically shied away from formal adoption out of concern for potential difficulties at the enforcement stage. However, after decades of use, there are no reported cases we are aware of in which recognition or enforcement was denied on the basis of evidentiary rules. Additionally, evidentiary rules and ethical canons generally defer to mandatorily applicable law, meaning that there is no need to determine a lack of conflict with such laws in advance of adoption. For example, looking to the IBA Rules solely for guidance may foster cherry-picking, with parties relying on them to establish rights without triggering consideration of the corresponding duties and limits.

**CONCLUSION**

The taking of evidence is a critical component of arbitration: it affects the time and costs of arbitration, as well as the credibility of the process. The broader the evidential rights and responsibilities granted to parties, the greater the responsibility of arbitrators and counsel to safeguard that process. Seen in this light, ethical canons are not an unnecessary add-on but a critical tool in safeguarding the reputation of arbitration.

**ANNEXE**
Comparison of ethical canons in relation to issues arising in taking evidence

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<tr>
<td>Apply only to proceeding s with state parties (Art. 1.2); tribunals have power to adopt (Preamble)</td>
<td>Available for parties to agree or tribunals to adopt (Guideline 1)</td>
<td>Art. 18.5, Annex: duty of parties to bind counsel to ethical guidelines in Annex</td>
<td>Drafted as a closed set of mandatory rules but generally applied as guidance only</td>
<td>Can be applied as a set of mandatory rules or referred to as guidance</td>
<td>Guideline I.E: duty to ensure observance by individuals under supervision</td>
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<td>Art. 6.1: counsel must present in a ‘fair and reasonable manner’ and may not present or rely on false or misleading evidence</td>
<td>Guidelines 9 to 11: including the duty to withdraw as party representative where warranted</td>
<td>Para. 3, Annex: potentiall- y extends duty to legal positions (‘any false statement’); Para. 4: duty not to procure, prepare or rely on false evidence</td>
<td>No, but general good faith duty in Preamble 3</td>
<td>Not addressed</td>
<td>Guideline II.C: forbidding knowing false submission- s of fact and requiring correction if possible</td>
<td></td>
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<td>Not addressed</td>
<td>Duty to: advise client to preserve documents (12) and supplement production (17); to take, and assist client in searching for and producing documents (15)</td>
<td>Para. 5, Annex: No duty to preserve, but duty not to ‘knowingly conceal or assist in concealmen- t of any document’</td>
<td>No express duty to preserve, but general duty of good faith; Art. 9.3, exclusion of illegally procured evidence; Art. 3.3.9 grounds to deny</td>
<td>Not addressed</td>
<td>Not addressed</td>
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<td>Art. 2.4: extends to 'any information imparted'</td>
<td>Yes</td>
<td>Art. 30: all materials created for the purpose of the arbitration and all documents produced; includes exceptions</td>
<td>Art. 3.13: all documents submitted or produced; includes exceptions</td>
<td>Art. 4.8: applies to documents submitted or produced and not in public domain; narrower exceptions</td>
<td>Yes</td>
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<td>Art. 6.1: expressly authorises 'pre-testimonial communication'</td>
<td>Counsel 'may assist' in preparing witness statements and expert reports (20); duty to identify counsel's role to witnesses (18)</td>
<td>Art. 20.6: 'it shall not be improper' to interview potential witnesses</td>
<td>Art. 4.3: 'it shall not be improper' to interview and to discuss their prospective testimony</td>
<td>Not addressed</td>
<td>Not addressed</td>
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<td>Art. 7.2: general duty to 'use best endeavours to cooperate effectively' with other counsel; no specific guidance re: cooperation in document production</td>
<td>Not addressed</td>
<td>Art. 28.4: duty to cooperate in facilitating the proceedings as to time and costs; potential cost consequences</td>
<td>Preamble 3: general duty for parties to act in good faith in the taking of evidence; Art. 3.6: consultation of counsel on document production</td>
<td>Addressed indirectly (see Art. 11 re: allocation of costs)</td>
<td>Guideline II.A: duty to cooperate and comply with tribunal's directions; Guideline II.D forbids acts intended to obstruct, delay or disrupt the proceedings</td>
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<tr>
<td>Not addressed</td>
<td>Not addressed</td>
<td>Art. 20.5: witnesses</td>
<td>Art. 8.1: witnesses</td>
<td>Not addressed, Guidelines IV.A IV.B,</td>
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must appear if requested by party or tribunal; discretion of tribunal as to weight in event of non-appearance

must appear if requested by party or tribunal; Art. 4.7: generally, tribunal to disregard if witness fails to appear without valid reason

but discretion of tribunal to limit witness testimony (Art. 5.3); duty of parties to avoid hearings if inappropriate (Art. 8.1).

Guideline III.B: arbitrators ‘shall ensure that all parties conduct themselves in a courteous and respectful manner’

Guideline III.B: requiring honest testimony and correction, forbidding false statements.

Guideline III.B: duty to assist the tribunal and follow instructions

Guidelines 26, 27: including admonishment, adverse inferences and cost consequences

Annex, para. 7, Art. 18.5, 18.6: tribunal may sanction counsel, issue written reprimands or cautions or other necessary measures

Art. 9.6, 9.7, 9.8: adverse inferences; cost consequences for parties

Art. 10: adverse inferences; Art. 11: allocation of costs based on parties’ conduct and cooperation

Endnotes

1 Amy C Kläsener is a partner at Jones Day and Courtney Lotfi is a counsel at Dentons. Back to section

2 We are thus in broad agreement that ‘the best methods to control guerrilla tactics is to prevent them in the first place or, if they raise their ugly head stop them quickly and firmly’: Günther Horvath, Stephan Wilske, ‘Conclusion and Outlook’ (Chapter 6) in Guerrilla Tactics in International Arbitration (Günther Horvath and Stephan Wilske (eds), Kluwer, 2013), p. 345. Back to section

4 See *Guerrilla Tactics in International Arbitration*, op.cit. (addressing a wide range of tactics in relation to arbitration from the blatantly illegal to the impolite).

5 Indeed, the demand for more cooperation and collaboration was one of the ‘key global themes’ identified by the 2018 Global Pound Conference: ‘Parties...seek greater collaboration from their external lawyers when interacting with them and their opponents. This represents a potential challenge to traditional notions of how lawyers should represent clients in disputes.’ Global Pound Conference Series: ‘Global Data Trends and Regional Differences’, available at https://www.pwc.com/gx/en/forensics/gpc-2018-pwc.pdf (2018), p. 3. The survey also identified a key discrepancy between the view of parties and advocates on this point, with parties more focused on collaboration and external counsels more focused on advocacy (id., at p. 11).

6 For an excellent comparative analysis of national ethical rules in relation to the issues of cybersecurity, see Sergey Alekhin, Alexis Foucard, Greg Lourie, ‘Cybersecurity, International Arbitration and the Ethical Rules and Obligations Governing the Conduct of Lawyers: A Comparative Analysis’, *TDM*, Vol. 16, Issue 3, May 2019 (concluding that the application of national ethical rules on cybersecurity is impracticable in arbitration and that international minimum standards must be developed specifically for arbitration).

7 For the purpose of this chapter, we purposefully highlight the most extreme examples within the civil and common law divide with respect to the taking of evidence and ethics.

8 Privilege may extend in some jurisdictions to communications between attorney and client, doctor and patient, spouses, and priest and penitent. The work-product doctrine may also shield access to certain types of information.

9 US Federal Rules of Civil Procedure, Rule 26(b)(1); Rule 26 was amended in 2015 and placed a greater emphasis on proportionality. Prior to the 2015 amendment, discovery in US federal courts extended to information relevant to claims or defences or, upon a showing of good cause, to the broader ‘subject matter’ of the litigation, with discoverable information being any information that appeared reasonably calculated to lead to the discovery of evidence, irrespective of whether that information itself was admissible. Chief Justice John G Roberts, Jr, ‘2015 Year-End Report on the Federal Judiciary’, available at https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.


13 US Federal Rules of Evidence, Rules 30 (depositions by oral examination) and 31 (depositions by written questions).  


15 American Bar Association’s Model Rules of Professional Conduct [ABA Model Rules], Rule 8.3, for example, requires: ‘A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.’  

16 See, e.g., Germany’s Professional Code of Conduct for Lawyers (Berufsordnung für Rechtsanwälte), Sec. 25 (requiring generally that any allegations of breach of ethical rules be presented to the attorney in question in strict confidence).  

17 The United States has no nationally applicable rules of professional conduct. Rather, each state and bar association will promulgate its own rules of professional conduct governing attorneys licensed therein. The majority of the states have adopted a form of the ABA’s Model Rules.  

18 ABA Model Rules (Preamble and Scope).  

19 id., Rule 4.1.  

20 See id., Rule 3.3(a), which prohibits lawyers from (1) making a false statement of fact or law to a tribunal or failing to correct a false statement of material fact or law previously made to the tribunal by the lawyer, (2) failing to disclose to the tribunal or legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or (3) offering evidence that the lawyer knows to be false.  

21 ABA Model Rules, Rule 3.3(b).  

22 This exception does not apply to a defendant’s testimony in a criminal matter.  

23 See, e.g., US Federal Rules of Civil Procedure, Rule 26. This requirement is broader than simply identifying potential witnesses.  

24 See ABA Model Rules, Rule 3.4.
ABA Model Rules, Rule 1.1 (competence) and comment on Rule 1.1 (explaining that competence includes adequate preparation); see also id., Rules 1.2(d), 3.3.(a)(3), 3.4(b), and 8.4(d).  

This latter objective should not be confused with coaching a witness on what to say, which is precluded. Rather, it should focus on how the witness is to communicate his or her testimony. 

Attorneys may reword language and reformulate the substance of a witness's response for clarity and accuracy during witness preparation. They may not prepare or assist in preparing testimony that is false or misleading. (e.g., D.C. Bar Ass’n Legal Ethics Comm., Op. 79 (1979)). Compare this with the standard applied in England and Wales, which permits witness preparation but prohibits “[s]uggesting an answer to a witness (‘I suppose you are trying to say . . .’) or conveying that an answer is wrong or implausible would and plainly ought to breach any professional code.” Brad Rudin and Betsy Hutchings, *New York Legal Ethics Reporter* (2006) (quoting L Dobbs and D Etherington, ‘Witness Coaching in Criminal Cases’, *The Barrister*, 12 January 2004). 

e.g., Geneva, England and Wales. 

Code of Conduct of the Council of Bars and Law Societies of Europe [CoC-CCBE], Article 1.5. 

id., Article 4.5. 

id., Article 4.1. 

id., Principles, pp. 9–11. 

Thus, we do not focus on other issues covered in these canons, such as disclosures relating to conflicts of interest, general duties of the arbitrator, *ex parte* communications, etc. 

See 2011 IBA International Principles on Conduct for the Legal Profession. 

1983 IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration [1983 IBA Rules]. 

This is a key point of differentiation between the IBA Rules on the Taking of Evidence in International Arbitration [IBA Rules] and the Rules on the Efficient Conduct of International Arbitration [Prague Rules], which seek to achieve the efficient conduct of arbitral proceedings. 

1983 IBA Rules: ‘If a party fails to comply with the Arbitrator’s order to produce any relevant document within such party’s possession, custody or control, the Arbitrator shall draw his conclusions from such failure.’ (emphasis added).
38 See 1983 IBA Rules, Articles 4 and 5.  

39 id., Article 4.8: ‘It shall be proper for a party or his legal advisers to interview witnesses or potential witnesses.’ (emphasis added).  

40 See id., Article 5.10.  

41 1999 IBA Rules, Article 3(a)(ii).  


44 id., p. 2 (c.f. International Council for Commercial Arbitration, Guidelines 2021 [2021 ICCA Guidelines], Introduction, clarifying that the Guidelines are not intended as mandatory rules or to serve as an autonomous basis for sanctions where no other basis exists).  

45 Catherine Rogers, ‘Guerrilla Tactics and Ethical Regulation’ (Chapter 5) in Guerrilla Tactics in International Arbitration (Günther J Horvath and Stephan Wilske (eds), Kluwer, 2013), at p. 319.  

46 London Court of Arbitration Rules 2020 [2020 LCIA Rules], Rule 14.5 (2014) and Rule 14.2 (2020) (‘at all times the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal's discharge of its general duties’) (emphasis added).  

47 2020 LCIA Rules, Rule 18.5.  

48 id.  

49 id., Rule 18.6 and Annex, para. 3. Notably, these measures differ from the sanctions foreseen by the IBA Rules, namely cost sanctions (Article 9.8) and adverse inferences (Articles 9.6 and 9.7). However, the difference is easily explained on the basis that the IBA Rules bind parties, whereas the LCIA Guidelines are specifically directed at counsel. It could be unfair to punish a party by sanctions or inferences for the unethical behaviour of its counsel. 
id., Annex, para. 3. Notably, this duty does not appear to be limited to factual statements and thus arguably extends to false statement of law. None of the other canons of ethical rules considered in this chapter go so far. Apparently a purposeful decision was taken by the IBA Ethics Subcommittee not to extend this obligation to adverse legal authority (see E Sussman, ‘Ethics In International Arbitration: Soft Law Guidance for Arbitrators and Party Representatives’ in Soft Law In International Arbitration (Lawrence Newman and Michael Radine eds, 2014), at p. 253 (providing an in-depth review of the work and deliberations of the IBA working group at pp. 250–54).

id., Annex, para. 4.

id., Annex, para. 5.

id., Article 30.1 (the revised rules came into effect on 1 October 2020).


2021 ICC Rules, Appendix IV(d), Case Management Techniques, does reference document production, but only in the context of techniques that may be employed by the arbitral tribunal and the parties.

2020 LCIA Rules, Annex, para. 5.

See IBA Rules, Article 3.13; Prague Rules; Article 4.8.

See id.; id.

See IBA Rules, Article 4.7; LCIA Rules, Article 20.5; Prague Rules, Article 5.


See Catherine Rogers, ‘Guerrilla Tactics and Ethical Regulation’ (Chapter 5) in Guerrilla Tactics in International Arbitration (Günther Horvath, Stephan Wilske (eds), Kluwer, 2013), at pp. 334–35, ‘the absence of clear ethics creates an anything-goes atmosphere, it may encourage attorneys to follow their worst, rather than their best, professional instincts. Conversely, a body of clearer ethical standards will help develop a collective understanding of what constitutes proper conduct and development and promotion of clearer shared notions of professional civility; and including a list of core ethical issues that should be addressed in ethical standards or rules at Sec. 5.03, pp. 322–35."