

OECD and International Bar Association report proposes global conduct guidelines for lawyers working on commercial structures

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Executive summary

On 20 May 2019, the Organisation for Economic Co-operation and Development (OECD) and the International Bar Association (IBA) co-published a report¹ (the report) laying out a set of eight principles that they recommend for governing lawyers and law firms engaged in or undertaking work associated with commercial structures, particularly those of an international character.

The report is the work product of the Task Force on the Role of Lawyers and International Commercial Structures (the Task Force), a collaboration of the IBA and the Secretariat of the OECD. The Task Force, formed following release of the Panama Papers and the Paradise Papers, focused on developing general principles of conduct for lawyers and related recommendations for governments in policy formation.

Detailed discussion

The report does not duplicate existing international or domestic guidelines for the legal profession with respect to how a lawyer should act or not act in certain circumstances. Rather, the report lays out high-level principles that are intended to assist governments in policy formulation and to guide lawyers as to how they should conduct themselves, consistent with the underlying domestic legal and ethical obligations. Additionally, the report covers anti-money laundering and counterterrorism financing laws, obligations and disclosure duties that exist in many countries.

The Task Force recommends the eight principles laid out in the report to national bar associations and law societies, encouraging them to adopt the principles and also to engage with their governments on how the principles can help in administering justice and upholding the rule of law.

The Task Force also advocates that where the principles are adopted and reflected in domestic law or professional regulations, violations of them should result in proportionate disciplinary measures. As stated in the report, these measures should include, where appropriate, disbarment, which should also be recognized in foreign jurisdictions.

The eight principles in the report are summarized as follows:

- ▶ **Principle 1:** Non-facilitation of illegal conduct - A lawyer should not facilitate illegal conduct and should perform due diligence to avoid doing so inadvertently.
- ▶ **Principle 2:** Misuse of the duty of confidence and privilege - A lawyer should not allow the confidential nature of the lawyer-client relationship or legal privilege to shield wrongdoers. To this end, lawyers should consider refusing a retainer if it may encourage illegal behavior; they also should avoid being placed in a position that would aid or abet the commission of a criminal offense.
- ▶ **Principle 3:** Client due diligence - A lawyer should undertake and document efforts to identify and verify the following items in a transaction: the client (or ultimate beneficiary), the origin of any funds, the substantive nature of the activity, and the legality of the activity in the lawyer's jurisdiction. These inquiries should be intensified if the inherent risks in the engagement are deemed high by international benchmarks or reasonably-based suspicions.
- ▶ **Principle 4:** Action where client conduct is, may be, or becomes illegal - If a client's conduct is, may be, or ultimately becomes illegal (even if it was originally legal), a lawyer should advise the client of the consequences of the conduct and recommend legal alternatives. If the client persists, the lawyer should consider ceasing the relationship and should evaluate any jurisdictional reporting obligations.

▶ **Principle 5:** Multi-jurisdictional risk - In a multi-jurisdictional transaction with indeterminate legality, a lawyer should encourage his or her client to seek expert advice for other jurisdictions and should consider terminating the relationship if the client does not do so or refuses to follow the advice that is given. A lawyer also should consider any jurisdictional reporting obligations.

▶ **Principle 6:** Use of illegally obtained information - A lawyer should strongly discourage a client from illegally obtaining evidence or information, with additional scrutiny given to cross-border activities.

▶ **Principle 7:** Disclosure of beneficial ownership - A lawyer should obtain, maintain, and verify up-to-date information on a client's beneficial ownership with all reasonable effort.

▶ **Principle 8:** Advertising by lawyers on international commercial structures - Any advertising by a lawyer should be transparent, accurate, and truthful.

The report also includes discussion of the rationale underlying these principles.

Implications

Given that commercial structuring is a common activity of a multinational company's tax department, companies should be aware of this report and the principles laid out in it. If the bar association in a jurisdiction that is relevant to a company chooses to adopt the principles, they could have implications for the company's relationship with both its in-house lawyers and its outside lawyers. Multinational companies also may wish to consider whether to incorporate the principles in their internal policies, including their policies with respect to global tax strategy, tax control framework, and corporate social responsibility strategy.

Endnote

1. <https://www.ibanet.org/Document/Default.aspx?DocumentUid=3b4fda81-d105-4c49-824c-2a3f6cb60bc2>.

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