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AN INTRODUCTION TO  
LEGAL ETHICS IN  
AFGHANISTAN



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An Introduction to the

# Legal Ethics in Afghanistan

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## PREFACE & ACKNOWLEDGEMENTS

Stanford Law School's Afghanistan Legal Education Project (ALEP) began in the fall of 2007 as a student-initiated program dedicated to helping Afghan universities train the next generation of Afghan lawyers. ALEP's mandate is to research, write, and publish high-quality legal textbooks, and to develop a degree-granting law program at the American University of Afghanistan (AUAF). The AUAF Law Department faculty and Stanford Law School students develop curriculum under the guidance of ALEP's Faculty Director and Executive Director with significant input from Afghan scholars and practitioners.

In addition to *An Introduction to Legal Ethics for Lawyers of Afghanistan (1st Edition)*, ALEP has published introductory textbooks about: *The Law of Afghanistan (3rd Edition)*; *Commercial Law of Afghanistan (2nd Edition)*; *Criminal Law of Afghanistan (2nd Edition)*; *Constitutional Law of Afghanistan (2nd Edition)*, *International Law for Afghanistan (1st Edition)*; *Law of Obligations of Afghanistan (1st Edition)*, and *Property Law of Afghanistan (1st Edition)*. Textbooks addressing Legal Methods: Thinking Like a Lawyer, Legal Methods: Legal Practice, and a new version of Public International Law are forthcoming. Many of the ALEP textbooks have been translated into the native Dari and Pashto languages and are available for free at [alep.stanford.edu](http://alep.stanford.edu). Additionally, ALEP has published professional translations of the Afghan Civil Code and Afghan Commercial Code, and business guides authored by Afghan students in the business law clinic. All are available on ALEP's website.

ALEP would like to acknowledge the individuals and institutions that have made the entire project possible. ALEP benefits from generous and dynamic support from the Bureau of International Narcotics and Law Enforcement (INL) at the U.S. Department of State. Current Stanford Law School Dean Elizabeth Magill, former Dean Larry Kramer, and Deborah Zumwalt, General Counsel of Stanford University and member of AUAF's Board of Trustees, have provided important continuing support to ALEP. ALEP's partnership has deepened over the last six years with AUAF's extraordinarily supportive leadership: Dr. Sharif Fayez (Founder), Dr. Mark A. English (President), Dr. Michael Smith (former President), Dr. Timor Saffary (Provost), and AUAF's Board of Trustees.

The creation of *An Introduction to Legal Ethics for Lawyers of Afghanistan (1st Edition)* has been one of ALEP's most challenging and rewarding accomplishments to date. The book represents nearly four years of work and the input of many devoted individuals. ALEP sought to produce a textbook that would be both highly informative about the development of legal ethics in Afghanistan, as well as practically useful to Afghan legal practitioners. The former objective required extensive scholarly research, while the latter required a deep knowledge of Afghan legal practice and the cultural norms that relate to the development of professional ethics. The Stanford-based and Kabul-based teams worked together closely on numerous drafts of the textbook in a quickly-evolving legal landscape that occasionally rendered the book dated before it could be published.

There are many to thank, from the original authors in the 2013 graduating class (Julian Simcock, Will Havemann, Jake Klonoski, and Nicolas Martinez), to the committed editors of the 2015 and 2016 classes. Ryan Nelson deserves special mention for authoring part of Chapter 1, and Jason

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ALEP looks forward to continuing the collaboration that made this book possible. Please share your feedback with us on our website, [alep.stanford.edu](http://alep.stanford.edu).

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# CHAPTER 1: AN INTRODUCTION TO LEGAL ETHICS

## 1. WHAT ARE LEGAL ETHICS?

This textbook will serve as a broad overview of the topic of legal ethics in Afghanistan. Our focus will be on the most important issues facing Afghan advocates<sup>1</sup> as they fulfill their professional responsibilities. After a discussion of what constitutes legal ethics and why they are important to study, we will look at the specific ethical rules that control the legal profession in Afghanistan.

### 1.1. Legal Ethics Definitions

You may already be familiar with the concept of ethics, or you may have been exposed to the term in your personal life or religious studies. In general, **ethics** are the accepted principles and rules of conduct governing an individual or a group. Ethics arise out of broad values shared by a group of people. These broad values are called **norms** or **morals**. From these values, groups form general beliefs about how to achieve these norms. These beliefs are called **ethical principles**. Ethical principles are used to formulate ethical rules, or formal rules that tell people what they can or cannot do. By enforcing these rules, groups can try to get their members to live in accordance with accepted norms. The following is an example illustrating the relationship between a norm, an ethical principle, and a rule in an organization.

Imagine that a group of friends who enjoy playing chess form a club. The purpose of the club is to create opportunities for members to play chess and to improve their skills. The members share a norm that everyone deserves an equal opportunity to play and learn, regardless of talent. They adopt an ethical principle that excessive competition is bad for creating a supportive educational environment. They adopt two rules: the club will not record members' wins and losses and the club will not hold tournaments where individuals are taken out of the competition after a loss. By implementing these rules, the club can put its ethical principle into concrete terms in a way that helps the group act in accordance with their accepted norm.

In this textbook, our discussion focuses on ethical rules that apply to individuals belonging to a certain group – people belonging to the legal **profession**. A simple definition of profession is an occupation or job requiring mastery of a complex set of knowledge and skills through formal education and/or practical training. Examples of common professions include law, medicine, and accounting. In professions, there are normally rules regarding eligibility and licensing requirements for practicing within the profession, and members are subject to specific rights and duties, standards of behavior, and disciplinary actions for violations of such standards. Anyone not licensed may not legally perform the services or acts provided by the profession. Note that this can create a monopoly, allowing some professions to charge high rates for their services. Most professions have a governing organization or board that oversees licensing of members and regulation of the profession.

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<sup>1</sup> Although the Advocates' Law uses the term "advocates" for those who are practicing law, the word will be used interchangeably throughout this book with "lawyer" and "attorney," as this is common terminology in the English language to reference legal practitioners.

Two key terms and concepts related to a profession are a professional and professionalism. Simply stated, a **professional** is a person qualified to perform the services provided by a profession. For example, a doctor is a medical professional qualified to perform treatments provided by the medical profession. Yet when people think of what it means to be a professional, the definition becomes broader. Professionals typically provide a service to members of the public through application of their particular skills and knowledge. Another key aspect of being a professional is being competent or skilled in a particular area. You may have heard people refer to someone doing his job carefully and skillfully as a professional. They are admiring the person's professionalism. **Professionalism** is the trait of performing a skill competently and expertly. Professionalism also refers to complying with rules and standards of conduct that exist within a profession. These rules and codes of conduct bring with them, among others, a number of duties. An important part of this book is talking about duties that members of the legal profession have towards their clients, the court, the legal profession, and other people, including their colleagues.

The **legal profession**, therefore, is an occupation based on expertise in the law and expertise in its application. Those who pursue a career in this profession and obtain certification from a relevant governing authority may practice law in their jurisdiction. You may hear such individuals referred to as **advocates**, **lawyers**, or **attorneys**. The terms all share the same meaning in the context of legal practice. In chapter two of this book, you will learn more about the legal profession in Afghanistan. Like in many other professions, joining the legal profession requires mastery of complicated ethical and legal rules and standards.

Considering the above explanations of ethics and the legal profession, you should now have a sense of what constitutes legal ethics. **Legal ethics** refers to the system of laws and regulations governing the conduct of individuals engaged in the practice of law. The regulations define the duties that advocates owe to their clients, the courts, fellow advocates, and other parties affected by legal practice. Every practicing advocate is expected to know and abide by his or her controlling ethics code, regardless of what type of law he or she practices.

All advocates, in all specialties, will confront ethical issues and obligations during their careers. These ethical issues are also known **ethical dilemmas**. An ethical dilemma is a situation in which two or more ethical obligations, duties, or rights come into conflict with one another. Throughout this book, you will read some hypothetical scenarios and actual cases<sup>2</sup> that will test your ability to make an ethical decision when such conflicts exist. You will be asked if a certain act is ethical or **unethical**. By "unethical" we mean that the act violates the ethics codes that govern lawyers. Of course, you need to know the ethical rules to answer those questions. We will outline these rules in Chapter Three and then go into more detail in subsequent chapters about different ethical rules regarding the rights and duties of attorneys.

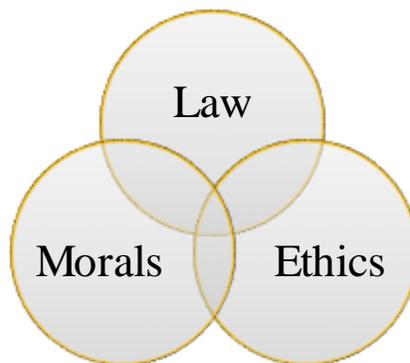
By now, you should have noticed that the purpose of this book is not to talk about morality as a system of beliefs that helps an individual to distinguish right from wrong. Rather, this book discusses certain codes of conduct that govern the behaviors of attorneys in Afghanistan. You

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<sup>2</sup> All names and characters used in these cases and scenarios are fictitious and resemblance to real people is purely coincidental.

may have also noticed some overlaps between morality, legal ethics, and laws. Many times, something that is immoral is also unethical and illegal. But, that is not always case. For instance, if your close friend tells you a secret and asks you not to share it with others, then you might consider it immoral to share that secret with someone else. However, disclosing a friend's secret does not necessarily violate ethical or legal standards. However, if a lawyer discloses a client's confidential information, then his act breaches the lawyer's codes of conduct and is considered unethical. As you will learn later, disclosing a client's secrets could also be considered criminal. In certain situations, an act may be immoral but not professionally unethical, while in another situation, an almost identical act could be unethical, and possibly illegal. Can you think of any reasons why this might be the case?

Since you have taken some legal courses so far, it might be interesting for you to explore how morality, legal ethics, and law are related. One way to visualize the interaction between these concepts is illustrated below.



Acts can be morally, ethically, and legally recommended, permitted, or prohibited. A certain act may be ethically prohibited and legally permissible, or vice versa. An act may also be morally prohibited even though the law does not prohibit it. For instance, the act of **perjury**, or lying while acting as a witness, is prohibited by all three standards of behavior. However, driving on one side of street is a legal requirement even though moral and ethical rules might be neutral as to which side of the street one should drive. Donating to poor and needy people might be morally recommended, but it is not necessarily required by law.

Another way to think about the relationship between morality, legal ethics, and law is to consider them as a spectrum with morality on one side and law on the other. Normally, if an act causes individuals or society to suffer little harm, only morality might intervene to condemn the act. Consider the example of someone who does not respect an elderly person or who does not help the poor when he is capable of doing so. Those acts might be immoral. But if an act does more harm, potentially affecting the integrity of a profession, it most likely will fall within the scope of professional ethics. A lawyer who is not honest to his client or is not competent to perform an acceptable job would face some disciplinary actions under rules of legal ethics. From these examples, you can see that the scopes of morality and legal ethics are different.

Like morality, the scope and purpose of legal norms are broader than the rules of legal ethics. If an action is more serious and causes injury to an individual, an area of law known as **private law**

will most likely intervene. This body of law governs the relationship between persons and makes sure that harms are compensated. Civil law and commercial law are two examples of private law. Alternatively, if an action is so harmful to the whole society that it should be stopped and punished, then criminal law, which is a branch of **public law**, will intervene. Consider the example of an attorney bribing a prosecutor to win a case. Besides the fact that bribery is immoral and unethical, the act is considered so harmful to society that it is defined as a crime in the Penal Code of Afghanistan.

The goal of this discussion was to help you understand the scope of this course. There are many complex and sometimes contradicting theories in the philosophy of law and morality that discuss relationships between these different standards of behavior. For the purpose of this book, we will consider the many overlaps and interactions between each of these systems of rules and standards as working in concert with one another rather than contradicting each other. In the following chapters, our focus will be on the rules and standards of professional conduct for lawyers.

In this book, we are primarily concerned with exploring how advocates should behave when confronted with real-life situations. It is important to note that, while judges and legal professionals working in the civil service qualify as legal professionals, this book will focus primarily on ethics for practicing advocates. The reason for this is that Afghanistan has passed separate codes of conduct for judges and legal professionals in the civil service than for advocates.

### **Discussion Questions**

1. When you think about the term profession, what other occupations besides those named above do you think of?
2. For the professions you thought of in question 1, do they have an association and certain professional code of conduct that regulates their day to day ethical duties?
3. What similarities and differences do you see between those professions and the legal profession in Afghanistan?
4. Considering the criteria for comparing different standards of behavior, can you explain some differences between legal ethics, our personal feelings of right and wrong, our religious beliefs, legal rules, and custom? Can you give an example for each?

### **1.2. Legal Ethics as a Type of Ethics**

In discussing the ethical obligations of advocates, we will look at advocates on an individual, as well as collective, level. On the one hand, this textbook will examine issues of personal responsibility, focusing on the vast number of ethical choices that individual advocates face. On the other hand, this textbook will discuss issues involving the collective responsibilities of the

**Afghan Independent Bar Association (AIBA)**, including the distribution of legal services in Afghanistan and the regulation of who may practice law and under what conditions.

Even though codes and laws exist to regulate the conduct of individual advocates and the legal profession in Afghanistan, they do not specifically address every ethical problem you may face as an advocate. Therefore, you must think about what ideas informed the rules of conduct in the code and how that framework will apply when you find yourself in a difficult ethical situation during your practice.

### Discussion Questions

1. Ethical dilemmas happen in every profession. Some professionals knowingly or mistakenly violate professional codes of conduct. Likewise, individuals also sometimes do not or cannot make ethical decisions. Can you think of a time in your personal, academic, or professional life that you faced an ethical dilemma?
2. When facing that ethical dilemma, did you seek guidance from a person, book, or set of rules to decide how you should respond to the dilemma? What action did you ultimately take to resolve the dilemma?

### 1.3. Case Study: A Simple Illustration of Ethics

#### The Case of Ahmad<sup>3</sup>

In 2009, a man petitioned to Department 74 of the National Security Directorate, writing: “My brother, Fahim, is involved in a legal case with a prosecutor named Ahmad. Ahmad asked Fahim to bribe him with 20,000 Afghanis in order to get a favorable outcome in the case.”

Based on the petition, officials from the National Security Directorate and Prosecution Department contacted Fahim. They asked him to call Ahmad and make an appointment to meet at Zarnegar Park the following day, promising to deliver the money to Ahmad at that time.

When Fahim met Ahmad in the park the following day, the enforcement squad was watching from a lookout twenty meters away. They observed as Fahim and Ahmad spoke for several minutes, after which Fahim took the Afghanis out of his pocket and gave them to Ahmad. Ahmad took the money with his left hand and put it in his jacket pocket, nodding his head to Fahim. The squad then emerged from their hiding place and arrested Ahmad.

The officials from the National Security Directorate accused Ahmad of accepting a bribe. In his defense, Ahmad said that he agreed to meet with Fahim to discuss the case in which Fahim was a defendant. He said that, when he met with Fahim in Zarnegar Park, Fahim offered him money as

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<sup>3</sup> This example comes from a real case of prosecutorial misconduct in Afghanistan. The names and certain facts have been altered for the purposes of this textbook.

a “gift.” Because it was a gift, Ahmad said that he did not feel he should reject it. He denied asking for the money, but did acknowledge telling Fahim he would do what he could to help Fahim in light of the generous gift.

Ahmad’s case was taken to the trial court. The trial court declared Ahmad guilty of violating the Criminal Code and sentenced him to six months’ imprisonment and a fine of 20,000 Afghanis.

Read the below questions first, and follow the instruction below on how to answer questions of this type.

### Discussion Questions

1. You already know that there is a criminal issue of bribery in the case of Ahmad. Do you think that Ahmad’s conduct also presents a legal ethics issue? Though you have not yet studied specific ethical rules, try to explain in plain language what might be unethical about Ahmad’s conduct.
2. Ahmad did not confess to asking for the money from Fahim; rather, he stated that Fahim gave him the money as a “gift.” If we are to believe Ahmad that he did not ask to be paid by Fahim, does that make his behavior more or less ethical, or does your analysis remain the same?

Answering questions about ethical dilemmas requires some organizational and analytical skills. Below is one method of answering this type of question.

#### 1.4. Steps in Resolving Ethical Dilemmas

You can consider the following tips when answering ethical questions in this book:

1. First carefully read the facts of the case.
2. Understand the question. Most of the time you only have to focus on the legal ethics issues. Unless you are asked otherwise, do not discuss civil or criminal aspects of the case. Also, do not attempt to focus your answers on rules that have not yet been covered in class.
3. Once you spot the issue, find out what the rules of legal ethics say. Cite from the sources you will examine in the coming chapters, providing a brief explanation of the relevant rules.
4. Then apply the rule to the case. This may require analysis because not all the questions are simple. You may need to make good arguments as to why the rule should apply to a particular case.
5. Finally, provide a conclusion. In your conclusion, state how the lawyer(s) should have acted.

Remember the case of Ahmad and the steps in resolving ethical dilemmas as you read onward and encounter more subjects involving legal ethics. This textbook will refer back to the Ahmad case as new concepts are introduced.

## 2. TRADITIONS OF MORAL REASONING

In order to analyze the narrower concept of professional responsibility in Afghanistan—the task that occupies the bulk of this textbook—it is important to reflect briefly on the sources of ethical reasoning animating the doctrine. Both Islamic and Western cultures contain rich traditions of moral reasoning, and the basics of each will be discussed below.

### 2.1. Traditions from Islam

In this section, you will learn how ethics is addressed in Islam. This discussion is important because of the role that Islam and Islamic Law play in Afghanistan's legal system, as well as in the daily lives of Afghans. As you will see below, a crucial part of Islamic teachings focuses on ethical norms prescribed in primary sources of Islamic Law, which suggests that not all moral behaviors are the same. These prescriptions to act in certain ways can be obligatory (wājib, fardh), recommended (mandūb, mustaḥabb), indifferent, morally neutral or permissible (mubāh), reprehensible (makrūh), or forbidden (harām). The ethical prescriptions that are obligatory or strictly prohibited are at the core of Islamic Law. Thus, in spite of various interpretations of this issue, it is fair to say that Islamic Law and Islamic ethics are virtually inseparable.

Understanding Islamic ethics is also critical to learning Afghan legal ethics because Islam has shaped many of the legal and ethical rules you will learn in this course. When you read the specific legal ethics rules later, consider their source(s) and the reason for having such rules. Often, attorneys' duties exist to protect the interests of their clients, prevent harm to their clients, or to uphold the dignity of the legal profession. Other times, the policy reason behind a rule may be to maintain justice. Compare these reasons with the ethical rules of Islam that you will learn below. See if the outcomes of both rules and standards are alike or different.

Note that this discussion will be brief and will only provide examples from the primary sources of Islam. Talking in detail about all aspects of Islamic ethics—a rich and complex field—would require a separate course. Therefore, we will only touch on the primary sources of Islamic Law to see how some moral standards and principles are addressed. In other words, we will see how moral obligations (i.e. what a person ought to do), values (i.e. what objects or state of affairs are important in life), and virtues (i.e. what characteristics a Muslim should have) are addressed in the primary sources of Islam. We will not discuss philosophical examination of particular legal issues from perspectives of Islamic and Islamic Law. However, as you learn more about the legal profession, think how the general notions of morality below could be applied in the legal profession.

The history of ethics in Islam, like many other Muslim traditions, goes back many hundreds of years. There are two terms from the *Qur'an* that have largely shaped the debate on ethics in Islam: *khulq* (pl. *akhlaq*, also spelled *khuluq*) and *adab* (pl. *adab*). As the following discussion

of *khulq* and *adab* suggests, all Muslims are required to embody a high moral standard of behavior and good character regardless of what profession they hold.

In the context of ethical study, the term *khulq* generally refers to one's individual character. Outside the context of ethics, the term *khulq* can mean "religion," "nature," "natural disposition," "chivalry," or even "habit." As an example, *Khulq* can be found in *Surah al-Qalam*, verse 4:

"And verily, you (Prophet Muhammad) are of exalted moral character (*khulq*)."

The term *adab*, in the context of ethics, generally refers to the proper standard of conduct or etiquette to which Muslims should adhere. This correct form of conduct constitutes the sum of prudential knowledge that shields from error one's speech, acts, and character. The Arabic word *adab* derives from the root signifying a feast, *ma'duba*, in order to nourish the body. Thus, ethics can be seen as one's use of education and practice to cultivate his or her proper standard of conduct—a so-called nourishment of the mind and spirit.

With regard to legal ethics in particular, the *Qu'ran* also contains several verses that lawyers should bear in mind. First, verse 135 of *Surah an-Nisā'* reads:

O you who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves or parents and relatives. Whether one is rich or poor, Allah is more worthy of both. So follow not [personal] inclination, lest you not be just. And if you distort [your testimony] or refuse [to give it], then indeed Allah is ever, with what you do, Acquainted.

This verse instructs all Muslims, especially lawyers, to stand "firm in justice" even if that means going against what may seem to be in the best interest of themselves or their families. Second, there are two other verses from *Surah an-Nisā'* that may apply particularly to lawyers. Verse 105 provides:

"Indeed, We have revealed to you, [O Muhammad], the Book in truth so you may judge between the people by that which Allah has shown you. And do not be for the deceitful an advocate."

Verse 107 states:

"And do not argue on behalf of those who deceive themselves. Indeed, Allah loves not one who is a habitually sinful deceiver."

These two verses appear to have special ramifications for criminal defense lawyers who might be called to represent individuals accused of deceitful conduct.

### Discussion Questions

Do you think that verses 105 and 107 from *Surah an-Nisā'* suggest that Muslim lawyers may not defend persons they know to be guilty of a crime, or that they know to be deceitful in some

manner? If so, is there a tension between these two verses and Article 2 of the Advocates' Law, which gives all persons the right to legal representation upon arrest?

**Hint:** Fully answering this question would require consideration of Islamic Criminal Law and fundamental rights in addition to ethics. Since those are not the subjects of this course, simply make an argument using the general examples and principles quoted in this section from *Qur'an* and Sunnah.

In addition to these Qur'anic references, the *Hadith* also mentions ethics and morality when Aisha reports that "the *khulq* (Morals) of the Prophet was based upon the *Qur'an*."<sup>4</sup> Likewise, the *Qur'an* considers the Prophet, peace be upon him (PBUH), as an ideally perfect man who has the highest moral character<sup>5</sup>. The *Qur'an* urges Muslims to follow the practices of the Prophet (PBUH) who was well known throughout his life as honest, just, and trustworthy. Many practical examples of moral behavior can be found in the life of Prophet Mohammad (PBUH). As Sunnah shows, the Prophet asked Muslims to fulfill their covenants, to avoid breaches of trust, to be merciful to orphans, to do good acts and avoid bad ones, to treat their neighbors well, and to be generous in the daily course of life. He visited and comforted the sick and the afflicted. He was tolerant and treated poor and rich equally.

Consider a well-known Hadith in Islam. Anas narrated that the Prophet (PBUH) said: "None of you believes until he loves for his brother what he loves for himself."<sup>6</sup> Later, when we explain the ethical rules Afghan lawyers must follow, you will notice that principles like this provide a foundation for how an attorney should act towards his client. In another Hadith, the Prophet (PBUH) said that "I was sent to perfect good character."<sup>7</sup> He further said, "Those who have perfect faith are those who have better moral characters."<sup>8</sup> These and Hadiths such as these that emphasize doing the right thing, being honest, protecting and helping victims, fulfilling one's promises, being fair, and helping minors and seniors cast light on different aspects of moral behaviors recommended in Islam. Likewise, values and beliefs such as respecting human dignity, individual rights and liberties, justice, and being trustworthy are highly emphasized in those primary sources of Islam. These values and principles are so general that one could argue they are applicable to all professions. However, notions such as justice, rights, human dignity, and honesty are particularly relevant to our discussion on legal ethics.

With respect to the legal profession in particular, Islam teaches that law and ethics are inseparable. Law in Islam must meet two ends: the practices must fulfill worldly ends and they must simultaneously serve as acts of salvation.<sup>9</sup> Critically, individual responsibility is at the center of Muslim legal ethics. In Islam, lawyers are obligated to motivate every member in society towards piety (*taqwa*), to remind others of the importance of finding the truth, and to represent those who cannot stand up for themselves.

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<sup>4</sup> HADITH part XV, clause 359.

<sup>5</sup> See Quran Surat Al-Ahzab, verse 21.

<sup>6</sup> Vol. 4, Book 11, Hadith 2515

<sup>7</sup> Book No. 47, Hadith No. 47.1.8

<sup>8</sup> *Sunan Abi Dawud*, No. 4682.

<sup>9</sup> *Id.* at 239.

In early decades of Islam, the legal profession was obviously not as developed as it is today. Therefore it is not surprising that Islamic Law does not provide a detailed written manual code of conduct for lawyers. However, as you noticed above, Islamic primary sources provide a basis for ethical conduct for all professionals. The primary sources so strongly emphasize that judges must maintain a high standard of ethical and religious conduct that many jurists were intimidated to serve as judges. Studying the professional lives of Caliphs, judges, and jurists shows that they were very cautious to act ethically all the times. Companions of the Prophet (PBUH) and Muslim jurists tried to translate the ethical mandates set forth in the *Qur'an* and Sunnah into practice. For example, the second Caliph of Islam, Umar, wrote letters to many of his judges, governors, army commanders, and leaders in different regions. He sent the most letters to Abu Musa al-Ashari, who was governor-cum-chief justice in Basrah. The letters to Abu Musa are the richest in substance regarding judicial, legal, moral, and administrative topics. In one letter, Umar wrote:

“[A]dministration of justice is a binding ordinance of God and Sunnah (of the Prophet) which ought to be followed.

If a suit is filed before you, decide it after careful consideration (and execute it), for even the most rightful judgment without execution is useless.

Consider all the people equal before you in your court and in your attention; so that the oppressor will not expect you to be partial and the oppressed will not despair from you.”

### Discussion Questions

1. In the context of ethical study, what do the terms *khulq* and *adab* mean? How might these concepts be relevant to the narrower study of legal ethics and professional responsibility?
2. Lawyers generally have a duty to represent the best interests of their clients. However, Muslim lawyers are instructed in verse 135 of *Surah an-Nisā'* to always “stand firm in justice.” How might these two obligations conflict? If such a conflict arose in your practice, how might you reconcile the difficulty?

People have different ways of interpreting the Islamic ethics described above. Scholars have developed categories for organizing the various schools of thought. On one side of the debate are the traditionalists, who themselves are quite fractured in their beliefs. **Traditionalism**, also known as orthodoxy, focuses mostly on historical interpretations of the *Qur'an*. One subcategory, doctrinaire traditionalism, relies heavily on the formalized legal and ethical opinions of respected jurists. These teachings are considered universally valid, and departure from these tenets is permitted only in limited circumstances.

The **modernist** school—sometimes referred to as transcendentalism—occupies the other side of the debate. Concerned that the teachings of the Prophet Muhammad have been altered, corrupted, or misinterpreted by subsequent jurists, modernists almost exclusively rely on the text of the *Qur'an* as an idealized source of normative behavior. In particular, modernists believe that their

most recent interpretation of the revealed Qur'anic principles is the most perfect, in part because it is the one most closely tied to the actual text.

### Discussion Question

1. What distinguishes the traditionalist and modernist schools of ethical interpretation? Within the traditionalist school, what differences exist between the doctrinaire and critical approaches? Are these distinctions meaningful?

As you analyze the various provisions in the Advocates' Law and AIBA Code of Conduct throughout this textbook, think about the degree to which they reflect the fundamental principles of Islam discussed in this subsection.

## 2.2. Traditions from the West

Just as the Islamic tradition has been divided into schools of thought, so too has the Western tradition. These schools of thought are too numerous and varied to discuss in complete detail. For this reason, our discussion will be limited to brief overviews of three influential theories of ethics: Virtue Ethics, Kantian Ethics, and Utilitarianism.

**Virtue Ethics** is a theory arguing people should strive to act in accordance with virtuous character traits. If a person acts virtuously, then he has acted ethically. One famous and early description of Virtue Ethics comes from Aristotle's *Nicomachean Ethics*.

To Aristotle, what is ethical depends on a thing's function or purpose. He argued that objects and things have unique functions and that fulfilling these functions to the best degree possible makes an object good. For example, a good dinner knife fulfills the purpose of dinner knives and does so well: it cuts food, it is sharp, and it is strong. Applying this logic to humans, Aristotle argued that the purpose of a human is to flourish. In order to flourish, a person must live a virtuous life by having a virtuous character. By accomplishing this purpose, a person will have lived an ethical and good life.

As you may already see, following this theory relies heavily on knowing what is virtuous. To help identify virtues, Aristotle proposed looking to the mean character trait between two extreme character traits. By looking for the middle character trait between the extremes of having too much or too little of a trait, Aristotle argued that a person could identify virtues such as courage. For example, too much courage may lead to recklessness and too little may result in cowardice. By coming to know these virtues and following them as a matter of habit, a person can come to live a virtuous life and make ethical decisions.

Kantian Ethics, as described by Immanuel Kant's *Groundwork of the Metaphysics of Morals*, takes a different approach. Instead of focusing on living a life following virtues, **Kantian Ethics** argues that actions are considered ethical when they conform to universal, generalizable principles. According to Kant, the source of these principles is human rationality and any immoral act is the result of an irrational decision.

Under this theory, the task of acting ethically involves identifying these generalizable principles. To Kant, these principles or duties tell people how to act and can be traced to one overall principle called the categorical imperative. The categorical imperative says that when trying to decide if something is ethical, you should think if it would be rational to have every other person act in the way you are thinking about. If it is rational, then it is ethically permissible to act in that way. For example, imagine you are considering telling a lie to get what you want. Kant would argue this is not allowed because if everyone lied to get what they wanted, no one would trust anyone else. Without trust, it would be irrational to lie – no one would ever believe you. For this reason, lying would go against the categorical imperative and would not be permitted by the Kantian.

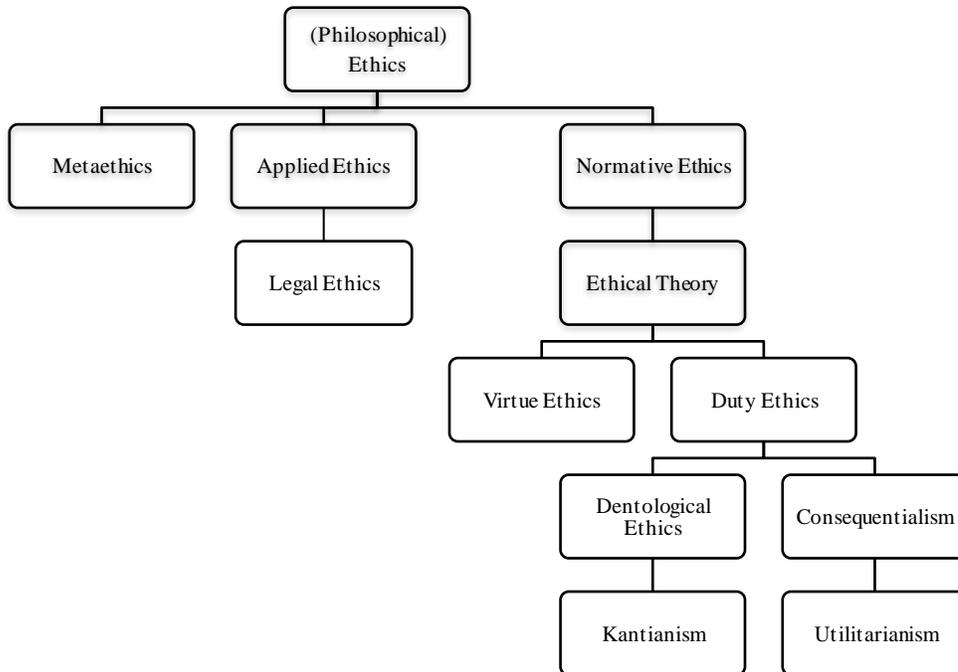
Over time, Kantians have interpreted the categorical imperative to require people to respect individual human dignity, freedom, and self-determination. These duties, like all those that come from the categorical imperative, must be followed no matter the consequences.

Utilitarianism offers another approach to determining what is ethical. **Utilitarianism** holds that whatever action leads to the greatest amount of good for the greatest number of people is the ethical choice. Thus, Utilitarians focus only on the possible consequences of their actions when making decisions about ethical choices. One adherent to this view, John Stuart Mill, described this theory in his work called *Utilitarianism*.

To Mill, the morally correct action is the one that produces the greatest balance of happiness (pleasure) over unhappiness (pain) for the greatest number of people. Thus, to solve an ethical dilemma, utilitarians that follow Mill start by identifying possible solutions and then weigh the amount of pleasure each action would bring against the amount of pain it would cause. Whichever option produces the most pleasure once all the pain is subtracted away is the ethical answer.

Critical to making this decision is determining what counts as pleasure. To Mill, pleasure does not necessarily mean the basic pleasures such as eating ice cream. Rather, pleasure means the satisfaction of desire. The higher the quality of desire that is satisfied, the more pleasure that is gained. For example, Mill believed it was more pleasurable to pursue knowledge and be dissatisfied than to remain happily ignorant. He believed this because he thought the satisfaction of desire in pursuing knowledge was of higher quality than the basic happiness that results from ignorance. Thus, when confronted with choosing whether to pursue knowledge or remain ignorant, a utilitarian that follows Mill would choose to pursue knowledge over remaining ignorant because it would lead to more pleasure.

While many other theories exist, Virtue Ethics, Kantian Ethics, and Utilitarianism present three influential ethical frameworks in Western thought. Look at the table below to see how these theories fit within the overall scheme of ethics and try out the discussion questions to see how these theories may lead to different answers for the same ethical dilemma.



### 3. WHY DO LEGAL ETHICS MATTER?

The existence of this textbook underscores our belief that the practice and instruction of legal ethics are both important. While few, if any scholars would argue that advocates should not abide by high standards of ethical conduct, there are many that question the effectiveness of teaching legal ethics in law schools. This section will address the question of why legal ethics matter.

#### 3.1. Why Teach Legal Ethics?

In general, courses on legal ethics and professional responsibility have three main objectives: (1) to teach students how to spot ethical dilemmas when they arise in legal practice; (2) to make students aware of the particular laws and regulations governing the conduct of advocates; and (3) to equip future advocates to conduct themselves ethically once they enter the legal profession. Ultimately, legal ethics courses seek to influence the conduct of students once they leave school and become practitioners. At the very least, law students should finish a course in legal ethics with the tools necessary to determine whether an ethical problem exists in a given situation and to know the relevant rules and sources of law.

You might wonder what the incentives are for an attorney to act ethically, when unethical behavior, such as accepting bribes, may have financial rewards. The strongest incentive relates to the fact that attorneys are in some ways business people. Without clients or cases, attorneys do not have jobs. Therefore, an attorney's reputation in the public and legal community is very valuable. When an attorney acts unethically and becomes known as someone who lies or cheats, fellow attorneys, clients, and judges will not trust him. This will make it very difficult for him to

generate and keep business. Additionally, because society wants to discourage unethical lawyers from taking advantage of clients or the legal system, there are consequences for breaking ethical rules. Depending on the unethical conduct and the rule or law broken, attorneys may be disciplined by the AIBA, sued for malpractice by a harmed client, or even convicted of a crime. We will discuss disciplinary measures for unethical behavior in the last chapter of this textbook, after we cover all of an attorney's ethical obligations.

As you study the material in later chapters, think about how you can get the most out of this course. Think about how the skills developed in this course will translate into your career as a professional lawyer, and take time to reflect on the difficult scenarios with which you will be presented.

### **3.2. Importance of Ethical Standards in the Legal Profession**

The legal profession can play an important role in protecting individual rights, promoting efficiency by reducing corruption, and therefore helping establish rule of law in a country. For the legal profession to play these roles, it should be free from government and other forms of outside controls. As you will learn later, the existence and enforcement of legal ethics in Afghanistan promotes a legal profession that has such level of freedom. A legal profession that is free from government control is vital for having an independent judiciary.

Regarding protection of individual rights, you may have noticed that one primary objective of the Afghanistan Constitution and statutory law is to protect individual rights. The Preamble of the Constitution, for instance, mandates a civil society based on “social justice, protecting integrity and human rights, and attaining peoples’ freedoms and fundamental rights.” The UN Basic Principles on the Role of Lawyers emphasizes the “vital role” bar associations must play in protecting the legal rights of their membership as well as average citizens:

Governments and professional associations of lawyers shall promote programs to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

Thus, a robust legal ethics regime, administered by an independent bar association, seeks to ensure that a country's poorest citizens have access to quality legal representation. This includes free legal aid that will be explained in Chapter 3.

### **Protecting Individual Rights – AIBA Fact Sheet**

[A]dequate protection of fundamental human rights requires effective access to legal services provided by an independent legal profession. International standards require that Bar Associations cooperate with Governments to ensure that everyone has effective access to legal services and that lawyers are able to counsel and assist their clients in accordance with the law and recognised professional standards and ethics. In many other jurisdictions, Bar Associations take an active role in the protection of human rights and fundamental freedoms through involvement in legal aid or pro bono activities; the establishment of specialised sub-Committees dealing with, for example, women and children’s rights; and public education initiatives.

Also a respected legal ethics regime promotes efficiency by reducing corruption in both the private and public sectors. The UN Basic Principles on the Role of Lawyers recognized the positive impact bar associations can have on promoting efficiency in the legal system:

Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

In addition to promoting the criminal statutes outlawing corruption, such as criminalizing the act of accepting bribes, the AIBA ethical rules also deter lawyers from engaging in corrupt conduct. Those ethical rules define what is considered as corrupt conduct, how lawyers should avoid it, as well as what will be the disciplinary consequences of engaging in corrupt conduct. You will learn about these disciplinary consequences at the end of this book.

### **Reducing Corruption – AIBA Fact Sheet**

Professional associations of advocates have a vital role to play in upholding professional standards and ethics of their members, in order to facilitate the highest levels of competence and to protect the public. These professional standards for advocates in Afghanistan are enshrined in the AIBA’s Code of Conduct, which all AIBA members commit to uphold upon receiving their license. Acting outside of this ethical code can subject an AIBA attorney to reprimand by the AIBA’s Monitoring Board, and in extreme cases, by taking away that advocates’ license. . . . [I]t is frequently the task of a Bar Association to uphold the code of ethics by investigating and, where appropriate, penalising that lawyer. Such measures help to restore public confidence in the legal system by illustrating that no-one is above the law and that lawyers themselves must abide by established ethical standards and procedures.

### **Discussion Questions**

Think of some challenges facing the state justice system in Afghanistan, such as lengthy trials and detention periods, lack of legal awareness, and in some cases prevalence of informal justice over formal justice system. How could the legal profession play a role to solve these problems?

We complete this discussion with an example illustrating the significance of ethical behaviors by attorneys, prosecutors, judges, and other law enforcement agents in attaining justice. As you read the case below, think about who may have suffered as a result of unethical conduct in the legal profession, and why ethical rules—even very simple ones—are important.

Assume that Ahmad is a very honest farmer who never lies and expects other to do the same. Ahmad's son, Khalid, was present at a crime scene where one of his friends was killed in a fight. Police arrested Khalid along with several other boys at the scene. Ahmad knew that Khalid did not commit the murder and that he was only at the crime scene because he was trying to stop the fighting among his friends.

Soon after the arrests, Ahmad went to see Wakil, an advocate known in the community for representing people in criminal cases. Wakil agreed to help Khalid. When Ahmad asked about fees, Wakil quoted a high rate but said that Ahmad could pay it later.

Ahmad provided Wakil with details of the case and evidence proving that Khalid was not the murderer. Ahmad expected the case to be resolved shortly after that, but it was months before he heard from Wakil again. By that time, Ahmad learned that all of the other suspects had been released. Wakil informed Ahmad that his son lost the first court case and would likely lose the secondary court case as well. Extremely upset, Ahmad consults you for help. You discover the following facts about Wakil's legal practice:

You discover that Wakil is well known in the community for his legal practice because of his name, which literally means "an advocate." However, he never attended law school and he has not renewed his legal license in 15 years.

You also find out that Wakil represented all other suspects in this case at the same time he took Khalid's case. Since Wakil received more money from other suspects, he convinced the police to release them without directing their case to a prosecutor. You find out that, in fact, Wakil made statements implying that Khalid was the murderer in order to help the others' cases.

You also find out that Wakil wanted to buy Ahmad's land and knew that Ahmad would not willingly sell it to him. So Wakil intentionally put Ahmad in a situation where he would be indebted to Wakil. Wakil wanted to let his legal fees accrue and then claim them when he knew they would be more than Ahmad would be able to pay in cash. Ahmad would have no option other than to sell his land to Wakil. For the same reason, Wakil intentionally delayed the investigation process and delayed some of the court hearings.

You also find out that Wakil knows the victim's family and is close friends with the father. The family is devastated about the son's death and wants to file a civil case for the harm

caused to their family. After getting the other suspects released, Wakil told the victim's family that he believes that Khalid killed their son and that he will make sure that Khalid is punished.

The result of all your research is evidence that Wakil worked for the benefit of everyone except for his client, Khalid. You conclude that Wakil was not honest, not competent, not impartial, and had personal interests that prevented him from fairly representing Khalid.

### Discussion Questions

1. Do you think this case could actually happen for people like Ahmad who do not know about law and who cannot defend themselves without a professional attorney?
2. How important is the role of a defense attorney in cases like this where one's soul, freedom, property, or reputation is at stake?
3. Can you imagine what will happen to Khalid if an honest and professional attorney does not help him?
4. What punishments and disciplinary actions do you suggest for an attorney who acts unethically?

## 4. CONCLUSION

The goal of this chapter was to introduce you to the study of legal ethics, first by defining legal ethics and illustrating an ethical dilemma through a case study. This Chapter also emphasized the practical importance of teaching legal ethics in law school and the benefits of developing a written code of conduct that applies throughout the profession.

The rest of this textbook will introduce you to the specifics of legal ethics in Afghanistan. The second chapter discusses the legal profession in Afghanistan and analyzes the myriad duties and rights enumerated in the Advocates' law. The rights include the right to be paid a fee, open a law office, and reject cases. Duties include maintaining client confidentiality, practicing with honesty and sincerity, eschewing conflicts of interest, and defending three criminal cases per year free of charge. This chapter also pays particular attention to diversity in the legal profession. In this context, diversity refers equally to ethnic, gender, and socioeconomic variation within the ranks of the profession.

The third chapter discusses the authorities governing legal ethics in the country. In particular, the chapter outlines the background and history leading up to the enactment of the 2007 Advocates' Law and the 2009 AIBA Code of Conduct. The third chapter also sketches the institutional role of the AIBA as an independent organization. The fourth chapter builds on the foundation laid by the second and third chapter and describes competence of attorneys.

The fifth and sixth chapters focus on two particularly complicated ethical duties: that of confidentiality and avoiding conflicts of interest. The seventh chapter looks at the consequences for advocates when they violate their ethical duties. This chapter first explains legal malpractice and disciplinary actions, then describes the legal ethics of government lawyers, including prosecutors, public defenders, and civil servants.

## CHAPTER 2: THE LEGAL PROFESSION

### 1. INTRODUCTION TO THE LEGAL PROFESSION

In the previous chapter you learned about introductory concepts related to legal ethics. In this chapter we will build on what you learned in Chapter 1 and explain in further detail the legal, historical, and practical aspects of the legal profession in Afghanistan. Again, the **legal profession** is an occupation involving prolonged training and formal qualification based on expertise in the law and its application. We will explore the evolution and regulation of the profession and how its members interact with the Afghan legal system and citizens.

Every Afghan has the right to appoint an advocate of his or her choosing per Article 2 of **the Advocates' Law**, a law passed in 2007 pursuant to Article 31 of the Constitution. The law governs the rights and responsibilities of civil and defense attorneys. The right to appoint an attorney is fundamental to a fair legal system. It allows citizens to choose the attorney who will best represent their interests. It also helps to ensure that lawyers will serve the interests of their clients, and that they will not be influenced or controlled by a third party. The right to appoint an advocate creates a demand for professionals with specialized legal training who can counsel clients and skillfully represent them in court. The goal of the legal profession is to meet this demand.

#### Discussion Questions

1. Why is it important for citizens to be able to choose their own attorney? How would the legal system change if the government, or some other party, could require people to accept attorneys they did not choose?
2. Are you excited to enter into legal profession?
3. Some view the legal profession as a business, while others see it as a profession guarding and improving the rule of law, protecting the weak, and providing access to justice. What are some of the reasons you want to become a lawyer?

#### 1.1 Historical Background on the Legal Profession

Globally, the legal profession has existed for more than two thousand years. Historical records show that in 400 B.C., advocates represented parties in Greek tribunals. Between 100 A.D. and 300 A.D., legal advisors in Rome began to form communities around major courts. These communities were a precursor to the modern bar association. They standardized the process for training young lawyers and imposed some minimal quality controls on the practice of law. As Great Britain and other European commercial powers developed legal systems that were increasingly complex, a profession of specialized attorneys emerged to navigate these systems.

The modern lawyer was born. European powers subsequently exported their models of the legal profession around the world.

In Afghanistan, the roots of the modern legal profession extend to 1880, when Amir Abdur Rahman Khan became Afghanistan's king. Prior to Amir Abdur Rahman's reign, the Afghan judiciary was entirely independent from the government. Afghan judges were trained in religious madrasas and practiced exclusively Islamic law. But as part of his effort to seize political power from the provinces and strengthen the central Afghan state, Amir Abdur Rahman established a formal legal system that enforced a new, secular law: the law of royal edicts (sometimes known as civil codes). Amir Abdur Rahman also developed Afghanistan's first judge's manual, which codified proper court procedures and judicial ethics in the new legal system. While the boundary between Sharia and the law of royal edicts was never entirely clear, Sharia law generally governed family, property, and contract disputes, while the new royal edicts governed issues of taxation, commercial law, and administrative law. Of course, the distinction between Islamic and non-Islamic law persists today.

### **Manual of Judges**

The manual of judges (Asasul Quzat) was written by Ahmad Jan Khan Alokozai and published in royal publication in Kabul in November 19, 1885. The manual has three sections. The first section explains the conduct of judges and procedures that judges should consider when dealing with disputing parties, witnesses, and others in court. The second section instructs judges on how to write correspondence and legal documents. The third section explains financial rules. Each section then consists of a number of canons which are generally detailed and include examples and citations from Quranic verses, Hadiths, and other Islamic referrals. The first canons start with prohibiting judges from taking bribes.

Canon number 41, for instance, explains orders of the court and the distances at which parties should be seated in front of the judge. The canon requires that no matter the differences between disputing parties, neither party is allowed to be seated closer to the judge than the other party. It more specifically mentions that even if one disputing party is Hindu (i.e. followers of Hinduism) and the other is Syed (i.e. a descendant of the prophet), both should be treated equally. Canon number 42 further prohibits judges from explicitly or implicitly saying or acting in a way that would be considered discrimination. Similarly, canon number 45 requires judges not to disrespect disputing parties, threaten them, or reject them. Furthermore, in the words of this canon, a judge is not allowed to "tell a disputing party to quickly make your argument, or bring your evidence otherwise you will lose the case." When a party is not able to prove his claim, this canon requires judges to give the party a second opportunity to support his claim in the subsequent court sessions. Canon number 47 even specifies situations where a judge should not make a decision, such as when a judge is thirsty, hungry, or emotional.

In 1919, Afghanistan won independence from Great Britain. The new king, Amanullah Khan, was a hero of the war of independence. Though he had helped win Afghanistan's fight against colonial Britain, Amanullah believed that Britain's modern legal system was, in many ways, preferable to Afghanistan's judiciary, which remained highly religious and decentralized. He

therefore pursued a radical modernization agenda. He enacted Afghanistan's first Constitution in 1923, which took power from local governments and religious leaders and centralized it in the person of the king. He also sought to minimize the influence of religious leaders within the judiciary by creating a new breed of administrative courts separate from the Sharia courts. Further, Amanullah emphasized individual rights and sought to curb discrimination in Afghanistan—especially discrimination against women and religious discrimination, which was prevalent against non-Muslim minorities. Amanullah's reforms made him unpopular with Afghanistan's religious elites, who ultimately helped to force him from power. Though most aspects of the reform movement faltered at the end of Amanullah's reign, the movement helped create a central state in Kabul, consolidated a formal system of non-religious law, and paved the way for subsequent reforms. A first and yet important step in recognizing and regulating the legal profession was providing constitutional recognition of the right to be represented by an attorney. Although the 1923 Constitution does not list this right, it did recognize some fundamental rights of Afghan citizens. Articles 8 – 24 in particular are relevant to justice and fairness. Subsequent constitutions clearly recognized the right to an attorney and other details.

### **Past Constitutions: The Right to Have an Attorney**

#### **Constitution of Afghanistan (1964)**

Article 26: [E]very person has the right to appoint defense counsel for the removal of a charge legally attributed to him.

#### **Constitution of 1976 (English)**

Article 31: Crime is a personal deed. The pursuit, arrest or detention of the accused, and the execution of a sentence against him, shall not affect any other person. Torturing, and imposing punishment incompatible with human dignity is not permissible. Every person has the right to appoint defense counsel for the defense of a charge legally brought against him.

#### **Constitution of 1987**

Article 41: [T]he accused has the right to defend himself personally or through an advocate.

#### **Constitution of 1990**

Article 41: [T]he accused has the right to defend himself personally or through an advocate.

Legal education in Afghanistan evolved slowly. In the 1920s, Amanullah established a secular legal academy in Kabul, Dar al-Hukkam, to train lawyers and other judicial personnel. But this school was quickly closed, and until the late 1930s, Sharia practitioners controlled legal education. In 1938, Kabul University became the major provider of non-religious legal training in Afghanistan. The Kabul University Law Academy offered a three-year course of study in civil law. Later, Kabul University opened the Faculty of Islamic Law. These two distinct institutions reflected—and perpetuated—the rift between religious law and civil law that divided the Afghan legal profession. In 1968, graduates of Kabul University initiated Afghanistan's second significant wave of legal reform to help unify the judiciary. Recognizing the problem of a legal profession divided between Sharia and civil practitioners, the reformers created the Judicial Training Program ("the Stage"), which attempted to unify and standardize legal education—at

least to a degree—by ensuring that Sharia practitioners were proficient in basic civil law, and that lawyers with modern legal training also received some training in Sharia.

However, the reform movement was short-lived. The Soviet invasion of 1979, followed by civil war, the Taliban period, and the American war with the Taliban, largely destroyed Afghanistan's legal profession. After more than 20 years of conflict, the Taliban was ousted in late 2001, and a Loya Jirga assembled to draft a Constitution for the new Islamic Republic of Afghanistan. The Constitution was completed in 2004 and reestablished the importance of the legal profession in Afghanistan. Among many other provisions, the Constitution guarantees every individual the right to appoint a criminal defense attorney, provides that the state will appoint criminal defense attorneys to indigent persons, and calls for the regulation of attorneys by statute. In 2007, Parliament passed the Advocates' Law—one of only seven laws to be passed that year—which established the rules that would govern Afghanistan's legal profession. The **Afghanistan Independent Bar Association (AIBA)** was formally established in July 2008 to carry out the Constitution's mandate. The AIBA is a professional association of Afghan lawyers whose primary purpose is to promote and protect the rule of law by regulating how, where, and by whom law is practiced in Afghanistan.

**Al-Majalla Al Ahkam Al Adliyyah  
(The Ottoman Courts Manual)**

The Majalla, officially known as Majallat al-ahkam al-'adliyya, is a legal text commissioned by Ottoman Caliphate and published between 1867 and 1876 during the reign of the Ottoman Empire. It consists of a preamble containing various legal maxims followed by 16 books for a total of 1851 articles. The first 12 books cover commercial related matters, while the last four chapters are non-commercial and instead focus on evidentiary and procedural matters. The Majalla is more a restatement of dominant opinions of the Hanafi School than a code. For that same reason, citation to it could be found in a number of cases decided by Afghan judges. Below you can see a few selected provisions from the Majalla that instruct judges how to behave and make judicial decisions:

**SECTION II: CONDUCT OF JUDGES**

**1795.** The judge must abstain from any act or deed of a nature injurious to the dignity of the Court, such as engaging or selling, or making jokes while in Court.

**1796.** The judge may not accept a present from either of the parties.

**1797.** The judge may not accept the hospitality of either of the parties.

**1798.** The judge must abstain from any act during the trial likely to arouse suspicion or cause misunderstanding, such as receiving one of the parties alone in his house, or retiring with one of

them with his hand or his eye or his head, or speaking to one of them secretly or in a language not understood by the other.<sup>10</sup>

**1799.** The judge must be impartial towards the two parties. Consequently, the judge must observe complete impartiality and equality towards the two parties in everything relating to the trial of the action.

## 2. EVOLUTION OF THE REGULATION OF AFGHANISTAN'S LEGAL PROFESSION

Over the past 100 years, a series of evolving laws have governed Afghanistan's legal profession. Each law built on the previous one—preserving some provisions while rejecting or modifying others. A brief analysis of the evolution of these laws can help contextualize the rules that govern Afghanistan's legal profession today.

The first Afghan Advocates' Law dates to the reign of Amanullah. It provided the law in Afghanistan to be based in Islam and to institute basic educational requirements for practicing law. This law governed the Afghan legal profession until 1971, when King Mohammed Zahir Shah prevailed over Parliament to pass a new Advocates' Law. In 1986, during the Soviet period, another Advocates' Law was passed—this time by unilateral decree of the Soviet-backed ruler. Because the Afghan government in 1986 was secular, the Soviet-era Advocates' Law omitted all reference to Islam or Sharia. But the law did create Afghanistan's first bar association, which was to be overseen by the Ministry of Justice. The Soviet-era Advocates' Law also included the first provision in Afghan law concerning pro bono work. The law provided that the bar association could take certain cases pro bono, and that the government would reimburse lawyers who provided their services free of charge.

Soviet forces withdrew from Afghanistan in 1989, and the communist regime of Mohammad Najibullah was decisively toppled in 1992. By the mid-1990s, the Taliban had emerged as Afghanistan's ruling party, and in 1999 the Taliban government passed a new Advocates' Law—again by an executive decree rather than a legislative resolution. The law reinstated Islam as the foundation of the Afghan legal system. Perhaps because Taliban leaders were hostile to foreigners after their experience with the Soviets, the law required that lawyers be Afghan citizens. It also required that attorneys never have been convicted of a **felony** (a crime punishable by death or continued imprisonment or long imprisonment), and that they have a diploma from a law school, a Sharia school, or a madrasa—either in Afghanistan or Pakistan. The Taliban-era Advocates' Law also set permissible fees that attorneys could charge their clients, established different tiers of attorneys based on their experience, and set basic ethical guidelines such as requiring lawyers to honor attorney-client privilege and to avoid obvious conflicts of interest. Unlike the Soviet-era law, the Taliban Advocates' Law made no mention of pro bono work.

In the Taliban era, as in the Soviet era before it, the Afghan legal profession was closely affiliated with the government. The 1999 Advocates' Law tasked the Ministry of Justice with

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<sup>10</sup> This represents a translation to English from the original Majalla. Referencing the original, the phrase “or retiring with one of them with his hand or his eye or his head” can best be understood to mean, “communicating nonverbally with one of the parties using hands, eyes, or facial expressions.”

overseeing the bar association. Indeed, the law required that the Minister of Justice or one of his deputies serve as the association's president. Because government officials oversaw the bar association and determined the rules that attorneys had to follow, Afghan lawyers were essentially supervised by the Ministry of Justice. The bar association therefore had little authority beyond what the government was willing to grant it. According to the founding president of the AIBA, prior to 2007, the bar association's duty consisted almost entirely of the administrative task of distributing licenses to attorneys. Arguably, the most consequential change brought about by the Advocates' Law of 2007 was to render the bar association independent from the government.

Considering the importance of supporting the legal profession, the issues of establishing an independent bar association and developing an ethical code of conduct were also emphasized in international conferences related to rule of law and governance in Afghanistan. For instance, among many recommendations of the Rome Conference on the Rule of Law in Afghanistan (July 2-3, 2007), it was recommended that codes of ethics and oversight mechanisms be established for all legal professionals. The recommendations included that "legal education should be combined with an obligation of ongoing professional development for practitioners." Similarly, the 2008 Afghanistan's National Justice Sector Strategy (NJSS) recommended that an independent bar association and legal aid system be established in Afghanistan. This document further required the Ministry of Justice to "provide interim support to the Bar Association during its inception by drafting by-laws, helping to develop accreditation procedures, licensing requirements, a code of professional conduct for members, and enhancing awareness of the Advocates' Law, and encouraging unregistered advocates, especially those living in the provinces, to register". The Strategy further emphasized the need to define, train, and enforce ethics codes for judges, prosecutors, and lawyers. The justice institutions were also required to establish ethics and integrity units for training purposes and to develop teaching materials. They were also expected to establish enforcement (disciplinary) bodies in the three justice institutions to investigate, prosecute, and adjudicate claims of violations of proper ethical and professional conduct. Finally, they should establish "procedures to enable lawyers, prosecutors and judges to make confidential complaints relating to corruption, unprofessional conduct or breaches of ethics."

It is worth noting that improvements on professional and ethical standards for attorneys was considered an important part of achieving good governance through supporting justice and the rule of law in the Afghanistan National Development Strategy (ANDS) for years 2008 – 2013.

### **3. PRESENT STATE OF LEGAL PROFESSION IN AFGHANISTAN**

Currently practicing law is different in Afghanistan than before. In the past, only sole practitioners were practicing law in Afghanistan known as Darul Wekala. Today, small law firms have started practicing law in major cities in Afghanistan. These firms have also expanded the meaning and type of legal practice. In addition to local law firms, some international firms have also showed interest in working in Afghanistan or jointly with Afghan local law firms. These companies not only provide litigation services, but also a variety of other legal services that will help investors, businesses, individuals, non-profit organizations, and others seeking legal support in Afghanistan. Those law firms are increasing in number. Likewise, with increase in the investment and development works in Afghanistan, the demand for legal expertise and services

has grown rapidly. As Afghanistan is striving for economic growth and self-sufficiency through using its potentials in agriculture, trade, and mining sectors, it is expected that the demand for legal services will also grow in those sectors. As newer laws such as competition law, intellectual property, and mining law are enacted or amended, new areas of legal expertise also emerge.

### **Discussion Questions**

1. The ANDS envisions Afghanistan in 2020 as a "society of hope and prosperity based on a strong, private-sector led market economy, social equality, and environmental sustainability.". Can you imagine how the legal profession will look like and what legal services will be demanded at that time?
2. How important is the legal profession in developing countries and particularly in Afghanistan?

That said, the profession is also encountering a number of challenges. First of all, there are not enough lawyers in Afghanistan. Even though the Constitution guarantees every Afghan citizen the right to a defense attorney, many Afghans nevertheless go without a lawyer. Today, law schools in Afghanistan simply do not have the capacity to train the lawyers needed to satisfy the country's demand for legal professionals. Even those who do graduate from law programs often do not become practicing attorneys. Because their skills are in high demand, many law graduates take better-paying jobs with foreign employers. Further, most Afghan lawyers live in cities. This means that Afghans living in rural provinces have an especially difficult time obtaining formal legal representation. In rural areas, traditional forms of dispute resolution—often through shuras and jirgas—still predominate over the formal court system.

### **Comparative Law Bar Associations in Other Countries**

In Italy, France, India, the United States, and many other nations, each state or province has its own bar association, and each bar association establishes a different set of requirements that attorneys must meet in order to practice law. The reason is that in those countries a decentralized system is proven to be more effective and could better serve local demands. Afghanistan, by contrast, has only one central bar association with one set of criteria for membership that applies throughout the country.

What are the benefits of having a single set of central rules dictating who may become lawyers? What are the advantages of state-by-state, decentralized rules?

In the late 1960s, there were 270 lawyers in Afghanistan. In 2012, the AIBA listed 777 lawyers as members. Other sources cited AIBA membership at 1200 in 2013. Results of bar exams taken in May 2014 show exam success rates as 52 out of 134 in Kabul, 21 out of 53 in Herat, 15 out of 27 in Kunduz, 10 out of 24 in Nangarhar, and 5 out of 13 in Kandahar. By contrast, Poland,

which has roughly the same population as Afghanistan, had 22,545 lawyers at the most recent count in 2006—nearly 20 times as many lawyers as Afghanistan. It is likely that there are lawyers practicing in Afghanistan that are not members of the AIBA, which is still a young and relatively untested organization. Still, according to the founding president of the AIBA, Afghanistan needs at least 27,000 defense lawyers.

Further, AIBA membership may be especially low given that lawyers are obligated to travel to Kabul or other provinces where an AIBA branch exists in order to take the bar exam and complete relevant paperwork. The bar association is young and requires more support to become stable and self-sufficient. Once an attorney receives license to practice, he has to pay an annual fee and report his income to the AIBA. But even at the highest estimate of Afghan lawyers, Afghanistan will require a more robust legal education system if it is to meaningfully comply with the Constitution's mandate that every citizen have access to legal representation.

A lack of regional offices and security challenges are other problems facing the AIBA and lawyers in Afghanistan. Besides Kabul, the AIBA only has offices in Kandahar, Balkh, Herat, and Nangarhar provinces. In insecure provinces, the number of attorneys is very low. Because of security challenges and a low number of attorneys, it is even more difficult to find an attorney to represent one in court in the rural areas of such insecure provinces.

In addition to those challenges, the role of a lawyer is not very well known in Afghanistan. In Afghanistan people often refer to informal institutions such as Shuras and Jirgas to solve their legal disputes. Because of this tradition and a societal problem of illiteracy, people in some parts of the country do not know the role of attorneys or how attorneys can assist them with their legal issues. According to the AIBA founding president, "the big concern is that the people have no idea about advocates and have no clue what they do".

#### **Discussion Questions**

1. Legal careers are often rewarding and challenging. What are some of the challenges a lawyer would face in his career in Afghanistan?
2. In the society where you live, what is the public perception about the role of attorneys?

#### **4. THE AIBA AND THE ENTRY REQUIREMENTS FOR PRACTICING LAW**

The AIBA is an association of attorneys that controls access to Afghanistan's legal profession. The AIBA oversees the process for entering into legal practice that was established in the 2007 Advocates' Law. In its Code of Conduct, the AIBA also sets the ethical standards with which lawyers must comply.

According to Article 6 of the 2007 Advocates' Law, a practicing lawyer must be a citizen of Afghanistan, must never have been convicted of a felony, and must have a Bachelor's degree in law or Sharia. In a departure from the Taliban-era law, graduates of madrassas are not eligible to practice law unless they have three years of practical legal experience. Additionally, the AIBA requires that lawyers pass an oral and written examination unless they have worked for three years as a member of the judiciary, in a prosecutor's office, or in the Ministry of Justice. Finally,

the AIBA separately requires that lawyers satisfy continuing legal education requirements to ensure that they keep pace with changes in Afghan law even after they begin practicing as attorneys. These requirements seek to ensure that lawyers will be adequately trained in law and that they will carry out the duties of their profession in a competent manner. You will learn more about the requirements for practicing law in Afghanistan in Chapter 4’s discussion of the competency of lawyers.

In addition to the requirements established in the Advocates’ Law, the AIBA also imposes certain financial and logistical obligations upon prospective attorneys. Lawyers should travel to Kabul or to other provinces with an AIBA branch to take the oral and written examinations and to swear the oath of office in person. Because the AIBA is self-financed, applicants must pay 1000 Afghani to obtain a lawyer’s license, must pay an annual fee to the AIBA, and, in at least some cases, must also give a percentage of their annual income to the AIBA. This is mandated in the AIBA Fact Sheet, though not the Advocates’ Law. While these requirements are not encoded in the Advocates’ Law, they serve to practically limit who may practice law in Afghanistan. You will learn more about the entry requirements for practicing law in Chapter 4.

## 5. LAWYERING: “INDEPENDENCE AND INTEGRITY”

Until now, this chapter has discussed the history of Afghanistan’s legal profession and the requirements established by law for becoming an advocate. But we have yet to discuss the lawyer’s actual role within the judicial system. Lawyers perform a wide range of functions in society. Lawyers draft contracts between parties engaged in business together. Lawyers also provide advice to clients about how to manage their affairs without violating the law. Often, lawyers also write the laws themselves. And in the event that a client is accused of breaking the law, lawyers will represent the client in a court proceeding.



Certain principles govern the manner in which lawyers must carry out these varying duties. Lawyering is predicated upon the principles of *independence* and *integrity*. First, a lawyer must be independent. This means that her loyalty must be to her client and to no one else. Independence could be discussed on two levels; independence of a lawyer as an individual or professional, and independence of the lawyers' associations (AIBA) or the profession at large. Here we focus more on independence of lawyers in their professional work. We will explain independence of the AIBA as a non-government non-profit association in Chapter 3. Regarding independence as a requirement for an attorney's code of conduct, the AIBA Code of Conduct considers two requirements. First, one should act freely without any external pressures, such as pressure from the government or others. Second, an attorney should also act freely from illegal internally biased tendencies such as discrimination. Once an attorney accepts a case, then he should not discriminate against his client at all. Likewise, the attorney should not behave unethically because of pressures from political power, his colleagues or superiors, his personal connections, or others.

In the same context of independent behaviors of attorneys, another principle emerges that requires a lawyer to represent her client regardless of whether she agrees with the client's cause. This aspect of a lawyer's independence is quite nuanced. It requires a lawyer to divorce her own sense of right and wrong from her client's objectives—which she may or not agree with. A lawyer's mandate is therefore at odds with itself: lawyers must be strong advocates on their clients' behalf, but must also be independent from their clients. Lawyers must represent their clients' interests to the utmost extent, but they are not accountable for their clients' objectives, and cannot be punished for their clients' past misdeeds. Otherwise, citizens with unpopular causes would never be able to secure legal representation. A lawyer's duty of independence is laid out in Article 3 of the AIBA Code of Conduct, reprinted below.

### **Discussion Question**

Assume that a company has good relations with a political party in Afghanistan. On many occasions the company has publicly donated to some political campaigns of that party. As a result the party wins election. In the next term the party loses, and the opposition group wins and accuses the company of tax fraud. The government announces that the company deserves no representation and that they should be punished. Is the government's action legal?

### **AIBA Code of Conduct**

#### **Article 3: Independence**

[An advocate] shall be duty bound to perform his/her duties and provide advice in an independent way, without regard to pressures and discriminations.

Second, a lawyer must perform her job with integrity. She must abide by the law and by the ethical guidelines set forth in her jurisdiction. She cannot break the law, even where it would advance her client's goals, nor can she put her personal interests above the interests of her client. A lawyer's duty of integrity is laid out in Article 4 of the AIBA Code of Conduct. As you can

see below, lawyers are expected to consider honesty and integrity in almost all aspects of their professional works. As you will see later, honesty and integrity are so broad they could apply in many professional situations.

### **AIBA Code of Conduct**

#### **Article 4: Honesty, Integrity and Fairness**

Advocates shall observe the standards of honesty, integrity and fairness before the Court, other institutions and amongst fellow advocates.

### **Discussion Question**

1. Your client is charged with a crime and you find out that she has indeed committed the crime. You advise her of all her options. Because the evidence against her is weak, you also tell her that you think she should plead not guilty. Have you acted unethically? Why or why not?
2. Your client is a doctor who comes to you and admits that he made a mistake during a surgery on one of his patients. He tells you that no one knows about the mistake and that the patient is fine now. He further tells you that, should the patient develop any type of health problem as a result of your clients' mistake, there is almost no chance to trace it to your client. Your client asks for your advice on how to handle this situation. How would you advise this client?

Attorneys' major ethical problems emerge when the twin principles of independence and integrity conflict with each other. What happens when a lawyer's duty to zealously represent her client conflicts with the duty to act with integrity? Where does a lawyer's duty to her client end, and where does her duty to broader societal interests begin? The doctrine of legal ethics attempts to resolve these difficult moral issues.

### **"Neutral Partisanship"**

One commentator has famously described the advocate's role in terms of the concept of "neutral partisanship." This concept is explored in the excerpt below. As you read through the excerpt, determine whether you agree with the author's opinion about the role of the lawyer. Should a lawyer always feel free to represent clients who seek her help, regardless of whether she believes in the morality of the clients' cause?

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"The first principle of conduct is the principle of neutrality. This principle prescribes that lawyers remain detached from his client's ends. The lawyer is expected to represent people who seek his help regardless of his opinion of the justice of their ends. In some cases, he may have a duty to do so; in others, he may have the personal privilege to refuse. But whenever he takes a case, he is not considered responsible for his client's purposes. Even if the lawyer happens to

share these purposes, he must maintain his distance. In a judicial proceeding, he may not express his personal belief in the justice of his client's cause.

The second principle of conduct is partisanship. This principle prescribes that the lawyer work aggressively to advance his client's ends. The lawyer will employ means on behalf of his client, which he could not consider proper in a non-professional context, even to advance his own ends. These means may involve deception, obfuscation, or delay. Unlike the principle of neutrality, the principle of partisanship is qualified. A line separates the methods which a lawyer should be willing to use on behalf of a client from those he should not use... Most debates within the Ideology of Advocacy concern the location of this line..."<sup>11</sup>

### **Problem**

Arsala agrees to defend Ahmad in a criminal case. Ahmad was arrested by police while he was dressed in traditional women's clothes. The accusation against Ahmad was that he wanted to attack some government agencies in Kabul. The prosecutor used the fact that Ahmad dressed like a woman as his strongest evidence and asked the court to punish Ahmad for crimes against national security.

Arsala could easily challenge the argument made by the prosecutor, but you noticed he did not defend Ahmad properly. You are observing the court session and when court recesses, you approach Arsala and ask him whether wearing women's clothes is a crime in the penal code? He says, "No, it is not." He continues, "I did not like my client from the beginning. Why should a man dress like a woman?! Even if he did not have a criminal intent, he should be punished for wearing women's clothes!"

- 1) What ethical issues do you see in the way Arsala acted and expressed his opinion to you about this case?
- 2) Assume a prospective client is charged of a crime you are strongly against and asks you to represent him in court. How would you feel about representing the case? How will you decide?

In order to clarify the ethical responsibilities of the legal profession, the AIBA has instituted certain standards with which attorneys must comply. Attorneys in Afghanistan enjoy both certain rights and responsibilities. These rights and responsibilities help them to navigate the unique ethical dilemmas of the legal profession. They will be the subject of the remainder of this chapter. Subsequent chapters will analyze lawyers' specific duties in more detail.

## **6. RIGHTS OF ATTORNEYS**

Article 10 of the Advocates' Law provides that lawyers enjoy certain rights:

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<sup>11</sup> William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1 WISCONSIN LAW REVIEW 29, 36 (1978).

## **Advocates' Law**

### **Article 10: Rights of Advocates**

Any person, who holds a license to practice, has the following rights:

- (1) To represent and defend, in accordance with this Law, the rights of his/her client before a court and other authority, in both criminal and civil cases.
- (2) To participate in all phases of detection, investigation and trial, by assisting and responding on the behalf of his/her client.
- (3) To obtain information regarding the detection, investigation and trial processes of his/her client and the results.
- (4) To examine documents related to his/her client's civil and criminal lawsuits.
- (5) To visit, interview, correspond and communicate with a client who is being held under custody, detention or in prison, in a secure and confidential environment.
- (6) To provide legal advice to legal and physical persons.
- (7) To be paid a fee by his/her client for counseling and any other legal services provided in accordance with the guidelines of the Association and by mutual agreement.
- (8) To open a law office.
- (9) To exercise other rights provided for in legislative documents.

Many of the rights enumerated in Article 10 are functionally necessary for attorneys to operate a legal practice. For example, Article 10(6) recognizes lawyers' right to represent legal and physical persons. Article 10(5) provides lawyers the right to visit and communicate with incarcerated clients in a confidential environment. And Article 10(8) guarantees lawyers' right to open a law office. While these rights are fairly straightforward, certain other rights enumerated in Article 10 require more explanation.

### **6.1 The Right to Be Paid a Fee**

The Advocates' Law provides that attorneys have the right to be paid a fee. This means that unless an attorney is working pro bono—a topic that will be covered in more detail below—she has the right to be compensated for the services she provides to her client. By recognizing the right to be paid a fee, the Advocates' Law assures that attorneys can establish viable practices and earn a living from their work. But, as is true about many advocates' rights, the right to be paid a fee is coextensive with related responsibilities that govern how a lawyer's fee must be collected.

Article 22(1) of the AIBA Code of Conduct establishes that representation should take place in accordance to a written contract between an attorney and her client. The contract should specify, among others, the representation fees. Also, the contract must describe the services that the attorney will provide to her client, as well as the fee that the client will pay in return for the services. In fact, according to rules of contract formation under the CCA, a contract of vague subject matter is not enforceable. In contract law in Afghanistan, this type of contract is called a vitiated or corrupt contract. A vitiated contract could become a valid and enforceable contract only if the problem with the contract (in this case the ambiguity) is resolved. Regarding the written requirement, the majority of contracts under the Civil Code of Afghanistan are not

required to be written. In very exceptional cases, such as buying immovable property or representing a client in litigation, this is a requirement.

A contract for legal services will prevent the lawyer from demanding a higher fee than the one initially agreed upon by the parties. It will also prevent the client from refusing to pay after the legal services are rendered. The AIBA Code of Conduct further requires that lawyers keep each client's account separately—to avoid combining different clients' assets—and that the fee charged be “fair and reasonable.”

The terms “fair and reasonable” do not have a concrete definition in law. They can be defined on a case-by-case basis. The goal is to make sure an attorney does not overcharge for legal services. There are some general principles in other codes that prohibit excessive price and requires fairness in exchange of goods and services. As an example, the CCA has a rule that excessive price (also know as **lesion** and Ghabn) if caused by fraud is not allowed in contracts. Since the agreement between an attorney and his client is also a contract, this rule could arguably be applicable to their relation too. The excessive price explained in article 571 of the CCA is defined as charging for an item or service 15 percent higher than the actual or market price. If excessive price is proven in a contract of sale or service, the overcharge party can claim reduction of the amount or fee to the fair amount.

### **Civil Code of Afghanistan**

#### Article 571

(1) If fraud of one party to contract inflicts excessive lesion on the other party, the deceived may claim rescission of contract.

(2) Lesion shall be called excessive if the difference between the real value of property at the time of contract and the price it is sold for amounts to 15 percent or more.

### **Discussion Questions**

The AIBA Code of Conduct also stipulates that while lawyers have the right to collect a fee for their work, they may not demand “goods, services and benefits” other than the legal fee. Why do you think the AIBA included this prohibition in the Code of Conduct? What kind of misbehavior does it seek to avoid? How should parties distinguish between permissible fees, on one hand, and impermissible “goods, services and benefits,” on the other?

## **6.2 The Right to Accept and Reject Cases**

Attorneys also have the right to accept and reject cases. This right guarantees that lawyers may decide for themselves which clients to represent. Lawyers' ability to accept and reject cases is critical to a well-functioning legal system. It advances both independence and integrity among lawyers. Permitting lawyers to choose their clients helps them to avoid conflicts of interest that would compromise their independence. The right to accept and reject cases also allows lawyers to avoid working on cases with which they disagree or for clients whom, for whatever reason,

they do not feel comfortable representing. In this way, the right to accept and reject cases advances judicial integrity. The AIBA has drawn the reasonable conclusion that lawyers are more likely to effectively represent clients in cases they have selected themselves.

### Discussion Question

1. Considering the fact that there is not enough attorneys in Afghanistan and that some clients may desperately need an attorney to represent them, do you think attorneys should be required by law to accept all cases referred to them?
2. What are some of the grounds on which attorneys should be restricted from accepting certain cases?

### 6.3 The Right to Access Discovery Materials

The Advocates' Law guarantees that lawyers have the right to retain information regarding the "detection, investigation and trial" of their clients, and to "examine documents related to [their] client's civil and criminal lawsuits." These rights give civil and defense attorneys the crucial ability to view **discovery materials**, any materials not protected by the attorney-client privilege that contain information regarding the detection and investigation of a client. Viewing discovery materials helps attorneys to develop a strong case against the opposing party, and to learn about the opposing party's case against their client. The theory is that if both parties to a dispute develop their case based on full information, justice is more likely to be done at trial. Prior to the adoption of the Advocates' Law, however, attorneys were frequently barred from viewing evidence against their client that was in the possession of the opposing party. Therefore, attorneys often did not understand the nature of the case against their client until the trial began—forcing them to scramble to restructure their argument in light of the case against them, and seriously impeding their advocacy. According to the founding president of the AIBA, courts hostile to defense attorneys often prohibited defense attorneys from being present at criminal trials altogether. Judges would ask that attorneys submit their papers and then leave the courthouse before the trial began. This policy, coupled with the inaccessibility of discovery materials, meant that lawyers often submitted legal briefs that completely failed to address the case against their client. And attorneys were unable to correct this failure because they were not permitted to be present at trial.

The right to access discovery materials is therefore an important addition to the law governing the Afghan legal profession. It ensures that lawyers have the opportunity to understand the case against their client before trial begins, and it helps lawyers to develop the best argument on their client's behalf. When the opposing party's evidence was kept hidden, attorneys worked in the dark, and therefore such effective advocacy was often not possible.

In addition to those rights, traces of some other rights and privileges could also be found in the Advocates' Law. For instance, according to Article 37 of the Advocates' Law, an attorney has the right to be provided with security for his office. Because of the nature of an attorney's work, this is more specifically mentioned in the law only for legal professionals. In the next section,

you will learn about different duties of attorneys toward their clients, court, and the legal profession.

## 7. DUTIES OF ATTORNEYS

The right to practice law in Afghanistan carries with it considerable responsibilities. When talking about responsibilities, note that there are different sources of responsibility. If a responsibility arises from a contract between parties, this is often called contractual responsibility. A contract between a lawyer and his client(s) creates several rights and responsibilities for both of them. Another type of responsibility arises when someone does something that harms another. This is known in Afghanistan as extra-contractual responsibility, or civil responsibility. The word obligation is mostly used for contractual and extra-contractual responsibilities. If the law imposes certain responsibilities on lawyers or others, this is often called a legal duty, such as the duty to pay taxes or to comply with rules of law.

Frequent breach of strict legal duties could lead to criminal responsibility. When lawyers, as members of the legal profession, are required by professional codes of conduct to act in a certain way when providing legal services, this is called as professional responsibility. Professional responsibilities of lawyers are addressed in different statutory sources and ethical standards that you will learn more about in Chapter 3. Furthermore, some responsibilities related to professional conduct that are sourced in ethical rules (e.g. the AIBA Code of Conduct) are more specifically called ethical responsibilities. In this section and in subsequent chapters covering the complex duties of lawyers, we will primarily focus on the professional and ethical responsibilities of lawyers. Other types of responsibility will be explained in other legal courses such as contracts and civil responsibility (collectively known as the law of obligations). However, in order to better explain the duties of lawyers, we may also touch on other types of responsibilities that are broadly applicable to everyone.

Afghan law imposes certain duties on lawyers to ensure that they conform to the high standards required of the legal profession. Article 13 of the Advocates' Law, reprinted below, enumerates the primary duties of advocates. You should become familiar with the different provisions of Article 13 as you proceed through this textbook. The Advocates' Law is supplemented by the AIBA's Code of Conduct, which further contributes to the web of laws and regulations defining lawyers' duties. The remainder of this chapter will provide an overview of attorneys' responsibilities under Afghan law. This textbook will later revisit particular responsibilities in more depth.

### **Advocates' Law**

#### Article 13: Duties of Advocates

Advocates shall have the following duties:

- (1) To maintain client confidentiality.
- (2) To practice law with honesty and sincerity, respecting the dignity of all individuals.
- (3) To respect the orders of a court and/or other authorities.
- (4) To attend court hearings on behalf of his/her client.

- (5) To refrain from providing any kind of legal assistance to competing parties in the case.
- (6) To keep the client's documents and return them once the case is concluded.
- (7) To provide the client with a receipt when issuing and receiving any document from the client.
- (8) To refrain from disseminating information that would harm other advocates.
- (9) To refrain from any action that would cause an undue delay in the investigation and implementation of a court's order.
- (10) To refrain from lending or transferring the name and title of his/her law office to others.
- (11) To inform the competent authorities about any change in the location of his/her office.
- (12) To renew his/her license.
- (13) To pay income taxes in accordance with the law.
- (14) To give reports on their annual income to the Association.
- (15) To defend at least three criminal cases in each year, free of charge, upon confirmation of the Ministry of Justice.
- (16) To defend the Code of Conduct as provided for in the Association's By-Laws.
- (17) To carry out other duties in accordance with the By-Laws of the Association.

The duties listed in Article 13 can be divided into three categories: (1) duties owed to the *client*, (2) duties owed to the *court*, and (3) duties owed to *other constituencies*. This section will briefly discuss each type of duty in turn to give you an idea of what responsibilities the practice of law mandates. The most important and complicated duties of an attorney, namely competence, confidentiality, and conflict of interest, will be explained in separate chapters in depth. As you learn about these duties, think about the rationale and need for attorneys to have such duties.



### 7.1 Duties Owed to the Client

As already discussed, lawyers must uphold the principles of independence and integrity in their representation of clients. These broad principles are achieved in practice through the application of more specific duties owed by lawyers to those they represent. Lawyers' duties to their clients can be categorized either as duties of care or duties of loyalty. **Duties of care** require attorneys to carry out their duties competently. They guard against an attorney's inadvertent negligence or carelessness. **Duties of loyalty**, on the other hand, require attorneys to remain loyal to their client. They prevent attorneys from purposeful self-dealing at the expense of those whom they represent.

### 7.1.1. Duty of Care

The Advocates' Law and the AIBA Code of Conduct require that lawyers meet certain minimum standards of competence. Generally speaking, a lawyer must represent her client with basic care and attention to detail, and must comply with certain legal formalities. This is called a **duty of care**. For example, lawyers cannot miss important court dates, cannot lose their clients' documents, and cannot misstate their clients' case due to inattentiveness or carelessness. A failure to meet these minimum standards is a breach of a lawyer's duty and may be grounds for sanctions by the AIBA, such as monetary fines or even disbarment. Article 18 of the AIBA Code of Conduct generally articulates an attorney's duty of care:

#### **AIBA Code of Conduct**

##### Article 18: Performance of Duties in an Appropriate Manner

An advocate shall be duty bound to perform his/her duty in appropriate and timely manner, and he/she shall not accept those cases that he/she is unable to handle.

Article 13 of the Advocates' Law enumerates certain specific duties that can be characterized as duties of care. For example, attorneys must attend court hearings on behalf of their clients, must keep their clients' documents, must provide a receipt in exchange for any documents given to them by their clients, and must return the documents once the case is concluded. Additionally, the AIBA Code of Conduct, Article 8 requires that lawyers take care to notify their clients of the progress of their case in a timely fashion. These specific duties are not exclusive, and should be read as particular aspects of an attorney's broader obligation to practice law with care and competence.

#### **Problem 1**

Ahmad recently received his license to practice law in Afghanistan. After a few weeks, he met his first client. The client seemed very pushy and wanted to know about the outcome of his case right away. He was repeatedly asking Ahmad to tell him that he will win the case. One day the client threatened to hire another attorney if Ahmad did not provide a concrete timeline and assurance that he would win the case,. Thus, Ahmad gave the client a timeline and promised a result that is likely to be unrealistic. Now some evidence indicates the case will take longer than what Ahmad predicted and that it is possible the client will lose on some of his claims. The client is unhappy and thinks Ahmad was not honest with him. What ethical issues do you see here? How would have you acted if you were Ahmad?

#### **Problem 2**

The same Ahmad who very recently started practicing law receives his second client. During the first interview, he tells his client that he is available 24/7. Ahmad even gives his personal phone number to the client and tells him that he is very punctual and expects the same from his client. But during one important meeting at the Hoqooq Department, Ahmad does not show up. When his client calls him, he says he has gone on a picnic and will not be available for two days. Did Ahmad violate any of his professional responsibilities?

### 7.1.2 Duty of Loyalty

In addition to maintaining minimum standards of care, lawyers owe their clients a duty of loyalty, a lawyer's duty to remain loyal to his or her client. Article 10 of the AIBA Code of Conduct articulates an attorney's duty of loyalty:

**AIBA Code of Conduct**  
Article 10 – Interests of the Client

An Advocate shall be duty bound to respect the best interests of his/her client based on the interests of justice, observance of the rule of law and ethical standards.

**The Civil Code of Afghanistan**

As you will learn more in Chapter 3, the Civil Code of Afghanistan also has some provisions regarding the rights of attorneys. In the Civil Code of Afghanistan, the term attorneyship (Wekalat) is used to apply to a much broader context of legal representation than the defense lawyering used in the Advocates' Law. Attorneyship includes representing someone in the buying or selling of property, or in a legal dispute involving negotiation for settlement. The provisions related to attorneyship require an advocate to be loyal to the aforementioned principles. Read the below provisions and think how the duties of care and loyalty are addressed there.

**Article 1563:** Agent may not transgress the determined limits of agency, unless communication with client has been impossible and circumstances are such that a reasonable client would agree to the continued representation. In this case, agent shall be obligated to immediately notify client of his transgression against the limits of agency.

**Article 1564:** If agency is pro bono, agent shall be obligated to take such precautions in performing agency that he takes in his personal affairs and in no way shall he be obligated to take more care than that of an ordinary person.

**Article 1569:**

(1) Agent may not appoint another person as agent without permission of client.

(2) If agent is authorized to take action, he may appoint another person, with permission of client, as agent. In this case, the second agent shall be considered an agent of client and shall not be deposed with deposal or death of the first agent.

**Article 1600:** Agent for claim shall not have authority to compromise and agent for claim shall not have authority to file lawsuit without special permission of client.

**Article 1605:** Agent for claim may not donate the subject of claim to defendant nor may he acquit him of it.

### **7.1.3 Attorney-Client Privilege and Conflicts of Interest**

The two predominant duties of loyalty are the duty to maintain the confidentiality of a client's information, and the duty to avoid conflicts of interest. Much of the doctrine of legal ethics deals with how lawyers should navigate these two complicated responsibilities. Because confidentiality and conflicts of interest will be revisited in later chapters of this textbook, we will not address them in detail here.

### **7.1.4 Withdrawing from a Case**

In addition to honoring confidentiality and avoiding conflicts of interests, two other duties of loyalty require mention. The first regulates when an attorney may leave a case she is working on and is addressed in Article 17 of the AIBA Code of Conduct. While clients may dismiss their lawyer at any time, the AIBA Code of Conduct prohibits a lawyer from leaving a case to which she is assigned unless she has a "reasonable excuse" for doing so. This prohibition ensures that attorneys will not, except in dire circumstances, leave clients who depend on them for legal services. Lawyers who have a reasonable excuse to leave prior to the end of a case must inform their client at least one week prior to trial, or, if the trial has already begun, they must inform the judge and must turn over all the client's papers to the client.

The law does not define what constitutes a "reasonable excuse." It is therefore unclear how grave a situation must be before a lawyer is excused from a case she has accepted. The law in other countries may help provide some guidance on this question. In the Philippines, a lawyer may only leave her case if she obtains consent from her client, or if the court, after holding a hearing, decides that the interests of justice permit her to leave. The American Bar Association's Model Rules of Professional Conduct provide some other examples of when a lawyer may be permitted to withdraw from representing a client. These examples include: when doing so would not adversely affect the interests of the client; when the client insists upon a course of action that the lawyer strongly disagrees with; when the client has used the lawyer's services to perpetuate a crime or fraud; or when the representation will result in an unreasonable financial burden on the lawyer.

### **7.1.5 Duty of Non-Discrimination**

Second, the AIBA imposes a non-discrimination duty upon attorneys. Article 9 of the AIBA Code of Conduct explicitly prohibits attorneys from discriminating against clients on the basis of their "ethnic or tribal group, nationality, religion, political opinion, gender, property or economic status."

While this duty is superficially a duty to the client—since it is the client that the attorney is prohibited from discriminating against—it benefits numerous other parties, too. The non-discrimination duty benefits potential clients who might otherwise be deterred from seeking legal

representation due to the prospect of discrimination. This in turn benefits the legal profession generally by helping advocates to attract more clients. And, of course, the non-discrimination duty benefits society as a whole by reducing overall instances of discrimination. We will return to the issue of non-discrimination in a later chapter.

### **Discussion Question**

The law only prohibits attorneys from discriminating against persons who are *currently* their clients. This means that attorneys may lawfully choose not to take clients for discriminatory reasons such as gender bias or religious intolerance. Why do you think the law permits such instances of discrimination? How effectively would an attorney who was prejudiced against her client uphold the principles of independence and integrity?

### **Problem Choosing A Client**

Fahim is struggling to make a living as a private attorney in Kabul. The owner of an Afghan mining company approaches Fahim seeking counsel regarding a profitable land acquisition that he wants help completing. Fahim is qualified to serve as the mining company's attorney, but he knows that the man has become rich largely by underpaying his employees and by spending as little as legally possible on safety precautions. As a result, working conditions for employees are terrible. Employees routinely suffer health problems due to malnutrition and workplace injury. Fahim badly needs the money he will earn by representing the mining company, but he is reluctant to work for someone whose employment practices he dislikes.

Fahim does not know what to do. On one hand, everyone is entitled to legal representation. If a murderer has the right to an attorney, why should Fahim think twice about representing this mining company owner—who has committed no crime and who contributes significantly to the Afghan economy? On the other hand, by representing the owner, Fahim would help perpetuate the employment practices that he finds so problematic. If he refused to represent him, Fahim might send a powerful political message, and encourage the owner to improve his business practices.

How should Fahim proceed? Is there a clearly "ethical" choice? Does your answer depend on how badly Fahim needs the company owner's business? Is there other information you would want to know before drawing a conclusion?

Some duties may be classified as both duties of care and loyalty. For example, the duty to keep clients updated on the progress of ongoing litigation could be a duty of care—since it requires lawyers to act promptly—but it could also be characterized as a duty of loyalty—since it requires lawyers to refrain from hiding important information from their clients. The duty to return a client's papers at the conclusion of the case could similarly be classified as a duty of care or as a duty of loyalty. The two types of duty should not be treated as exclusive, rigid categories, but rather as an analytic framework to help clarify lawyers' responsibilities.

## **8. DUTIES OWED TO THE COURT**

The bulk of lawyers' duties are owed to their clients—those for whom they are working and by whom they are being paid. But Afghan law provides that lawyers also owe certain countervailing duties to the court before which they practice. These duties help ensure that the court system functions efficiently and fairly for all parties. If a lawyer's duty to her client ensures that she meets her obligation to effectively represent her client in legal proceedings, then a lawyer's duty to the court establishes a check on the excesses that may result from such zealous representation. A lawyer's duties to the court help ensure that she does not advance her client's interests at the expense of fairness, honesty, or judicial efficiency.

Article 13 of the Advocates' Law generally establishes that attorneys must respect the orders of the court. Attorneys must also adhere to all court regulations and procedures. Afghan law elaborates on these general requirements by imposing certain more specific duties on attorneys as they interact with the court.

### **8.1 Duty of Timeliness**

Article 13 of the Advocates' Law specifically mandates that lawyers refrain from causing an "undue delay" in the implementation of a court order. This requirement means that lawyers may not purposefully delay executing a court order, even if it would benefit their clients to do so. Presumably, the Afghan legislature decided that the benefits of judicial efficiency in some cases justify limiting lawyers' ability to hinder court proceedings on behalf of their clients.

### **8.2 Duty to Ascertain the Correctness of the Case**

The AIBA Code of Conduct, Article 19 requires lawyers to gather information about their client and "ascertain the correctness of the case" prior to bringing a matter before the court. Article 28 further prohibits lawyers from "knowingly submit[ting] incorrect documents to the Court." These provisions require attorneys to make a reasonable inquiry regarding their client's claims before they file their case. Lawyers are not permitted to blindly trust their client's story; they must conduct their own research and apply their own judgment in determining the factual accuracy of the claims alleged.

The law is clear that if an attorney does conduct an inquiry regarding her client's claims, and determines that the claims are false or misleading, then she will breach her duty by submitting these claims to the court. But Afghan courts have not yet explored the extent of a lawyer's affirmative duty to conduct an inquiry. The Code of Conduct is silent regarding how extensive a lawyer's inquiry must be in order to fulfill her duty. Again, the law in other countries may provide useful context. The United States has adopted a negligence standard, providing that attorneys may be sanctioned for failing to undertake an inquiry that is "reasonable under the circumstances." In the Philippines, by contrast, lawyers are only prohibited from purposefully misleading the court, suggesting that no extensive inquiry is required.

### **Discussion Question**

Why is it the job of the attorney, and not the court, to determine the factual accuracy of the client's claims? Who do you think is better situated to verify that the client is telling the truth? Are there benefits to judicial efficiency when attorneys are required to determine the correctness of the case prior to filing the case with the court? Or does this requirement merely take one aspect of the court's job and shift this responsibility onto the attorney?

### **Problem** **Determining the Correctness of the Case**

Fahim is hired to represent Najib, who is accused of running a red light and causing a traffic accident. Najib insists that he did not run the red light. He claims that the light was green when he drove through the intersection, and that it was the other driver who ran the light and caused the accident. To prove his competence to drive, Najib shows Fahim a copy of his driver's license. Fahim then interviews three witnesses to the accident, two of whom claim that Najib ran the red light, and one of whom agrees with Najib that the other car ran the red light. In the legal memorandum he submits to the court, Fahim states that Najib was licensed to drive, and relies on the last witness's testimony in asserting that the other driver, not Najib, caused the traffic accident.

The judge finds that Najib did run the red light and that he was at fault for causing the accident. The judge also finds that Najib was not licensed to drive, and that the license that Fahim submitted to the court was a forgery. In addition to ruling against Najib regarding the traffic accident, the judge recommends that Fahim be sanctioned for failing to meet his obligation to determine the correctness of the case under Article 19 of the AIBA Code of Conduct.

When he asserted to the court that Najib did not run the red light, did Fahim violate his duty to determine the correctness of the case? What about when he failed to verify that Najib's license was valid?

### **8.3 Prohibition of Frivolous or Unlawful Lawsuits**

Lawyers are prohibited from bringing frivolous or unlawful claims to court per the AIBA Code of Conduct, Article 21. A **frivolous claim** is a claim that has no possibility of succeeding on the merits. An **unlawful claim** is one brought for an improper purpose, such as vindictiveness, to cause delay, or to cause another party reputational harm. By prohibiting lawyers from bringing frivolous and unlawful claims, Afghan law again seeks to preserve judicial efficiency by ensuring that lawyers act as responsible gatekeepers to the courts.

### **9. DUTIES OWED TO OTHER CONSTITUENCIES**

In addition to a lawyer's duty to her client and to the court, Afghan law imposes duties upon attorneys that are intended to serve various other constituencies. As we proceed through these duties, ask yourself who benefits from each. Is the beneficiary a discrete interest group? Is it the Afghan government? Or is the duty intended to benefit society as a whole? Why do you think Parliament and the AIBA created each duty?

## **9.1 Administrative Duties**

Lawyers must comply with certain administrative formalities as set forth in the Advocates' Law, Article 13. Attorneys have a duty to pay income taxes to the government, and to report their annual income to the AIBA. Lawyers must also inform authorities about a change in the location of their office, and must annually renew their licenses to practice law. Furthermore, Article 14 of Advocates' Law requires that lawyers should have an office and share the address with the Ministry of Justice and the AIBA. In the same line, lawyers should be organized and record important information about their professional works. Article 14 of Advocates' Law particularly requires lawyers to keep record of their administrative documents, registry of clients' documents, information about their revenues, and information about their incoming and outgoing correspondences. Normally the AIBA has prepared standard templates of these books and gives a copy to every attorney upon issuance or renewal of their licenses. It is an attempt to help attorneys be organized and transparent as well as to prevent any disputes regarding documents exchanged between clients and attorneys.

## **9.2 Duties to Other Attorneys**

The Advocates' Law seeks to promote cordial professional relations between lawyers by prohibiting them from "disseminating information that would harm other advocates." It is not entirely clear how far this prohibition extends. Obviously, lawyers are not prohibited from publishing information that questions their opponent's legal argument—otherwise, legal work would be impossible. The most reasonable reading of the lawyer's duty to other attorneys is a fairly narrow reading, by which lawyers are only prohibited from publishing defamatory material about their opponents or from purposefully causing their opponents reputational harm.

Additionally, the Code of Conduct, Article 31 prohibits attorneys from taking out advertisements that "harm the other advocate's honor." The Code of Conduct, Article 29 further clarifies that "[a]n advocate shall maintain a good relationship with fellow advocates, however he/she shall not place their interests above those of their clients." Thus, while a lawyer should strive to develop cordial relations with fellow attorneys, the law is clear that a lawyer's duty to her client outweighs her duty to other attorneys. As of yet, no Afghan law or scholarship has elaborated on the precise degree of an attorney's duty to other attorneys.

## **9.3 Duty to Report Other Advocates' Misconduct**

Just as lawyers have a duty to maintain good relationships with fellow lawyers, they have a parallel obligation to report on other lawyers who engage in misconduct.

### **AIBA Code of Conduct**

#### **Article 5: Reporting Misconduct or Violations of the Law by Other Advocates**

If an advocate receives any information regarding the violation of the law or the misconduct of another advocate, or his/her staff, he/she shall be duty bound to report the matter to the Association based on supporting documents.

Because the AIBA is a small, self-regulating organization, it cannot monitor and investigate all instances of attorney misconduct. Nor can it rely on other authorities like the police—who are untrained in the nuances of legal ethics—to report attorneys’ breaches of duty. Therefore, the AIBA imposes upon its members a duty to report on other attorneys who engage in misconduct. Importantly, this duty does not require attorneys to *actively search* for misconduct. Rather, the duty merely requires attorneys to report misconduct when they happen to witness it.

### Discussion Questions

What is your opinion of Article 5 of the AIBA Code of Conduct—which is a so-called “whistle-blower” provision? Does requiring lawyers to report on each other’s misconduct help to foster trusting and cordial relationships between lawyers? Recall that the AIBA also requires that advocates “maintain a good relationship” with one another. On the other hand, how else other than through a whistle-blower requirement can the AIBA hope to govern its members’ misconduct? Can you think of alternative solutions?

### 9.4 Duty to Provide Legal Aid

Afghanistan is one of few countries where the law requires attorneys to provide a minimum quantity of free legal services to indigent defendants. The Advocates’ Law requires attorneys to represent a minimum of three criminal defendants free of charge each year. Because attorneys have a monopoly on the provision of legal services, the law makes them responsible for representing those who require defense counsel but cannot afford to pay for it. This legal aid, or *pro bono*, duty is a new requirement under the 2007 Advocates’ Law. It was enacted to ensure that every defendant accused of a crime has access to representation by a legal aid provider, as guaranteed by Article 31 of the Constitution. Pro bono cases are assigned by the Ministry of Justice’s Department of Legal Aids in accordance to the Legal Aid Regulation of 2008. The Department of Legal Aids also seeks to provide, but does not guarantee, representation to female and minor defendants in civil cases. Three pro bono cases per year is a minimum requirement, and attorneys are permitted to perform more pro bono work if they so desire.

Because pro bono cases are assigned rather than chosen voluntarily, the pro bono requirement is an important exception to a lawyer’s right to choose her own clients. Presumably, Parliament determined that the importance of providing legal representation to every criminal defendant—a constitutional requirement—outweighed the importance of allowing attorneys to choose their own clients in every instance.

But even though pro bono work is mandated by law, few attorneys in Afghanistan seem to actually comply with the pro bono requirement. Because the duty is new, many lawyers may simply be unaccustomed to pro bono work. Further, attorneys are the only professionals in Afghanistan required to offer their services for free. Many lawyers may therefore believe that the government has unfairly singled them out by forcing them, and no one else, to provide free services. And lawyers have no strong incentive to uphold their pro bono obligations, because the Ministry of Justice has adopted no mechanism to hold attorneys accountable for neglecting these obligations. To bring attorneys into compliance with the law, both the Ministry of Justice and the

AIBA will need to develop methods to hold attorneys accountable for failing to perform their pro bono work.

### **Comparative Law Legal Aid in Other Countries**

Different countries take different approaches to ensuring that the indigent have access to legal representation. In the United States, the government employs public defenders, a category of attorneys who are paid by the state and whose job is to defend persons unable to afford an attorney. Other countries, such as Germany, do not guarantee criminal defendants a lawyer, meaning that poor defendants must represent themselves with only limited legal support from the state. In both countries, there are also private, non-profit organizations dedicated to providing legal aid.

Other countries, including France and many other countries from the civil law tradition, take Afghanistan's approach of assigning private attorneys to represent indigent criminal defendants. But these countries tend to pay attorneys for their work, rather than requiring attorneys to perform the work at no cost. One exception is the Philippines, which also requires attorneys to perform pro bono legal aid. But in the Philippines, unlike in Afghanistan, pro bono cases are assigned by the courts rather than the Ministry of Justice.

Afghanistan's emphasis on pro bono service is probably a consequence of its limited supply of qualified attorneys. The small class of attorneys in Afghanistan must share their services more widely if all defendants are to be represented by a lawyer. According to the founding President of the AIBA, the pro bono requirement was also heavily influenced by the tenets of Islam, which emphasize service to the poor.

### **Discussion Questions**

1. It is subject to debate whether or not there should be a system of mandatory pro bono or merely a system of awareness and encouragement of people to refer to attorneys when they have a legal dispute. Do you agree with the current pro bono system in Afghanistan? Why?
2. The Pro Bono requirement in Afghanistan is primarily for criminal law cases and exceptionally for family and juvenile cases too. Why do you think this is the case?

### **9.5 Duty to Refrain from Representing**

Afghan law requires that if lawyers determine that their clients are committing a crime or violation, they must stop representing the client. This duty to refrain from representing clients engaged in a crime is the most extreme example of the inevitable conflict between a lawyer's duty of independence and her duty of integrity. Usually, an attorney is required to represent her client even when she does not agree with the client's cause. But, when the client's misconduct is sufficiently serious, the law demands that an attorney withdraw her representation altogether.

## **AIBA Code of Conduct**

### **Article 12: Refrain from Representing**

Whenever an advocate notices during the performance of his/her duty that his/her client is committing a crime or violation, he/she can refrain from representing the client.

The duty to refrain from representing one's client is triggered when a lawyer learns that her client is committing a crime or violation. The law does not specify that the crime or violation at issue must be violent or otherwise severe. The plain language of the Code of Conduct indicates that any crime, even a relatively minor one, will trigger the duty. The word "can," however, makes it less obligatory on the attorney. In other words, the plain interpretation of the article suggests that it is optional for an attorney to refrain from representing his client when the attorney knows that his client is committing a crime or violation. It is worth noting, further, that this duty applies when clients "are committing" a crime. This provision could be read narrowly as applying only to crimes that are in the process of being committed. In some cases the process of committing a crime may become unclear. One could argue that this article also applies to crimes that are in the process of being planned but that have not yet been committed. However, this is not a strong argument considering that, according to the penal code of Afghanistan, merely planning a crime is not in itself a crime because the "material element" of the crime is missing.

Ethical rules in many other countries also address how attorneys should respond when they learn that their client is committing or planning a crime. These rules are particularly specific in the United States. American attorneys are permitted to disclose to the authorities information about a client's ongoing or future crime under the "crime-fraud" exception to the attorney-client privilege. The theory is that while clients are entitled to informed professional guidance in defending their past misconduct, they are not entitled to assistance in planning future illegal activity. And permitting lawyers to disclose information about their clients' future crimes is thought to deter clients from planning such crimes. But, unlike the AIBA's Code of Conduct, the American Bar Association's Model Rules of Professional Conduct do not require attorneys to quit representing clients engaged in a crime or fraud. Rather, attorneys are merely permitted to do so.

By contrast, Article 12 of the AIBA Code of Conduct is silent regarding whether an attorney who learns her client is committing a crime may report the crime to the authorities, or whether she must simply stop representing the client but stay silent about the crime that is about to occur. The latter rule could lead to troubling consequences. Under such a rule, a lawyer who learned that her client was planning to commit murder would be prohibited from alerting the police and helping to save the victim's life. In most American states, lawyers who learn that their client is planning a crime are not required to inform the authorities—even when doing so would save a life. But lawyers are always permitted to tell the authorities if they learn that their client is planning or committing a crime.

### **Discussion Question**

Based on the theories of ethics you learned in Chapter 1, do you think it is unethical to break the duty of confidentiality and report to police a crime that your client has committed, or that you have reasons to believe he will most likely commit in the future?

Only authoritative interpretation by Afghan courts or the AIBA will clarify whether attorneys have the right to tell the authorities about their client's future criminal conduct. However, compelling principals of public policy support permitting such disclosure. This question will be addressed in more detail during the chapter on confidentiality and the attorney-client privilege.

### **9.6 Duty to Refrain from Obtaining Unlawful Privileges**

Attorneys may not use their positions to gain unlawful privileges. This means that attorneys are prohibited from using their authority to gain benefits to which they are not entitled. The unlawful privileges prohibition is aimed at eliminating corruption in the legal profession. Corruption is pervasive in both the public and private sectors in Afghanistan. In one survey, one in two Afghans reported having bribed government officials at least once. More than half of the Afghan population thinks that corruption is the country's greatest concern, and one international magazine rated Afghanistan the fourth most corrupt nation in the world. Underlying the AIBA Code of Conduct is an attempt to ensure that Afghan attorneys do not participate in this culture of corruption. According to the AIBA, requiring lawyers to comply with the Code of Conduct helps to "restore public confidence in the legal system by illustrating that no one is above the law and that lawyers themselves must abide by established ethical standards and procedures."

The prohibition of unlawful privileges is only the most obvious example of this anti-corruption priority. This duty also helps to make sure a lawyer's work with his client is transparent and in compliance with other regulations such as tax laws. This provision prohibits, for instance, parties from agreeing on a lower fee in their written contract. It also prohibits attorneys from receiving other types of privileges in secret. Assume for example that a client is a government employee. The client cannot give his attorney unlawful privileges, such as hiring the attorney's relatives for government positions without properly following the government recruitment process. The client also cannot provide favors for the attorney that would violate legal rules.

The duty to refrain from obtaining unlawful privileges is not explicitly a duty to the client, nor is it a duty to the court. Rather, it seeks to benefit Afghan society as a whole by reducing corruption and thereby ensuring that the legal profession operates fairly for all parties. When corruption is reduced, the legal profession will itself benefit, as citizens are more likely to hire lawyers when they will not have to worry about paying bribes or satisfying other corrupt demands.

#### **Problem Defining an Unlawful Privilege**

Payman, Fahim's coworker, decides to move to Herat and open a law practice of his own. A local judge approaches him and makes the following offer: Payman should seek clients accused of serious crimes who are scheduled to appear in the judge's court. Payman should convince these clients that, for a sizeable fee, he can successfully defend them before the judge. After

Payman collects the fee, the judge will acquit the client. Then Payman and the judge will share the fee between them.

Will accepting the judge's offer violate Payman's duty to refrain from obtaining unlawful privileges? Who would be harmed by such an arrangement?

### **Discussion Questions**

Throughout this chapter, we have seen that lawyers' rights and duties in practice often conflict with one another, causing ethical dilemmas. Similarly, there are often exceptions for rules regarding the rights and duties of lawyers. For example, lawyers must maintain cordial relations with other lawyers—except when doing so would violate a lawyer's duty to her client. Lawyers have the right to choose their own clients—except when the state requires them to participate in pro bono defense work. Lawyers have a fundamental obligation to respect their clients' interests and keep client information confidential—except when they have a duty to withdraw from representing clients who are committing crimes.

In many respects, the law of legal ethics is a series of tradeoffs between different, competing interests. The interest in maintaining friendly relations among lawyers must be balanced against society's interest in advancing effective advocacy. And the interest in effective advocacy must be balanced against society's interest in promoting fairness and efficiency in the judicial system. In your opinion, is the law successful in making these tradeoffs? If you were a legislator, would you have balanced the priorities the way Parliament has? Or would you have made different tradeoffs emphasizing different values?

### **Problem**

Rashid is a lawyer and is willing to represent a rich client, Nawid, at the appellate level regarding a criminal case. Rashid agrees to meet with Nawid in his office to discuss the case. Before the meeting, Rashid finds out the name of the judge who will sit in the appellate panel. During his meeting with Nawid, Rashid intentionally displays a photo of himself with the judge who will decide Nawid's case. Rashid tells Nawid that he and the judge are cousins. Seeing the photo of Rashid with the judge convinces Nawid that Rashid stands a good chance of winning the case. Nawid asks for Rashid's legal representation and Rashid agrees. Later it is revealed that Rashid altered the photo using computer software.

1. How many ethical issues have you spotted in this problem?
2. Can you find an ethical duty towards the client that was breached? An ethical duty towards the court that was breached? An ethical duty towards other lawyers that was breached?

### **The Ethics of Negotiation**

This chapter has focused primarily on the attorney's role when representing clients in court. It has focused on the rights and responsibilities of lawyers when they have a case in court before a judge. However, the out-of-court role of a lawyer is often just as critical—if not more critical—than her role during court proceedings. Lawyers are frequently called upon to conduct transactional work on behalf of clients. And because many civil and criminal cases settle prior to trial, even trial lawyers must be adept at behind-the-scenes negotiation. In the course of the settlement process, and in many other contexts, lawyers must be prepared to negotiate successfully and forcefully on behalf of their clients.

The ability to negotiate is therefore a crucial skill for all lawyers. But the art of negotiation presents its own unique ethical quandaries, many of which are not directly addressed by the Advocates' Law or the AIBA Code of Conduct. Broadly speaking, the AIBA Code of Conduct requires that lawyers seek to advance their clients' best interests. In a negotiation, this obligation might tempt a lawyer to mislead—or even lie to—the other party in order to obtain the best result for her client. On the other hand, lawyers have a duty to observe “the highest standards of honesty, integrity and fairness,” and are prohibited from making false or misleading statements. This obligation would counsel an attorney to be entirely honest during negotiations—even where doing so would hurt her client.

Once again, then, the duties of *independence* and *integrity* are in conflict. And this conflict is particularly problematic in the context of negotiations. During negotiations, there is a strong incentive to misrepresent one's own position in order to gain leverage over the other party. Further, information asymmetries make it likely that the other party will never discover such misrepresentations—making them all the more tempting.

How should this conflict be resolved? On one hand, no one would argue that lawyers are permitted to act fraudulently on their client's behalf. To take an obvious example, a lawyer negotiating to sell her client's real estate could not claim the property is twice as valuable as it actually is. On the other hand, a lawyer cannot be expected to give away *every* piece of relevant information to the opposing party, either. To take another obvious example, a lawyer negotiating to win her client a contract cannot be expected to reveal the absolute lowest price at which her client would accept the contract. If such disclosure were required, the negotiation would have no purpose!

The problem lies in determining the permissibility of behavior between these two extremes. Misrepresentations can be placed along a spectrum of seriousness—from irrelevant omissions all the way to obvious and material falsehoods. In between these extremes lie a whole host of behavior—bluffs, false impressions, half-truths, and white lies—whose appropriateness may be context-specific. Neither Afghan law nor the AIBA has established standards determining when a negotiation tactic crosses the line from appropriate advocacy to inappropriate fraud. Until they do, it will be up to lawyers to set the appropriate bounds of their advocacy, based on their understanding of Afghan law and their own moral commitments.

## 10. CONCLUSION

The modern legal profession in Afghanistan dates back to the late 19th century, when a secular, centralized judicial system began to take shape under Amir Abdur Rahman Khan. After almost 100 years of incremental but meaningful reform, Afghanistan's legal profession was decimated during decades of conflict starting with the Soviet invasion of 1979, and lasting through the Taliban period and the American invasion of Afghanistan in 2001. Though conflict still persists today, the Constitution of 2004 restored the importance of Afghanistan's legal profession, guaranteeing that every Afghan citizen has the right to an attorney. The Advocates' Law of 2007 set the rules for who may practice law in Afghanistan and laid the foundations for how the legal profession is to govern itself. The Advocates' Law also called for the creation of the AIBA, an independent bar association tasked with overseeing the legal profession and setting ethical guidelines for lawyers. These guidelines establish how lawyers are expected to advance the principles of independence and integrity that govern the conduct of the legal profession.

Lawyers in Afghanistan enjoy certain irrevocable rights. In return they owe an interlocking—and sometimes conflicting—set of duties to their clients, to the court before which they practice, and to various other constituencies. This chapter provided a brief outline of these duties; later chapters will explore lawyers' most important duties—the duty to maintain confidentiality and to avoid conflicts of interest—in greater detail.

The AIBA is still a young organization. It should therefore come as no surprise that the requirements set forth by the AIBA and the Advocates' Law are not universally followed. Not all attorneys practicing in Afghanistan are registered with the AIBA—which requires attorneys to come to Kabul (or other big cities where the AIBA is located) to take an examination and pay an annual fee. Further, even attorneys who are members of the AIBA may not be familiar with all provisions of the new ethics code. And most lawyers practice in cities, leaving rural areas almost entirely untouched by the new rules established to govern the legal profession. Despite these obstacles, codified ethical guidelines, as well as clear requirements for who may enter the legal profession, are important steps towards building a strong judiciary and advancing the rule of law. A growing challenge for new lawyers in Afghanistan will be to help institutionalize the rules contained in the Advocates' Law and the AIBA Code of Conduct, to ensure that they are followed and respected throughout the country.

## CHAPTER 3: LEGAL & REGULATORY AUTHORITIES ON ETHICS

### 1. INTRODUCTION

This chapter introduces you to the sources of rules and expectations that control advocates' behavior in Afghanistan. You will also learn about the actors and institutions of the legal profession in Afghanistan. We will explain the legal authorities that regulate the profession as well as the institutions that are established to enforce those regulations and help the profession to function. For the purpose of this Chapter, legal authority means rules that regulate the conduct of lawyers. Institutions and actors mean organizations or establishments that are responsible for creating such rules, enforcing them, or monitoring the conduct of lawyers. As an example, the Advocates' Law is a set of rules that could be considered a legal authority. Broadly speaking, there are many institutions and actors involved in the creation and enforcement of this law. These include institutions with law making power, Courts that enforce those rules, and other government agencies and non-government organizations that work in accordance to the mandates of this law. We will provide a narrow consideration of institutions related to the legal profession, studying institutions such as the Afghanistan Independent Bar Association (AIBA) that are mainly established to create ethical rules, adjudicate complaints, enforce those rules, and "regulate and lead all activities of advocates."

A brief example should help to clarify the distinctions between legal authorities and institutions. As you read the following hypothetical, do not be concerned with the specifics of the legal rule at issue. Instead, focus on the way in which multiple actors and authorities are involved in this scenario.

#### Exercise 1

A young lawyer in Kabul has recently become an accredited advocate and wants to represent an accused person who is on trial for murder. You will learn more about what formal accreditation means later in this Chapter. For now, you simply need to know that the lawyer is subject to the legal provision at issue in the hypothetical.

The lawyer knows the accused is poor and cannot afford to pay an attorney to represent him in court. Therefore, the lawyer wants to represent the accused for free. The lawyer wants his free representation to be counted towards his pro bono duty. Assume that the lawyer has this approved by the relevant administration responsible for managing free legal aid to **indigent** clients, or clients unable to pay for legal services. The lawyer agrees to represent the accused in this case. Though the victim's family members are dismayed that a young lawyer is willing to defend a client accused of such a terrible crime, the young lawyer believes all defendants have the right to a proper defense at trial.

Not long after the case begins, the accused admits to his lawyer that he is guilty. He committed the murder, he explains, because the victim had stolen his money and refused to repay it. While our young lawyer is concerned with this information, she knows that, pursuant to Article 13 of the Advocates' Law, she must "maintain client confidentiality." The lawyer knows that the

AIBA Code of Conduct and the Legal Aid Regulations emphasize protecting the interests of clients. Given this obligation, the lawyer continues to press forward with her preparations.

A few days later, the lawyer has a disagreement with the dead victim's brother while shopping at a local market. The victim's brother is visibly upset, and he demands to know why the lawyer accepted the case. He grabs her by the arm and states the following: "Are you defending a person who killed my innocent brother? Shame on you!" The lawyer answers angrily, "First of all, your brother was not innocent. He started the dispute. My client did not have any option but to kill him."

1. Can you list all the rules governing the conduct of the lawyer in this case? (For now, do not be concerned with what the rules say; just see if you can identify the rules.)
2. From these rules, can you identify which rules are related to the professional conduct of lawyers and which ones are broad legal rules applicable to everyone?
3. Can you identify the institutions involved here?

## 1.1 Chapter Objectives

At the conclusion of this Chapter, you will have a working knowledge of many concepts. First, you will understand distinctions between different sources that regulate the conduct of lawyers in Afghanistan. More specifically, you will understand how those sources are different by comparing the scope and characteristics of each. You will also learn the relationship between these sources. Second, you will be able to cite the primary laws and rules that govern the ethical responsibilities of lawyers in Afghanistan. Third, you will be exposed to an in depth history of how Afghanistan's legal ethics framework was founded. These sources will serve as the backdrop to the more detailed provisions you will study in subsequent Chapters. Fourth, you will understand more about the institutions that enforce ethics in Afghanistan, particularly the important role played by the AIBA. You will learn how the AIBA is different from other associations. Fifth, you will understand the relationships and dynamics that exist between the institutions governing legal ethics in Afghanistan. In some cases, understanding the interplay between these institutions will be as important as understanding the provisions themselves.

## 2. INTRODUCTION TO RELEVANT LEGAL AUTHORITIES AND INSTITUTIONS

The rules that govern lawyers include statutory sources, regulations, ethics codes, and by-laws. These rules also introduce institutions that enforce the rules by specifying the institutions' authorities and functions. In a broader analysis of those rules, we will come up with a long list of legal authorities and institutions that are relevant to the legal profession. For example, a lawyer may commit a crime during his professional work, or cause harm to his client, or violate the ethical standards of his profession. Other times he may act against the policies of his employer or breach an agreement between him and his client. Under a broader analysis of the rules that regulate lawyers, all of these regulations and standards could be considered law governing the behaviors of lawyers. Similarly, a broad analysis of rules will bring with it a long list of institutions that are creating, supervising, or enforcing those rules. In some cases those

institutions will also govern the behaviors of lawyers as well. Below you can see a number of such regulations and institutions that may regulate the conduct of lawyers. Since you have learned about most of these authorities and institutions in other courses, we will only provide a short explanation and a few examples for each. Pay attention to how your previous knowledge of law is relevant to the main topics of this course.

<b>Who Regulates Lawyers? <sup>12</sup></b>		
<b>Institutions</b>	<b>Role of Institution in Regulating Lawyers</b>	<b>Regulatory Sources</b>
Legislature	<ul style="list-style-type: none"> <li>• Makes new laws that govern lawyers.</li> <li>• Amends previous laws.</li> </ul>	<ul style="list-style-type: none"> <li>• Advocates' Law of the Islamic Republic of Afghanistan</li> <li>• Also past laws and regulations that are no longer valid.<sup>13</sup></li> </ul>
Judiciary	<ul style="list-style-type: none"> <li>• Applies the law when there is a dispute.</li> <li>• The Supreme Court interprets the law.</li> <li>• Courts have some lawmaking power in judicial matters.</li> <li>• The Supreme Court reviews the constitutionality of laws and regulations.</li> <li>• Adjudicates complaints of a party unsatisfied with the disciplinary decisions of the AIBA regarding violations of the AIBA Code of Conduct.</li> <li>• Imposes other sanctions in cases regarding the professional behaviors of attorneys.</li> <li>• Disqualifies lawyers who temporarily or permanently are not allowed to practice law.</li> </ul>	<ul style="list-style-type: none"> <li>• Law Governing the Organization and Jurisdiction of the Islamic Republic of Afghanistan's Justice System</li> <li>• Regulation of Judicial Conduct for the Judges of the Islamic Republic of Afghanistan (June 2007)</li> </ul>
The Attorney General's Office	<ul style="list-style-type: none"> <li>• Prosecutors bring criminal charges against attorneys if they commit crimes.</li> <li>• The Attorney General's Office prepares and enforces ethical regulations for prosecutors.</li> </ul>	<ul style="list-style-type: none"> <li>• Code of Conduct and Professional Standards for Prosecutors of the Attorney General's Office for the Islamic Republic of Afghanistan.</li> </ul>
The Afghanistan	<ul style="list-style-type: none"> <li>• Informs suspected persons of their right to</li> </ul>	<ul style="list-style-type: none"> <li>• Afghan National Police</li> </ul>

<sup>12</sup> This chart is taken from Lisa G. Lerman and Philip G. Schrag, *Ethical Problems in the Practice of Law* (3rd ed., Wolters Kluwer 2012) (P. 43-44). Contents have been substantively changed based on laws of Afghanistan.

<sup>13</sup> Note that some others laws that were enacted in the past, and are still binding are other sources regulating the conduct of lawyers. Articles 1554 – 1608 of the Civil Code of Afghanistan, for instance, regulate different types of attorneyship. The Civil Code, however, describe contractual aspects of the general notion of representation. The Code provides provisions for all scenarios where one person represents another such sale or purchase of goods, initiation of a lawsuit, and settlement. Similarly, Article 12 of the Penal Code categorizes a defense attorney as an “Official of Public Services”. Considering defense attorneys as Officials of Public Services brings with it some strict duties as well as some protections (*See, e.g.*, last part of this chapter and Articles 12, 62, 148, 248, 254, 258, 270, and 275 of the Penal Code).

National Police (ANP)	<p>access an attorney and their option to find a free legal aid provider.</p> <ul style="list-style-type: none"> <li>• Cooperates with attorneys.</li> <li>• Arrests an attorney suspected of committing criminal wrongs.</li> </ul>	<p>Code of Conduct (July 2011)</p> <ul style="list-style-type: none"> <li>• Also see Article 28 of the Legal Aid Regulation</li> </ul>
The Independent Administration Reform and the Civil Service Commission (IARCSC)	<ul style="list-style-type: none"> <li>• For legal professionals working as civil servants providing legal services, they are bound to this set of rules designed for civil servants.</li> </ul>	<ul style="list-style-type: none"> <li>• Code of Conduct for Civil Servants in Afghanistan</li> <li>• See for instance Article 16 of the Legal Aid Regulation about the MoJ hiring legal aid providers.</li> </ul>
The Ministry of Justice (MoJ)	<ul style="list-style-type: none"> <li>• The Legal Aid Department of the Ministry of Justice was created particularly to assist implementation of the Legal Aid Regulation.</li> </ul>	<ul style="list-style-type: none"> <li>• Legal Aid Regulation, Official Gazette Number 950 (2008)</li> </ul>
Government Administrative Agencies	<ul style="list-style-type: none"> <li>• Ministries, commissions, and other administrations have some power to make binding rules, guidelines, and codes of conduct that in some instances are applicable to lawyers.</li> <li>• These institutions occasionally hire lawyers to assist with legal issues. Their own ethical rules are then imposed on the lawyers.</li> </ul>	<ul style="list-style-type: none"> <li>• For instance if the Ministry of Women Affairs hires attorneys to represent women, the Ministry may develop a more specific code of conduct for lawyers to comply with.</li> </ul>
Afghanistan Independent Legal Aid Board (the “Board”)	<ul style="list-style-type: none"> <li>• Works with individual <b>legal aid providers</b> (those doing their pro bono work and those who are hired to provide free legal services to indigent clients), law clinics, and NGOs providing legal aid.</li> <li>• Suggests amendments to the Legal Aid Regulation.</li> <li>• Adopts procedures and codes of conduct.</li> </ul>	<ul style="list-style-type: none"> <li>• See particularly Article 20(4) of the Legal Aid Regulation that allows (the “Board”) to amend the regulation and Article 20(11) that authorizes the Board to adopt procedures and codes of conduct.</li> </ul>
Afghanistan Independent Bar Association (AIBA)	<ul style="list-style-type: none"> <li>• The main institution responsible for drafting and enforcing ethical rules and implementing many provisions of the Advocates’ Law.</li> <li>• Adopts Codes of Conduct.</li> <li>• Administers bar exams and licenses lawyers.</li> <li>• Adjudicates complaints about attorney misconduct and imposes disciplinary sanctions on lawyers.</li> <li>• Interprets codes of conduct.</li> </ul>	<ul style="list-style-type: none"> <li>• AIBA By-Laws</li> <li>• AIBA Code of Conduct</li> </ul>
Non-Governmental Non-Profit Organizations	<ul style="list-style-type: none"> <li>• Some such NGOs and Independent Commissions are: the Norwegian Refugee Council, the Legal Aid Organization of</li> </ul>	<ul style="list-style-type: none"> <li>• Sometimes these NGOs adopt policies, procedures, or codes of conduct that</li> </ul>

(NGOs) providing legal services	<p>Afghanistan (LAO), the International Law Foundation of Afghanistan (ILF-A), Da Qanoon Ghushtonky, the Independent Human Right Commission, and others providing legal aid to indigent people or assisting in training, hiring, and working with attorneys.</p> <ul style="list-style-type: none"> <li>• These institutions sometimes develop their own policies regarding ethical codes of conduct for their members, trainees, and counterpart organizations.</li> </ul>	regulate their operation or the conduct of their employees.
Law Firms	<ul style="list-style-type: none"> <li>• As the employers of lawyers, law firms develop their own codes of conduct and policies that regulate the professional conduct of their members.</li> </ul>	<ul style="list-style-type: none"> <li>• For instance, a law firm assisting returnees with their legal cases may develop a more specific ethical policy for its members and emphasize greater equality, less discrimination, and respecting diversity.</li> </ul>
Clients	<ul style="list-style-type: none"> <li>• The attorney-client contract establishes a legally binding relationship between a lawyer and his client that brings with it many rights and responsibilities.</li> <li>• Agreement of parties to a contract is an important source for a judge to refer to when settling a contractual disagreement.</li> </ul>	<ul style="list-style-type: none"> <li>• A contract may include conditions that more specifically require how certain ethical duties, such as timely communication, should be performed.</li> </ul>

From all the authorities and institutions listed above, this Chapter will address three legal ethics authorities in particular: (1) the Advocates' Law, which was provided for in Article 31(5) of the Constitution of Afghanistan; (2) the AIBA Code of Conduct, which was **promulgated**, or put into effect by official action, in 2009; and (3) the Afghanistan Legal Aid Regulation which was adopted based on Article 3 of the Advocates' Law.

### Discussion Questions

1. What is the relation between the different types of responsibilities for lawyers discussed in Chapter 2 and the different types of sources explained above?
2. What are the advantages of codifying ethical norms into law?

Recall your knowledge of Afghanistan's hierarchy of sources in its legal system. The most superior source is the Constitution of Afghanistan. The constitutional principles about individual rights and duties, checks and balances, duties of the state, and other principles are very broad. It is the statutory laws based on those constitutional principles that provide more specific rules on how a constitutional mandate may be enforced. When the Constitution recognizes a right or sets a priority for the state, the statutory laws provide details about how such a right will be protected or what priority will be achieved. Take, for example, the right to education mentioned in Article

43 of the Constitution. The Constitution recognizes the right and lets the details be regulated by statutory laws and regulations. To define what this right means and how the state will support it, a number of laws were enacted to further explain the system of higher education in the country. This is why there are currently laws and a significant number of regulations, procedures, guidelines, and codes of conduct related to higher education. More efforts are undergoing to amend the current laws, or to have more laws and regulations wherever necessary.

If you pick a statutory law, at the beginning it is likely you will find provisions regarding the constitutional foundation of the law, the scope of the law, and the objectives for creating the law. These provisions answer questions as to why the law was enacted, to whom it will be applied, and what it is expected to achieve. Like the Constitution, it is normal for the statutory laws to leave details for specific regulations to further explain certain provisions of the law. Therefore, the Constitution serves as a foundation for statutory laws and the statutory laws serve as a foundation for regulations. A regulation may also serve as foundation for procedures, rules, and guidelines that are at the bottom of the hierarchy of sources and have a narrower scope. A superior source of law sometimes more specifically addresses a new law or regulation to be adopted.

The same rule of interaction for sources of law applies to legal authorities within the legal profession. Only one article in the Constitution of Afghanistan recognizes the right to have access to an advocate. The Constitution leaves it to statutory laws to explain the details of who will be considered as a defense attorney, what rights and obligations an attorney has, and other relevant questions about their professional works. You now know that this law is called the Advocates' Law. The Advocates' Law includes major important rules about the work of defense lawyers in Afghanistan. But as you will learn more in this Chapter, the law refers issues—such as the creation of an independent bar association or the provision of free advocates to indigent clients—to other sources. These sources are the Legal Aid Regulation and the AIBA By-Laws. While the AIBA By-Laws explain important rules about the structure, roles, and responsibilities of the association, it allows more specialized ethical standards to be covered in the AIBA Code of Conduct.

Among the sources of law, we can conclude that no regulation can be against provisions of statutory laws and that no statutory laws can be against provisions of the Constitution. A second conclusion is that statutory laws are, by definition, decisions made by members of the Afghan Parliament who are elected by Afghans. They reflect the aggregated political, deliberative, and constitutional influences that shape the democratic legislative process. A professional code of conduct prepared and enacted by an association often does not have the same amount of legitimacy as a law. That is why the scope of a professional code of conduct is narrow and does not affect other parties not involved in the creation of the code. With regard to the AIBA's Code of Conduct, it is not technically a law. It is instead a codification passed with the approval of the AIBA's membership. But you will see that the AIBA's Code of Conduct was promulgated in much the same fashion, albeit with a smaller population of voters (its own members, rather than the members of the Afghan Parliament). As part of their membership, registered advocates agree to be bound by certain expectations. When they are punished, they are punished in keeping with the regulations that were passed according to the AIBA's By-Laws. For these reasons, in addition to the more practical enforcement dimensions, we might also say these regulations have

greater democratic legitimacy—and, as a result, deserve heightened respect and deference. The chart below summarizes how this system works:



We will follow the same structure in next sections of this Chapter by talking first about the Constitution, then about the Advocates’ Law, and then about the AIBA Code of Conduct. At the same time, we will turn to institutions created specifically for the purpose of regulating the professional works of lawyers. In order to better explain those actors and institutions, we will quote from sources such as the AIBA By-Laws and the Legal Aid Regulation.

### 3. CONSTITUTIONAL FOUNDATIONS OF THE LEGAL PROFESSION IN AFGHANISTAN

As explained earlier, the 2004 Constitution provides a foundation for many laws enacted after 2004. The most relevant law regulating the legal profession is the Advocates’ Law, which was actually prepared due to Article 31 of Afghanistan’s Constitution. This Article states, “[t]he duties and authorities of advocates shall be regulated by law.” The first portion of the Advocates’ Law makes it expressly clear that it was passed pursuant to Article 31. This is important for several reasons. First, as will be explored further below, the Constitution envisioned a role for an independent group of professional advocates. In this respect, advocates in Afghanistan have come to be seen as not only a professional group, but as also an important part of the legal system.

The second inference we can draw pertains to the placement of the constitutional provision. Although the specific reference to the Advocates’ Law is provided in Subsection 5 of Article 31, the full scope of Article 31 deals almost entirely with the right to obtain an advocate to defend oneself in court. Consider the following provisions:

#### Article 31 of the Constitution of Afghanistan

“[1] Every person upon arrest can seek an advocate to defend his rights or to defend his case for which he is accused under the law.

[2] The accused upon arrest has the right to be informed of the attributed accusation and to be summoned to the court within the limits determined by law.

[3] In criminal cases, the state shall appoint an advocate for a destitute.

[4] The confidentiality of oral, written or telephonic communications between an advocate and his accused client are immune from invasion.

[5] The duties and authorities of advocates shall be regulated by law.”

Note that three of the five provisions in Article 31 focus largely on the rights of clients and on the importance of providing proper defense resources for accused persons. That is, they pertain only indirectly to the rights of advocates. This is a key lesson, and it will appear in several other instances as we proceed through the Chapter. Put simply, the drafters of Afghanistan’s Constitution saw the empowerment of lawyers, in part, as a means by which to augment the rights of the accused. An empowered legal profession would have the strength necessary to resist coercion and provide strong defenses for those in need. It should not surprise you, therefore, to see this principle reflected in the Law itself: in fact, the second substantive articles contained in the Advocates’ Law mandates that every person, both male and female, has the right to “appoint an advocate of his/her choice” upon arrest. That is, the article is focused exclusively on clients, not advocates.

#### **4. THE ADVOCATES’ LAW**

The Advocates’ Law is the primary authority on legal ethics for attorneys in Afghanistan. On November 24, 2007, President Karzai officially endorsed the Advocates’ Law after it was passed by a Joint Committee of both houses of the National Assembly. The scope of the Law is substantial, and it will be featured throughout the coming Chapters. To that end, a copy of the Law’s full text is provided in the appendices at the end of this book. It will be helpful to refer to the text frequently as you read the upcoming analysis.

##### **4.1. To Whom Do These Laws Apply and How Are They Enforced?**

The Advocates’ Law contains 5 chapters and 44 articles, divided according to subject matter. The first Chapter contains “general provisions,” including, among others, the right of Afghans to appoint an Advocate. It also establishes the Law’s constitutional foundation, which plays an important role in the Law’s interpretation. The second Chapter of the Advocates’ Law covers the requirements necessary to practice as an advocate. The third then describes the careful balance between an advocate’s rights and duties. Because these portions of the Law deal largely with substantive provisions, they will be addressed in greater detail in the Chapters to come. Chapter 4 contains the Law’s disciplinary provisions, which, when coupled with the substantive provisions contained in Chapter 1, tell us much about the scope of the Law’s authority and reach. Finally, Chapter 5 features what the Law describes as “Miscellaneous Provisions,” which include a host of items, ranging from finding sources, to security, and attorney filing fees.

In order to establish the substantive scope and jurisdictional reach of the Law, we return briefly to its first Chapter. Chapter 1 of the Advocates' Law includes two foundational elements of the Law: it states the Law's purpose, and it also defines the term "advocate." When evaluated in combination, these provisions tell us much about how far the law extends.

### **Article 1 of the Advocates' Law**

"The Law is enacted pursuant to Article (31) of the Constitution to regulate the rights and duties as well as other responsibilities of advocates."

### **Article 5 of the Advocates' Law: Definition of the Term "Advocate"**

"For the purposes of this Law, the following terms have the following meaning . . .

The term "advocate" means a person who is included in the Roster of practicing advocates and is entitled to defend and represent the rights of his/her client before a court of law, other authoritative tribunals, or initiate judicial proceedings, in accordance with the provisions of the law."

As the above provisions make clear, the Advocates' Law extends only to "advocates," which are defined, in turn, as those attorneys included in the "Roster of practicing advocates."

When reading other statutory sources and legal texts, you will encounter different terms used to explain the concept of one person acting on behalf of another in a specific situation. These terms are often confusing. Representation is a broad term used to explain all scenarios where one is speaking or acting on behalf of another person. In the Civil Code of Afghanistan, this term is used mostly in a family law context as well in transactions. Agency is another legal term used to define a relationship between two persons based on trust when one person (the Principle) asks another (the Agent) to represent him in a certain transaction. Agency mostly applies in the commercial law context. However, it could also apply to certain types of representation in civil contracts that are explained in the Civil Code under Lawyering (Wakalat). The Civil Code distinguishes between different types of attorneyship including the attorneyship of sell, buy, litigation, and settlement. The Advocates' Law has been more specific by using the term defense lawyer. The term "defense" helps to distinguish it from other similar concepts used in other areas of law. However, do not think "defense" should mean a defense lawyer is only defending a client in court against criminal charges or lawsuits. The role also includes other types of assistance, including protecting rights of a client in all stages of a case, legal consultation, initiating lawsuits, or negotiating for settlements. You will learn more in Chapter 4 how broadly this term can be interpreted and used in Afghanistan.

The definition of "advocate" should also be read in conjunction with Article 7 of the Law, which provides limitations on how far the term extends.

### **Article 7 of the Advocates' Law**

“The following persons are *not* entitled to practice law as an advocate:

(1) Judges, prosecutors, military officers, police and national security officers, civil servants and municipality's employees, and members of the national assembly, as well as members of national, provincial and district councils, so long as they are employed as such, except lecturers of the Faculties of Law and *Sharia* (with the consent of the University) and legal aid providers.”

When supplemented by the information provided in Article 7, we get a full picture of what types of lawyers fall under the term “advocate.” In sum, the Advocates' Law pertains to the conduct of *criminal defense attorneys* (or *defense attorneys*) and *civil defense attorneys* (or *civil attorneys*). The first group of lawyers specializes in defending clients charged with criminal conduct. The second group, on the contrary, specializes in defending their clients involved in a civil litigation as a defendant. The term advocate does not include prosecutors or other civil servants operating within the government. It will not surprise you to learn that the AIBA's roster of attorneys reflects these limitations in practice: in 2013, their membership was comprised of approximately 40 percent defense attorneys, and 60 percent civil attorneys.

Because the Law grants substantial power to the bar association—including both determining accreditation and licensing standards for attorneys, as well as broader “administrative” responsibilities found in Article 4—the bar association plays a major role in the substantive reach of the Advocates' Law. Article 4 underscores the idea that the Law envisioned a substantial role for the bar association in administering legal practice.

### **Article 4(1) of the Advocates' Law: Administration**

“To regulate and lead all activities of advocates, an independent non-governmental Association of Advocates (the ‘Association’) shall be established.”

Finally, as is made obvious by the title of the legislation, the Advocates' Law is *law*. That is, it is subject to the full power of the state's enforcement authority; if an individual falls within its scope, that individual can be punished accordingly. In addition, while the Law is subject to the interpretation of courts, courts may not explicitly overrule its provisions. Their role, subject to the limitations alluded to above, is to interpret the laws passed by the Afghan National Assembly and signed by the President. Courts can accept guidance from the Supreme Court in that respect. But they may not explicitly ignore or overrule the provisions contained in the Law. This point may sound clear, but it bears emphasis. As we will see shortly, the enforcement mechanisms contained within the Advocates' Law are somewhat distinct from the AIBA's Code of Conduct in this regard.

## **Discussion Questions**

1. Take a moment to reflect on the mechanisms that give laws greater “democratic legitimacy.” Do you agree with this assertion? Are there empirical assumptions at work here that might **contravene**, or conflict with, the argument? That is, do all laws necessarily reflect the “will of the Afghan people,” or might they depend on the circumstances under which these laws were passed?
2. How broadly is the term Wakeel used in your community? Have you heard the term used in family, political, and social contexts?
3. What is the need for having different sources of rules to govern the conduct of lawyers? Is it true that the advanced training lawyers receive in law and ethics allows lawyers to be ethical and truthful at all times?

#### 4.2 History of the Advocates’ Law

As stated earlier, the Advocates’ Law has yet to receive any specific interpretation by the Supreme Court. Unfortunately, this means that one of our primary methods of statutory interpretation—judicial authority—is unavailable. Nevertheless, we can learn much from the Law’s history to aid us in our search for clearer interpretation.

The historical foundation of the Advocates’ Law can be traced to Kabul in November of 2005. A group of Afghan lawyers, with input from the International Bar Association, drafted a document that envisioned a process to govern the duties, activities, and responsibilities of attorneys in Afghanistan. Those represented included “Afghan lawyers, lawyers groups, government lawyers, judges, academics, law students, national and international NGOs, UN agencies and international donors.” The participants divided into four working groups to address the following issues: (1) The Role of Lawyers and the Independence of the Legal Profession; (2) Objectives of the [Bar] Association; (3) Governance of the [Bar] Association; and (4) Rules of Professional Conduct and Ethics for the Legal Profession.

The motivation for the Advocates’ Law was relatively clear. As one scholar notes, “problems of training, corruption, and influence have followed the Afghan legal profession from the inception of the current state court system back in the 1960s, and have not been eliminated by recent postwar reform. As a first step to reorganizing the legal profession, the Afghan government has drafted new sets of laws governing qualifications and conduct for defense attorneys, prosecutors, and judges.”

Based on the collective input of the working groups, a tentative “Position Paper” was sent to the Afghanistan Ministry of Justice. The Position Paper was produced by the International Bar Association, and it depicts some of the earliest ideas behind the Law’s final language. In this respect, several items in the document are particularly noteworthy. First, from the beginning, one of the primary purposes of the Law was to establish an *independent* bar association (this focus is further explored in our section covering the AIBA). Second, the document drew heavily on international norms. As the Position Paper makes clear, its provisions set out “the requirements in international human rights law, binding on Afghanistan, with respect to an independent legal

profession and the important part a bar association plays in this.” The Position Paper goes on to cite specific sources of international law for the purposes of regulating the duties and obligations of lawyers.

The Position Paper’s primary source is the International Covenant on Civil and Political Rights (1966), to which Afghanistan is a party. The Position Paper draws in particular on Article 14(1) and Article 14(3) of the Covenant. Consider the following excerpt from the Position Paper:

**IBA Position Paper Excerpt: “The International Rules Regarding Independent Bar Associations”**

“Afghanistan is a party to the International Covenant on Civil and Political Rights (1966) to which it acceded in 1983. Article 22 of this Covenant provides that everyone has the right to freedom of association with others. This means that forming a bar association is a human right for members of the legal profession.

Article 14(1) of the Covenant provides that all persons shall be equal before courts and tribunals, and are entitled to a fair and public hearing. Lawyers are essential to the delivery of this right. With particular respect to criminal proceedings, Article 14(3) provides that everyone has the right to have adequate time and facilities to prepare a defence and to communicate with legal counsel of their own choosing, and to be defended either in person or with the assistance of legal counsel. In explaining what these provisions mean, the UN Human Rights Committee issued General Comment 13 in 1984 which provides, in paragraph 9, that: “Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgment without any restrictions, influences, pressures or undue interference from any quarter.” The reference to “their established professional standards” indicates that lawyers must have specific indicators of professional conduct and practice that they themselves help to decide upon. They must also be free to work independently without interference.”

Although there are many inferences to be drawn from the above passage, two items stand out. First, we have further evidence that the Law’s creation was actually less about the exclusive rights of advocates and more about providing for peoples’ rights in the courtroom. Second, for the purposes of interpretation going forward, we now know that many of the underlying principles behind the Advocates’ Law derive from international human rights norms. To that end, the technique of comparative legal analysis discussed earlier is once again applicable.

### **4.3 The Procedural History of the Advocates’ Law**

Following the publication of the IBA’s Position Paper, a “revised draft Advocates’ Law was finalized by the legislative department of the Ministry of Justice.” The legislative drafting department of the Ministry of Justice, the *Taqnin*, led the drafting and consultation process until it was presented to the lower house of the Afghan Parliament. On May 30, 2007, the lower house, the *Wolesi Jirga*, passed the Advocates’ Law, making it the “fifth law out of 52 to be passed [that] year by the *Wolesi Jirga*.” The passage of the law through the *Wolesi Jirga* was

aided substantially by the Secretary-General to the Secretariat, who was a trained lawyer. Commentators have indicated that he therefore “appreciated the importance of the Advocates’ Law,” and contemporary accounts suggest that the Secretariat, at the urging of the Secretary General, “played a key role in advocating for the law.”

Finally, civil society played an active role in the Law’s passage through the *Wolesi Jirga*. NGOs and other non-state groups had the effect of not only making the Law responsive to the needs of Afghans, but also protecting it from foreign pressures to a degree. As one observer recalled: “Through networking with Afghan NGOs and civil society, it was possible to meet and engage with influential parliamentarians who would play a prominent role in advocating for the Law not only within internal parliamentary meetings but also in the plenary session. This proved to be extremely effective and prevented the Law and the establishment of the bar association from being perceived by the Parliament as something imposed on it by the international community.”

The passage of the Law does not appear to have been without controversy, however. As former President Karzai noted in his Presidential Decree at the beginning of the Advocates’ Law, the National Assembly was compelled to invoke Article 100 of the Constitution in order to pass the legislation. Article 100 provides that, “[i]n case the decision of one house is rejected by another house, a combined committee composed of equal members of each house is formed to resolve the disagreement.” Although the history on the Law’s passage is sparse, the National Assembly’s decision to employ Article 100 suggests that the Law drew opposition in at least one of the houses, requiring a combined committee to resolve the dispute. Therefore, while some scholars have suggested that the “the [Advocates’] Law was passed without significant amendment,” the legal process suggests that it was not entirely easy.

Following its passage, the Advocates’ Law received substantial praise from the local and international community. The Law is now applied in a range of settings, and has become a staple of the teaching materials provided to many who work within, or in association with members of, the Afghanistan legal profession.

## **5. THE AIBA & THE AIBA CODE OF CONDUCT**

The AIBA—the first of its kind in Afghanistan’s history—was founded on July 30, 2008. Its founding was the result of five years of intense planning. Although foreign experts played a role, the AIBA was largely a product of Afghan influence and creativity. More than 400 lawyers attended the first General Assembly, representing a wide range of provinces and locations within Afghanistan.

Today, the AIBA has over 1200 registered lawyers, and its committees address issues as diverse as women and children’s rights, corporate law, and the importance of ongoing legal education for practicing lawyers. Perhaps the most unique aspect of the AIBA is its focus on the importance of women and public service: “The AIBA is one of the few bar associations in the world which stipulates a minimum percentage of women lawyers to be on its Leadership Council and which requires all lawyers to perform three cases per year pro bono as a requirement for annual registration.”

## 5.1. Defining Association in AIBA Context

As evident in the title of the AIBA, the terms ‘association’ and ‘independent’ raise questions as to what is considered an association. What does it mean for an association to be independent? In Afghanistan, the Social Organizations Law regulates the formation, operation, and dissolution of associations. Article 2 of this Law considers associations and communities as two types of social organizations. It states: “[S]ocial organizations (communities, associations) are the voluntary union of real persons, organized for ensuring social, cultural, scientific, legal, literary, artistic, and *professional* purposes”. According to Article 3 of this Law, all social organizations should comply with fundamentals of Islam, provisions of the Constitution, and provisions of the Social Organizations Law. Article 4 further states that an association’s legal personality will be complete only when the by-laws of that association are approved, registered, and published by the Ministry of Justice which is responsible for registering social organizations. There are a few professional associations currently registered with the Ministry of Justice.

According to Article 5 of the Social Organizations Law, no social organization is allowed to operate beyond the scope of its activity as defined in their by-laws. In fact, operating a social organization against the provisions of its by-laws is automatically considered grounds for that organization’s dissolution. A prosecutor can also submit a written request to an authorized court for the dissolution of an organization. If the court approves a dissolution request, the court will assign one or more persons the liquidation. Note that the Civil Code also has detailed rules on Social Organizations. According to Article 23 of the Social Organizations Law, when there are no provisions in that law, Articles 403 - 439 of the Civil Code will be applicable.

The AIBA is different from any other association registered with the MoJ and is one of the biggest independent professional associations registered with the MoJ. As you read in Chapter 2, several sources, including the Advocates’ Law, recommendations from international conferences related to Afghanistan, the Afghanistan National Development Strategy, and the Afghanistan National Justice Sector Strategy emphasized the creation of such an independent professional association.

## 5.2 Defining Independence in AIBA Context

Turning now to the second feature of the AIBA: it is independent. An independent association should not depend on another legal person or authority, including the state. The term independence is not absolute. Some agencies may have a level of independence while others could be considered independent in every respect. The first important requirement of independence—though not the only one—is that the word independence be in the title or name of an association. In addition, mechanisms should exist to ensure state and other powerful authorities are not controlling the association. The first such mechanism is for the association to have a separate **legal personality** from any other branches and institutions. Article 337 of the Civil Code defines a legal personality as “an abstract personality that has legal capacity and is established, for certain objectives, in the form of organization, company or association.”

The AIBA is a legal person and is entitled to all the rights and duties of any legal personality. The AIBA also has multiple sources of income. It still, however, has government financial

support as a source of income. The AIBA also has the power to self-regulate. The AIBA Code of Conduct and the AIBA By-Laws are examples of how the AIBA creates binding rules for its members. In doing so, AIBA members have equal rights to vote and make decisions. In courts, however, this is not the case. The court system is a more hierarchical system while the AIBA adheres to a non-hierarchical system of governance. This AIBA is also capable of adjudicating complaints and imposing disciplinary actions on members violating its rules and regulations. Furthermore, the AIBA has administrative authority in hiring or firing its staff. More importantly, the AIBA can also build relationships with similar associations abroad.

### **Discussion Questions**

1. Do you think courts can affect the independence of the AIBA by revising the AIBA's disciplinary decisions?
2. How can prosecutors pressure the AIBA and affect its independence by charging its members or otherwise summoning its members to court?

For the purposes of this textbook, the specific provisions contained in the AIBA's Code of Conduct ("the Code") will form the foundation of the coming Chapters in much the same way as the Advocates' Law. The history, passage, and scope of the Code will therefore be addressed in this section. As you will see, the way the AIBA enforces the Code is a big part of advocates' daily lives. As a result, you must also gain an understanding of the AIBA's founding. The AIBA plays a critical role in regulating the behavior of lawyers, and in the Afghan justice system more broadly.

### **5.3 The History and Origins of an Independent Bar Association**

If the legal profession is to be truly independent, the government must refrain from interfering with lawyers' work. As already discussed, before the AIBA was created, the Afghan legal profession was closely affiliated with the government. The Ministry of Justice oversaw the bar association, and lawyers in Afghanistan were required to register with the Ministry in order to practice. Advocates were therefore responsible to the government first, and to their clients second. They could reasonably fear that, if they took a case adverse to the government, they would suffer professional consequences. According to the AIBA, "without an independent legal profession, illegal actions by public authorities cannot be effectively challenged" because lawyers will be reluctant to stand up to government officials upon whom they depend. The Advocates' Law of 2007, however, explicitly renders the legal profession independent from the state. The law guarantees that "no person, including the state, can interfere [with] or oppose the exercise of the profession by the advocate." One of the fundamental changes made by the Advocates' Law, then, was to ensure that the AIBA operated independently of the Ministry of Justice, so that lawyers could perform their jobs free from state influence.

Like the Advocates' Law discussed earlier, the AIBA has its roots in earlier sources of legal authority. Unlike the Advocates' Law, however, the AIBA is the product of statutory, rather than constitutional, origins. Presidential Decree Article 2 of the Advocates' Law states: "The Ministry shall be obliged to take necessary measures for establishing an independent Association of

Advocates within three months from the enforcement of the Advocates' Law." As a result, the history and passage of the Law also provides important context regarding the history and birth of the AIBA. In some instances, the fact that the Advocates' Law formed the AIBA over-shadowed other aspects of the Law. In a speech to the plenary session of the Rule of Law Conference in Rome in July of 2007, President Karzai referred to the Advocates' Law only for what it meant for the AIBA. "We are finalizing legislation" he explained, "for the creation of an Afghan Bar Association which will help reform the legal profession. With this and many other measures we have laid the crucial foundations for the further development of our judicial system." The creation of an independent bar association, therefore, was a big achievement. During the first general assembly of the AIBA in Kabul, the Second Vice President of Afghanistan called the establishment of the AIBA "an important achievement that has happened for the first time in the history of Afghanistan."

Alex Wilks was an International Bar Association Legal Specialist in Afghanistan at the time of the AIBA's founding. In an environment where few records were kept, his firsthand account of the AIBA's founding provides a fascinating look at the way in which contemporary events shaped the institution. As Wilks notes of the Advocates' Law, for example, "[i]t is extremely satisfying that all the hard work and preparation has culminated in the establishment of such an important organization for Afghanistan as a whole. That the draft legislation required to bring the Independent Bar Association into existence was passed by both the lower and upper houses of parliament—the *Wolesi Jirga* and *Mascherano Jirga* respectively—one of only seven laws to be passed in 2007, is significant. It demonstrated that Afghan legislators considered the AIBA a priority in the context of the development of Afghanistan."

### Discussion Questions

Consider how Alex Wilks, the legal specialist that witnessed the passage of the AIBA, refers to the history of the Advocates' Law. In his description of the law, he is careful to note the role that Afghan institutions played, and the specific procedural manner by which it was passed. Why not simply discuss the practical aspects of the law, or its provisions? Think back to our earlier discussion about the way in which a law is passed as you think through your response.

## 5.4 The Importance of Independence

From the outset, the issue of independence was critical in the debate about the role of the AIBA. Returning briefly to the IBA Position Paper (the earliest template of the Advocates' Law), we see the initial outline of these ideas. The Position Paper drew heavily upon international legal sources. It referred to the *UN Basic Principles on the Role of Lawyers*, for example, in citing the following premise: "[l]awyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference." For the purposes of the future AIBA the Position Paper was emphatic: "the bar association should be independent and run by its own members. It should be instrumental in setting standards for the profession." The final result, as the contemporary language of the Advocates' Law and the

AIBA's By-Laws make clear, is a bar association which has the characteristics of an independent, non-political entity.

#### **Article 4(1) of the Advocates' Law: Administration**

“To regulate and lead all activities of advocates, an independent non-governmental Association of Advocates (the ‘Association’) shall be established.”

#### **Article 3 of AIBA By-Laws: Independence**

“The Afghan Independent Bar Association is an independent, non-governmental and non-political organization which functions as the representative body for advocates to achieve the goals set out in these By-Laws and in accordance with the Constitution of Afghanistan, the Advocates' Law and other laws of Afghanistan.”

The independence of the organization is more than just rhetoric: it is grounded in the very structure of the AIBA. This is made clear by two of the Association's distinguishing characteristics. First, Article 30 of the Advocates' Law states that the AIBA will raise money through a combination of the following methods: membership fees, license fees, donations, sale of publications, fees for research, as well as financial support from international organizations. “Financial support by the government” is listed only fifth on the list, and, as the other **enumerations**, or listed items, make clear, it was far from the primary source envisioned. As such, the AIBA was designed to ensure that it would not be financially beholden to the Afghan Government, nor to any other political office.

Second, note the unique legal process that the Advocates' Law prescribed for the founding of the AIBA. Article 38 pertains to the “Legal Status of the [Bar] Association.” It states in full: “The Association of Advocates [AIBA] obtains legal status upon approval by the General Assembly, publication of its By-Laws in accordance to the law and upon registration of its Charter with the Ministry of Justice.” That is, the Afghan Parliament envisioned that the AIBA would be a self-starting entity. It would not gain legal status upon approval of the parliament alone. The organization would become a full-scale legal institution when its own members decided so.

These items, coupled with the history reflected in the IBA Position Paper, unequivocally reflect the Afghan Parliament's intention that the AIBA function independently. As we will see in a section to come, however, there are substantial checks on the actions that the AIBA may take, and on the extent of its enforcement authority.

#### **Discussion Questions**

Having read the arguments above, take a moment to form your own assessment. Do you think it is important to have an independent association regulate the activities of advocates? Why would a new entity need to be established? Consider the following questions in particular:

- (1) How might a group of lawyers be a powerful body in helping to regulate one another?
- (2) What are the advantages of a professional membership group, and what are the downfalls?
- (3) Can you think of how the AIBA might become a politically influential group? How does this inform your assessment of its independence?

### **The AIBA's Justification**

One possible rationale lies in the words provided by the AIBA itself. The AIBA makes the following case for its independence: "An independent judiciary cannot exist without the support of an active, independent legal profession. Unless lawyers are able to pursue their work without fear of reprisals, judges will not be able to decide matters before them on the basis of facts and in accordance with the law. Without an independent legal profession, illegal actions by public authorities cannot be effectively challenged. This includes situations where the independence of the Judiciary is not respected by the Executive, for example where public authorities do not comply with court orders or decisions given by a judge."

Note the manner in which the AIBA ties its own independence into the structural nature of the legal profession. They argue that an independent group of lawyers actually strengthens the credibility and independence of the legal system as a whole.

### **5.5 Institutional Responsibilities of the AIBA**

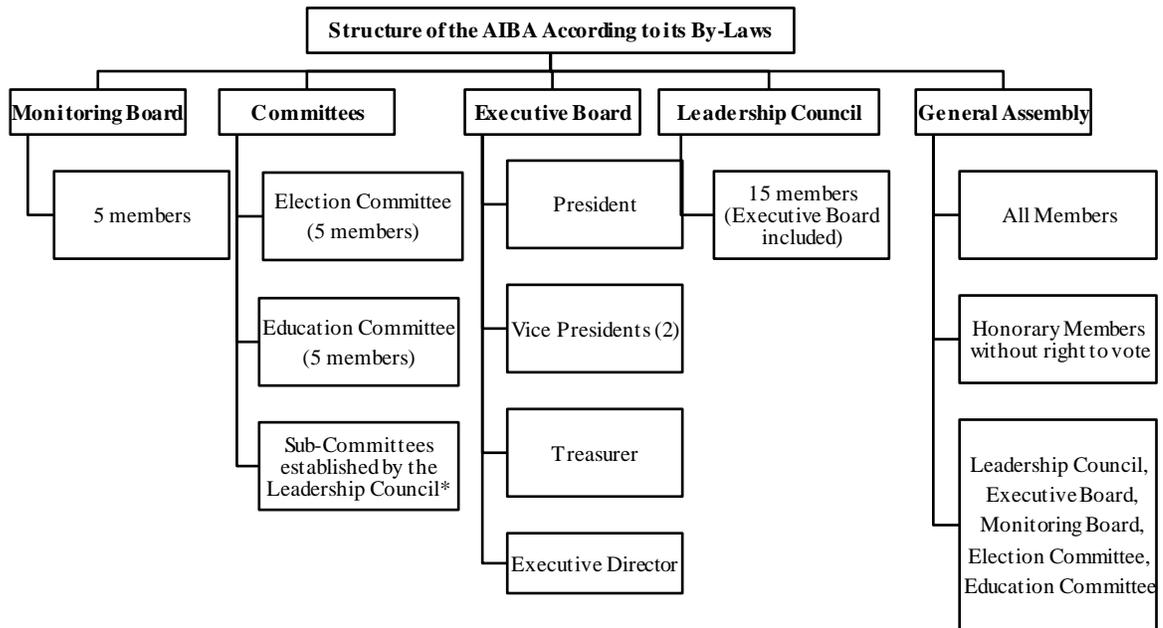
As mentioned earlier, the Advocates' Law endowed the AIBA with a range of responsibilities, most of which involve regulating the duties and responsibilities of lawyers. The AIBA's powers can be divided into three categories: (1) licensing powers, by which it determines the requirements a lawyer must fulfill in order to become a registered advocate; (2) regulatory powers, by which it promulgates regulations for its membership; and (3) disciplinary powers, by which it disciplines members and ensures compliance. Briefly compare these powers with the AIBA's objectives, as reflected in the group's mission statement:

#### **AIBA Mission Statement**

"AIBA believes in the right of Afghan citizens to have disputes heard and determined with the support of defense attorneys who are well-qualified, committed to the ethical practice of law, and able to practice independently regardless of any discrimination and without interference. AIBA was established to improve access to fair trials, to increase confidence in the legal profession among the public, to improve cooperation between stakeholders in the justice sector, to promote new generations of dedicated legal professionals and to fight against administrative corruption."

The AIBA operates in much the same manner as a small parliamentary structure, but it also holds **quasi-judicial** and **quasi-executive** functions. Quasi means "seemingly or apparently," so the AIBA has powers that appear similar to judicial and executive functions, though without the full authority a judicial or executive body would typically possess. As the By-Laws make clear, the

association is “composed of a General Assembly, a Leadership Council, an Executive Board, a Monitoring Board, and other Committees.” For our purposes, the General Assembly, Leadership Council, and Executive Board are the most relevant to the regulation of ethical activities, though we will touch on the Monitoring Board in chapter 7. For now, we will address the role of the General Assembly, Leadership Council, and Executive Board.



\*The new committees established in accordance to this power are: the Women Committee (6 members), the Family Committee (11 members), the Juridical and Law Studies Committee (11 members), the Public Awareness Committee, and the Media Committee (membership figures unavailable).

The General Assembly is “the highest authority” of the AIBA, and it is composed of all “members of the association” as well as the Leadership Council, Executive Board, Monitoring Board, Election and Education Committees, and the members of the Association. Consider the range of powers at its disposal:

### **Article 8 of the AIBA By-Laws: Powers of the General Assembly**

“The General Assembly has the following authorities:

- (1) To elect and remove the Executive Director, the Leadership Council, and the Monitoring Board;
- (2) To define the policy of the Association and give principal directions for the Association’s activities;
- (3) To suggest plans for amendment of the Advocates’ Law;
- (4) To approve and amend the By-Laws;
- (5) To hear the annual report of the Association;

(6) To take other decisions as necessary.”

The powers listed under (2) and (3) nicely capture the role of the AIBA’s General Assembly. Item (2) lists the power to “define the policy of the Association.” This represents the AIBA’s quasi-legislative power. Using this power, the AIBA, through the voting powers of its General Assembly, may promulgate rules that apply to its members. In contrast, note that item (3) is a far more qualified power. While the AIBA may *suggest* plans for amending the Advocates’ Law, it may not change the Law directly. As such, the General Assembly operates in much the same way as a small, self-contained, parliamentary system. It may pass regulations, but because only its members are allowed to vote, only its membership may be subjected to its outcomes. Note, also, that the “highest authority” of the AIBA belongs to the General Assembly, which is comprised of general members. This too is in keeping with a democratic parliamentary system. While the act of voting may take place through a representative, the ultimate power rests with the voting population itself.

Finally, the powers listed above make clear that the AIBA has statutory origins and limitations. That is, it may only employ its powers in keeping with the statutory parameters provided for in the Advocates’ Law. As Article 38 of the Advocates’ Law states, “The Association of Advocates [AIBA] obtains legal status upon approval by the General Assembly, publication of its By-Laws in accordance to the law, and upon registration of its Charter with the Ministry of Justice.” The By-Laws, therefore, must be in accordance with the provisions provided for in the Advocates’ Law. Presumably, once the AIBA strays beyond the powers of its enabling statute, its actions would be susceptible to judicial review and nullification.

Now consider the role of the Leadership Council. The By-Laws state that the Leadership Council is the “second highest authority in the Association and consists of 15 members, including the Executive Board.” Although it does not say explicitly in the By-Laws, the Leadership Council also has the ability to interpret ambiguities in regulations passed by the AIBA. The most likely manner in which this power is implemented is through a combination of the Executive Board’s powers and the Leadership Council’s powers. Consider the following Articles:

**Article 10 of the AIBA By-Laws: Powers of the Leadership Council**

“The Leadership Council has the following powers and duties:

- (1) To coordinate and supervise the implementation of the budget and the instructions of the General Assembly;
- (2) To hear and evaluate reports from the Executive Board.”

**Article 12 of the AIBA By-Laws: Powers of the Executive Board**

“The Executive Board has the following powers and duties:

(4) To direct the implementation of the instructions given by the General Assembly and the Leadership Council.”

Collectively, the Executive Board and the Leadership Council have the ability to “coordinate,” “supervise,” and “implement” the “instructions” of the General Assembly. This clearly involves a supervisory role, and possibly an executive role as well. But if we read “instructions” to represent policy, it also becomes clear that the Leadership Council and Executive Board hold some discretion in shaping the meaning and implementation of the AIBA’s regulations. In this respect, for regulations passed by the AIBA, the Leadership Council plays much the same role that the Supreme Court plays for the Advocates’ Law. That is, it is the final arbiter of legal interpretation issues for regulations promulgated by the AIBA.

Unfortunately, similar to the Advocates’ Law, the Leadership Council has yet to issue any interpretive rulings. This leaves us once again to rely on other methods of interpretation in the meantime. But keep an eye on the actions of the Leadership Council, as they may yet provide a ruling for future interpretation.

### Discussion Questions

1. Compare the legal profession with another profession in Afghanistan. Which one do you think is more heavily regulated? Why?
2. Do you agree that lawyers should be given a significant role to regulate their profession?
3. Now that you know more about duties and authorities of the AIBA, what roles can the AIBA play to promote ethical behaviors among its members? How?

## 6. THE AIBA CODE OF CONDUCT

The AIBA Code of Conduct (hereinafter, “the Code”) is the primary regulation governing the professional conduct of AIBA members. Much like the Advocates’ Law, the provisions within the Code of Conduct are divided according to subject matter. These subjects include: general provisions; relations with clients; relations with the court and between advocates; referrals, assignment of duties, and appointments; and a miscellaneous section which includes advertising, freedom of clients, and violations.

The Code of Conduct is provided as an Appendix in this book because it too forms a basis of professional ethics in Afghanistan. In the Chapters to come, you will explore many of the Code’s specific provisions in greater depth. But for the purposes of understanding its broader objectives, this section provides exposure to some of its more general provisions.

In addition, although the Code of Conduct is different from the Advocates’ Law—the Code, after all, is not technically a “law”—you will see that it possesses similar enforcement mechanisms. In this respect, your understanding of the Code of Conduct will be closely tied to your understanding of the institutional role played by the AIBA itself.

## 6.1 To Whom Does the Code of Conduct Apply?

All of the provisions of the Code of Conduct refer simply to “advocates,” rather than to “members” of the AIBA. At first glance, therefore, the Code appears to apply broadly to any advocate operating within Afghanistan. Given the structural and legal limitations of the AIBA, and the legislative context provided by the Advocates’ Law, however, we know that the term “advocate” actually means something more: it means “advocate” *and* “member of the AIBA.” To that end, Article 30 of the AIBA By-Laws describes the relatively straightforward requirements for membership in the AIBA:

### **Article 30 of the AIBA By-Laws: Membership**

“The Members of the Association shall be all those who have met the requirements of the Association set out in Article 6 and other provisions of the Advocates’ Law.”

Do not be confused by the internal reference in the above provision. Article 6 of the Advocates’ Law simply lists the requirements for becoming an Advocate, one of which is to obtain “certification in accordance” with the AIBA. Because all members of the AIBA must be advocates, therefore, and because all advocates must be registered with and accredited by the AIBA, there is substantial overlap between the two communities. It will not surprise you, then, that there is substantial overlap between the jurisdictional reach of the Advocates’ Law and the AIBA Code of Conduct.

### **Exercise 2**

After years of working as an attorney, you found your own law firm. Your firm grows quickly and recently you hire a fresh graduate, Waheed, who received his AIBA license a few weeks ago. You ask him to read all the firm’s policies regarding client interaction, use of electronics, client confidentiality, and overall professional conduct. One week later, you assign Waheed to work on the case of Ahmad, a client who wants to sue a man named Nawid about a business issue. You ask Waheed to interview Ahmad, research the issues in the case, and then meet with you once all the information ready. A few days later Waheed comes to your office and says that he has some bad news and needs your help. He is faced with the following problems and does not know which sources he should refer to answer his questions.

First, Waheed believes he has a conflict of interest with the case. He is not sure, however, and wants to research whether a close friendship with a defendant is considered a conflict of interest. Second, he recorded his client interview on his phone without first informing the client. Waheed then loaned his phone to his brother because Waheed’s brother. Waheed forgot to delete the client interview from his phone and the next day learns from his brother that the phone is lost.

Furthermore, after Waheed received some important documents from the client, Waheed spilled ink on the documents, partially affecting their readability.

Waheed asks for your help. He wants to know what rules, if any, he has violated, what responsibilities he has, and what institutions will be involved for each of his actions.

### **6.1. What is the Overarching Purpose of the Code of Conduct?**

The primary purpose of the Code of Conduct is stated in the first Article of the document.

#### **Article 1 of the AIBA Code of Conduct: “Purpose”**

“The Association shall take the necessary measures to ensure proper relations between clients and advocates, to defend their rights and to promote and enhance the ethical and professional standards of advocates in order to provide a better service to their clients. The advocates’ Code of Conduct shall be set out in this annex.

At times, you may be able to clarify a problem simply by asking yourself the following question: Does the legal decision or argument I am trying to make keep with the *purpose* of this regulation? In the Code of Conduct, Article 1 provides a clear basis for your analysis. Although Article 1 does not state the Code’s intentions in express terms, other Articles contained in the “General Provisions” section also clarify the document’s purpose. Consider the following provisions:

#### **Article 2 of the AIBA Code of Conduct: Observance of Professional Conduct**

“Advocates shall be duty bound to confirm his/her behaviour, to the standards set out in the provisions of the Advocates’ Law and these By-Laws during the performance of legal services and the provision of legal advice.”

#### **Article 3 of the AIBA Code of Conduct: Independence**

“Advocates shall be duty bound to perform his/her duties and provide advice in an independent way, without regard to pressures and discriminations.”

#### **Article 4 of the AIBA Code of Conduct: Honesty, Integrity and Fairness**

“Advocates shall observe the standards of honesty, integrity and fairness amongst fellow advocates.”

#### **Article 5 of the AIBA Code of Conduct: Reporting Violations of the Law by Other Advocates**

“If an advocate receives any information regarding the violation of the law or the misconduct of another advocate, or his/her staff, he/she shall be duty bound to report the matter to the Association based on supporting documents.”

One theme should be clear from the Articles above: the AIBA and the Code of Conduct are intended to ensure *professional* standards. The role of an advocate comes with unique duties and responsibilities. But the power of an advocate must also be moderated by regulatory measures, which include the option for disciplining those who violate ethical duties. Notice how these provisions also keep with the history of the AIBA, mentioned in the last section.

## 6.2. How is the Code of Conduct Enforced?

A later Chapter in this book will discuss the issue of discipline and malpractice more specifically. But for now, you should know a few of the basics about how the AIBA's Code of Conduct is enforced. First, Article 36 of the AIBA's By-Laws provides any *individual* the right to file a complaint against an advocate. As such, it gives substantial power to the client. Consider the full text of the Article:

### **Article 36 of the AIBA By-Laws: Complaints Against Advocates**

“Any *individual* may submit his/her complaints in writing regarding the behavior of an advocate or an advocate's employee to the Monitoring Board.”

The provision above provides little interpretive context for how far the term “individual” could be stretched, but Article 27 of the Advocates' Law provides some helpful guidance.

### **Article 27 of the Advocates' Law: Complaints Filed Against an Advocate**

“Any complaint against an advocate either proposed by a client *or other relevant authorities* in relation to the fulfillment and performance of the advocate's duties and responsibilities shall be submitted to the Association of Advocates.”

### **Article 5 of the AIBA Code of Conduct: Reporting Violations of the Law by Other Advocates**

“If an advocate receives any information regarding the violation of the law or the misconduct of another advocate, or his/her staff, he/she shall be duty bound to report the matter to the Association based on supporting documents.”

Thus far, there have been no rulings regarding the scope of the clause “other relevant authorities.” But if we combine the provisions above, we can make a few basic assumptions: (1) clients, or the representatives of clients, may bring claims against advocates; (2) advocates may bring claims against one another; and (3) the Monitoring Board, which is charged with the investigation of such claims, may begin their own investigations. Also note that under the Penal Code of Afghanistan, attorneys like prosecutors and judges are listed as Officials of Public Services. Although most provisions related to Officials of Public Services are more relevant to the work of Judges, Prosecutors, Police, and other government employees, some of those

provisions could also apply to the work of defense attorneys. The provisions regarding Officials of Public Services provide some protections for them as well as specify strict punishments for those Officials who are misusing their authorities. Among other punishments, debarment from the profession and separation from duties are other potential punishments for those Officers. Under certain circumstances, when an Official of Public Services is misusing his power and trust and violating provisions of the Penal Code, he could be punished with a fine, imprisonment, be debarred from the profession forever, or be prohibited from practicing in that specific profession. According to provisions of the Penal Code, courts may also impose punishments on lawyers. The same Articles of the Penal Code allow prosecutors to charge attorneys with criminal misconduct. However, it is not clear whether or not courts and prosecutors should inform the AIBA about such misconduct so that the AIBA could consider the possibility of imposing disciplinary actions. In practice, no practical examples exist showing that courts and the Attorney General's Office report misconduct to the AIBA for its consideration.

Once again, the text and history of the regulations on legal ethics suggest that the rights of lawyers were not the only issue on the minds of the drafters. Instead, these rights were often invoked as a means of protecting clients. That is, the independence of the legal profession was intended to separate it from the corruption and coercion that harmed the individuals in need of representation. As you work your way through the provisions in the Chapters that follow, focus on the rights and duties of lawyers, but do not lose sight of the rights of clients. The rights of clients were a primary consideration for the Law's drafters, and they should be for you as well.

## **7. STRUCTURAL TENSIONS: THE AIBA, THE COURTS, AND THE AFGHAN PARLIAMENT**

Some scholars have suggested that the primary role of the AIBA is to “act as a necessary counterpoint to the government and the courts in the delivery of justice and the rule of law in the country.” This assessment is in keeping with the independent vision of the AIBA that was covered in the sections above. You should know that, while the AIBA does have considerable autonomy, several realities frustrate the conception of a purely independent AIBA.

First, the courts can, and have, overruled decisions of the AIBA—even in instances that relate only to disciplining members pursuant to the Code of Conduct. Article 40 of the AIBA By-Laws makes clear that an advocate “has the right to appeal the disciplinary punishment imposed by the Monitoring Board, the Leadership Council or the Executive Board to the court.” The By-Laws do not make clear, however, exactly how much discretion the reviewing court has to overturn the decision of the Leadership Council. The history of enforcement measures to date suggests that the court has, at times, played an active role in overturning decisions of the AIBA.

Second, the Advocates' Law contains a provision that not only threatens the independence of the AIBA, but also threatens its existence more generally. Article 43 of the Advocates' Law states in full: “The [Bar] Association cannot be abolished without the order of an authorized court.” While the potency of this provision is somewhat disguised by the way it is phrased, it clearly poses a substantial check on the power of the AIBA. According to the provision, the AIBA cannot, for example, be abolished by the President. But the AIBA *can* be abolished by an authorized court of some form. This is a contentious issue. For starters, what exactly constitutes

an “authorized court” is far from clear (although, if the clause refers to hierarchical prestige, presumably the Supreme Court has sufficient status). As a result, this clause is likely to create substantial future debate. For now, it is enough to note the substantial check the clause provides on the power of the AIBA. If the AIBA ever becomes a highly disfavored political institution, which means it is violating provisions of its By-Laws and the Social Organizations Law, an “authorized court” technically has the power to dissolve it entirely. According to Article 13 of the Social Organizations Law, however, dissolution should be requested by the Attorney General’s Office. This Article refers to term “proceeding” which indicates that the court cannot unilaterally dissolve an organization without first giving it a chance to defend itself against accusations presented by the prosecutor. Thus, both court and prosecutor are bound to observe all procedural laws and allow the association to defend itself. Further, as you learned earlier, in addition to the Social Organizations Law, the Civil Code of Afghanistan is also a source on formation, operation, and dissolution of social organizations. As you can see below, Articles 437 and 439 further elaborate the grounds for dissolution of an association and the definition of an authoritative court.

### **Civil Code of Afghanistan**

**Article 437:**

(1) The Association shall be dissolved in the following cases:

- 1 – If it cannot fulfill its obligations.
- 2 – If it allocates its properties or interests for objectives other than those stated in the charter.
- 3 – If the association violates provisions of the charter, any measure of law, the goals for which the association was formed, or public order and mores.

(2) Request of dissolution of the association shall be submitted by any member of the association, concerned person, or prosecutor to the competent court in whose jurisdiction the association is located.

**Article 439:** If a court rejects requests for dissolution of the association, it may nullify the measure against which the protest was filed.

The third and final check that the Afghan Parliament possesses over the AIBA is never stated expressly, but it may be derived implicitly from the nature of the AIBA’s founding. The Afghan Parliament could, either through the issuance of a new law or through an amendment to the Advocates’ Law, abolish or alter the make-up of the AIBA. As we discussed earlier, through Article 8 of the AIBA By-Laws, the AIBA may suggest amendments to the Advocates’ Law; and given its expertise in the subject area, one could argue that it is especially suited to do so. But the AIBA cannot, of course, pass its own legal amendments. That role is reserved for the Parliament. To that end, the final check that Parliament holds is renewed legislative activity. Note that no clear constitutional provision would save the AIBA. While the Constitution of Afghanistan mandates that the “duties and authorities of advocates shall be regulated by law,” it does not prescribe a specific method of doing so. Nor, does it require that the enforcement of such duties be performed by any institution in particular.

### **Discussion Questions**

Consider thinking about these structural tensions along two different spheres: the institutional sphere (i.e. how do these tensions look from the perspectives of the authorities in each organization?), and the individual sphere (i.e. how do these tensions play out for an individual client or advocate?).

1. What are the three main factors that limit the AIBA's regulatory and enforcement powers?
2. How do those factors limit the independence of the AIBA?
3. In context of the legal profession as a whole, how do these checks strengthen or weaken the justice system?
4. Do you see any overlap between the sources discussed so far? If yes, what is the reason for different sources having similar provisions?

### **Researching and Drafting Exercise**

1. Visit the website of the AIBA and see if you can learn about their recent works. Look for reports, paper releases, news, and professional opinions regarding practical issues. Discuss the various roles that the AIBA plays to promote access to justice, enhance legal awareness, and strengthen the rule of law in Afghanistan.
2. In some countries it is common to have a preamble for the Lawyers Code of Conduct. The current AIBA Code of Conduct does not have a preamble. If you were asked to write a preamble, what would be some key points you would include to the preamble?
3. Try to compare the Advocates' Law and the AIBA Code of Conduct by comparing the scope of each, the formation method, the objective, the superiorities, the sanctions, and also the enforcing institution. Can you find ten differences and ten similarities between those two sources?

## **8. THE LEGAL AID DEPARTMENT OF THE MOJ, THE INDEPENDENT LEGAL AID BOARD, AND THE LEGAL AID REGULATION**

The Legal Aid Regulation (the "Regulation") was enacted through presidential decree in July 2008 to meet the right of access to state appointed defense attorneys in criminal cases, as prescribed in Article 31 of the Constitution. As explained in this Chapter, Article 31 of the Constitution served as a foundation for the Advocates' Law, the AIBA By-Laws, and the AIBA Code of Conduct. The Regulation has four chapters and 30 articles. The first article explains the foundation of the regulation (Article 3 of the Advocates' Law) and the purpose of the regulation. According to the same Article, the regulation is enacted for the purpose of regulating the structure, authorities, and duties of the *Independent Legal Aid Administration* as well as to regulate the affairs of *Legal Aid Providers*. Historically, the existence of a legal aid administration goes back to the year 1989 when a legal aid administration was created as part of

the Supreme Court. Legal aid remained part of the judiciary until 2007. On November 25, 2007, according to Presidential Decree number 111, the administration became part of the Ministry of Justice and was named the Legal Aid Department. The administration has branches in 26 provinces and has 92 legal aid providers in its Tashkeel. According to the National Justice Sector Strategy (NJSS), there were at least 170 legal aid lawyers in 2008 who provided legal aid services through approximately ten legal aid organizations. Despite the historical development of this administration, the Legal Aid Regulation mainly shapes its structure.

The Ministry of Justice is tasked to regulate legal aid issues in close collaboration with the *Independent Legal Aid Board* (hereafter “Board”). *Legal aid* is defined as defending indigent, suspected, or accused persons, or providing legal consultation for them in any stage of prosecution. Legal aid also includes defending the rights of women and juveniles, and providing them with legal advice in civil cases in accordance with the provisions of the regulation. An *indigent person* is one whose income is not sufficient for his minimum life expenses.

The procedure for receiving free legal aid starts with the police office, the Attorney General’s Office, or the Courts. These institutions are required to introduce an indigent person to the Ministry of Justice in Kabul or to its directorates in the provinces. The MoJ or its Directorates ask the person requesting legal aid to fill a request form. According to the Regulation, the Board is tasked with preparing this form, and the indigent, suspected, or accused person (or his family members) should complete the form. All information provided in the form must be correct or else the request will be rejected and the person completing it could be held liable. A person asking for free legal aid should not only cooperate with the legal aid provider and provide accurate information, but he is also required to stop receiving free legal aid if he is no longer eligible.

A person’s request could be rejected by the Legal Aid Department if he is not considered eligible for free legal aid. In that case, the Department should provide the requesting person with a written explanation of why his request was rejected. The person can complain about the rejection to the Board. The Board can review the decision and make a final decision. When receiving requests for free legal aid, priority will be given to children, women, and people with disabilities, such as those who are deaf, blind, mute, or disabled, or returnees and internally displaced persons. In 2013, the Legal Aid Department defended 2331 indigent persons in criminal cases. According to a news report, around 95 percent of the prison population is poor and cannot afford to hire a defense attorney. According to the same source, and quoting from the AIBA, around 50 percent of cases are decided by courts without an attorney present. This highlights the need to have more legal aid providers in Afghanistan.

A person receiving legal aid can terminate his relationship with the legal aid provider in any stage of his case. A notice of termination should be given to the Legal Aid Directorate in order for the legal aid provider to be assigned.

Defense lawyers registered with the AIBA, NGOs licensed to provide legal aid, or Law Clinics can provide the legal aid. Individual attorneys, NGOs, and Law Clinics should obtain a license from the Board to provide such aid. The Legal Aid Department can also hire advocates who meet

two sets of requirements: (1) the Advocates' Law requirements to practice law; and (2) the Law of Civil Services Employees requirements for becoming a government employee.

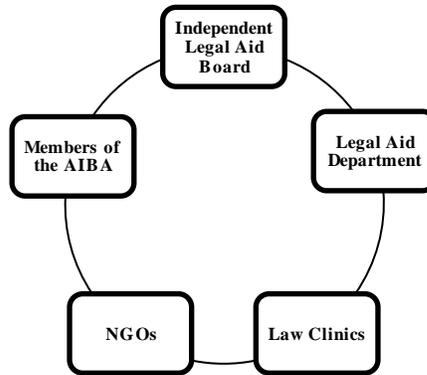
### **Article 18 - Duties and Authorities of the Legal Aid Department**

The Legal Aid Department has the following duties and authorities:

1. To assign a legal aid provider in any stage of prosecution for indigent, suspected, and accused persons.
2. To ensure collaboration between justice institutions with legal aid providers during their work.
3. To collect authentic statistics about legal aid provided to suspected and accused persons.
4. To oversee performance of legal aid providers during any stage of criminal prosecution.
5. To report on a quarterly basis its activities to the Independent Legal Aid Board.
6. If possible, to assign legal aid providers for indigent women and children.
7. To perform other tasks as assigned by the Independent Legal Aid Board or by the MoJ.

Note that the ethical rules and duties of legal aid providers in the Legal Aid Regulation are almost the same as those mentioned in the Advocates' Law and the AIBA Code of Conduct. Because you have learned some of these duties in previous chapters and will learn more about them in subsequent chapters, we will not separately explain the rules for legal aid providers. However, you are encouraged to read the Legal Aid Regulation in conjunction with the Advocates' Law and the AIBA Code of Conduct.

The structure, duties, and authorities of the Board are explained in Chapter Three of the Legal Aid Regulation. One main reason for the Board's existence is to have a better system of governance for legal aid providers. Another reason is to enable the Board to coordinate efforts among different actors and players to provide legal aid in Afghanistan. The Board is consisted of one authorized representative from each of these institutions: the Law Faculty of Kabul University, the Sharia Faculty of Kabul University, the Afghanistan Independent Human Rights Commission, the Ministry of Women Affairs, the AIBA, NGOs operating in the area of legal aid, and the Head of the Legal Aid Department at the MoJ. These members will serve for a period of two years and there is no restriction to the number of future terms they can serve. The members will elect a Head of the Board from among themselves to serve for one year. The Head of the the Legal Aid Department will also serve as the Secretary of the Board. The Board will hold monthly meetings and can also call extraordinary meetings.



**Actors in the Legal Aid System of Afghanistan**

Like the AIBA, the Board is responsible for making a list of all legal aid providers and sharing the list with police offices, Attorney General's Offices, courts, prisons, detention centers, and juvenile rehabilitation centers.

### Discussion Questions

According to a commentator, the “Independent Legal Aid Board lacks Independence” for several reasons. One reason is that the Regulation has given significant power to the MoJ to regulate legal aid affairs with cooperation of the Board. Furthermore, in the structure of legal aid, four out of seven members are representatives of different government institutions. The Secretary of the Board is also the Head of the Legal Aid Department. Furthermore, the Board does not have legal personality.

1. Compare the independence of the AIBA and the Board, and explain how the concept of independence differs between the two.
2. Critically think how the system of legal aid would best work in Afghanistan. Would it be good to have an independent institution, or to have more government supervision? How could legal aid efforts be better coordinated in Afghanistan so that every indigent person can have access to legal aid?

## 9. CONCLUSION

You are still at a relatively early stage in your understanding of legal ethics in Afghanistan. By now, however, you should have a working knowledge of the following concepts. We have covered the distinction between ethics as a form of philosophical thought, and ethics as it is embodied in law and other binding authorities. You have also been exposed to the primary regulations that shape the legal ethics framework in Afghanistan—the Advocates’ Law and the AIBA Code of Conduct, in particular.

By now, you should also have a basic understanding of these substantive concepts: various laws and regulations that regulate behaviors of lawyers in general, more specific ethical rules for

defense lawyers, the history of the Advocates' Law and the AIBA, the international and political influences that shaped these sources, and their constitutional foundations. Finally, you have begun exploring the different institutional mechanisms that regulate lawyers in general and legal ethics in particular in Afghanistan. As you go forward, be mindful of the overlapping reach in each of these institutions. In some cases, understanding the interplay between them will be as important as understanding the provisions of legal ethics themselves.

## CHAPTER 4: COMPETENCE

### 1. INTRODUCTION

In the previous chapters you learned about legal ethics, the legal profession, and the sources of the rules that regulate the behavior of lawyers in Afghanistan. In this chapter, you will learn about the rules for maintaining and developing your competence as a lawyer in Afghanistan. You may have heard this Dari proverb: “if you cannot pick up a heavy stone, leave it as it is.” The idea is that people who are trusted to help others should be capable of doing what they are expected to do, or otherwise they should not accept the responsibility and let those who are qualified do it. This principle is important in the legal profession. Ethical rules require lawyers not to accept cases that they cannot handle, and after accepting a case, to do their best by using all their knowledge, skills, and experience.

#### 1.1. Chapter Objectives

By the end of this chapter, you will understand what competence means and how it relates to becoming and remaining a qualified member of the legal profession in Afghanistan. You will learn how the laws regulating competence have developed. Importantly, you will understand who is eligible under the current legal and ethical standards to serve as a lawyer. You will also learn who is *not* allowed to serve as defense lawyer and why, and who can serve as a defense lawyer without being required to obtain a license from the AIBA. You will also learn that lawyers have a duty to represent clients professionally and must comply with rules that require them to remain competent. Finally, at the end of this chapter, you will learn about how the attorney-client relationship is formed and how it is terminated.

#### 1.2. What is Legal Competence?

A basic definition of **competence** is having the skills, knowledge, and judgment to do something successfully. In a legal setting, the term competence can apply to lawyers, to their clients, or to court. A competent court is one that has the legal authority to deal with a particular legal matter. A competent defendant is one that has the mental ability to know what he is accused of. This chapter will focus exclusively on the competence of lawyers. Broadly speaking, a competent lawyer is one who possesses the knowledge, skills, and judgment to successfully represent clients on legal matters. While that definition sounds simple, it is not. How much legal knowledge is sufficient to be considered “knowledgeable”? What breadth of skills must a lawyer possess for the many types of cases he or she will handle? We will explore these and other nuances of competence below.

The requirement of competence for lawyers is one of the most important topics in legal ethics. The duty of competence is the first consideration in an attorney-client relationship and remains an active duty throughout the course of that relationship. Some of the duties you learned about in the previous chapters and will learn about in subsequent chapters will arise only in certain situations; however, lawyers are always required to be competent. Further, because of the relationship between justice and the legal services that lawyers provide, the competence of lawyers is central to the overall functioning of the justice system. Competence standards ensure

that a person who becomes a lawyer is qualified to enter the legal profession, is able to represent their clients with the utmost professionalism, and will remain qualified whenever representing clients.

### **1.3. What Makes a Lawyer Competent?**

It is quite difficult to specify the exact requirements of competence for lawyers. Think about why that might be. Is the knowledge needed to successfully defend an accused person the same as what is needed to help a company make a commercial transaction? Do criminal lawyers and commercial transaction lawyers need the same skills? Of course not. Some other countries' bar associations have attempted to clearly define competence and have created ethical rules that list the skills and qualifications a lawyer needs in order to represent his clients. But even those countries have to continuously expand the list of skills that are considered the ingredients of competence.

In Afghanistan, there is an absence of clear guidance on competence in the Advocates' Law and AIBA Code of Conduct. However, there are competence rules found in the entry requirements to the profession as well as some ethical rules that apply to particular areas of practice.

In the absence of clear guidance in the Advocates' Law and the AIBA Code of Conduct, one can interpret legal competence broadly or narrowly. Under a broad interpretation, as you will read below, competence entails a large number of qualifications that are necessary for a lawyer to perform his job properly. Under the narrow interpretation, however, competence is more about meeting certain legal requirements for entering the profession and certain other requirements to remain an effective member of the profession. These requirements are mostly related to knowledge of law. These rules about competence could also be categorized as either input regulations and output regulations. Input regulations ensure that a person admitted to the legal profession has academic qualifications, legal skills, and related experience. Output regulations ensure that the qualified lawyers actually provide a high quality level of service.

In this Chapter we will discuss three dimensions of competence. First, we will discuss competence as it relates to the minimum requirements for becoming an attorney. Second, we will look at competence as a duty to represent clients in accordance with legal and ethical rules and standards. Finally, we will discuss competence as a long-term commitment of lawyers to remain qualified by complying with rules that focus on their continuing legal education. We will look at how these requirements are covered in the Advocates' Law, AIBA By-Laws, and other applicable sources.

#### **Discussion Question**

1. Imagine that you have a legal issue and want to hire a lawyer to represent you in court. How will you decide who to hire?
2. Do you think the qualifications you are looking for in a lawyer are too idealistic, or do you think they are basic qualifications that all lawyers should have by law?

### 1.3.1. Knowledge of Law

Lawyers must be knowledgeable about the law pertaining to their cases. Law is a broad field that is continuously expanding. You have learned in other courses how the legal system of Afghanistan has evolved over time and how new areas of law have recently developed in Afghanistan. New types of courts and other adjudicatory bodies have also emerged, and with them, new procedures for adjudicating cases in those courts have been created.

Lawyers must have knowledge of both substantive and procedural law in order to be able to defend clients in court. If an attorney does not know basic principles of criminal law, for instance, it is very unlikely that he will be able to defend a client charged with criminal misconduct. Likewise, if an attorney does not know how the trial process works and what procedures should be considered to protect his client's rights, such as the right to appeal, then he will not be able to effectively defend his client. Consider the example below and, even though you don't yet know the law involved, discuss whether you think the lawyer in this scenario is competent or incompetent.

#### **Problem**

Ahmad is an attorney who agreed to represent Mahmood in his case against his business partner, Rahmat, who had sold their business without first getting the consent of Mahmood. Rahmat claims that the business was making a loss every day, and therefore he had to sell it to prevent more losses. Rahmat had sold the business at 50 percent of the total amount both partners initially invested in the business. Now Rahmat claims that for the amount they lost, both of them should be equally liable. However, Mahmood does not accept that arrangement and wants all his money back. Mahmood also told Ahmad that he should not accept any judgment, unless he receives a judgment in his favor requiring the defendant to pay for all the losses. The primary court decides that Rahmat should pay for 85 percent of loss and Mahmood should accept 15 percent of loss.

This was the first time Ahmad had represented a client in three levels of trial. Ahmad did not know about the rule for making an appeal and thus lost the chance to appeal. Now Ahmad's client, Mahmood, sues Ahmad because he thinks that he did not competently represent him. The client also says that Ahmad does not have basic knowledge of law, violated terms of their contract, and committed malpractice. Thus, Mahmood wants Ahmad to pay for the remaining 15 percent.

Do you agree that Ahmad was incompetent and should be liable? [Do not be concerned what the law says at this stage. We will cover related provisions of ethical sources in the next sections].

As you will learn later, the Afghanistan Advocates' Law and the AIBA Code of Conduct consider differently trained lawyers to nevertheless be knowledgeable of the law. Those sources

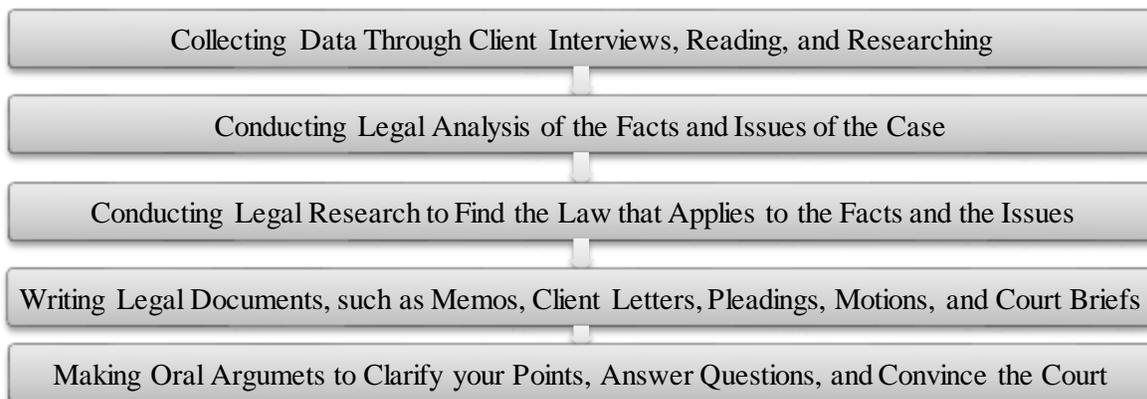
of legal ethics assume that graduates from Law and Political Sciences and Sharia faculties<sup>14</sup> are both eligible to become lawyers. In addition, graduates of religious schools or *madrassas* are also eligible to become lawyers so long as they meet some additional requirements.

### 1.3.2. Lawyering Skills

Lawyers' knowledge is only useful to the extent that they know how to apply it to clients' situations. To solve complex legal problems, lawyers need legal analysis and reasoning skills. These skills help lawyers to understand legal issues, identify the relevant law, and most importantly, figure out how to apply the law in particular cases. By using these skills, lawyers are able to explain what the law really says about a situation and persuade a court to favorably resolve a client's problem.

In order to be an optimal problem-solver, a lawyer must have mastery of legal research and writing skills. Legal research helps the lawyer be informed about which laws pertain to a client's case. Law is very broad and is influenced by current events and policy. It is constantly changing. As such, instead of memorizing the law, lawyers need to know how they can find the most up-to-date and accurate laws relevant to their clients' cases. This skill requires knowledge of the hierarchy of sources of law and knowledge of where to find particular rules. Now that there is legal information and sources available online, lawyers must also be able to do legal research online.

Similar to legal research, legal writing is also an important skill every lawyer should have. Most of the official communication lawyers do with court is in written form. A competent lawyer should be able to state his argument briefly and clearly. This requires knowledge of legal terminology and its proper use. You can learn more about these particular skills in ALEP's materials on Legal Methods, a course designed to give you an in-depth introduction to lawyering skills. Below is a visual representation of key skills a competent lawyer should have.



#### 1.3.2.1 Obtaining Sufficient Legal Knowledge and Skills

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<sup>14</sup> Our international readers will note that a faculty in Afghanistan is the same as a school or department in many other countries. Therefore a law faculty is synonymous with law school.

The Advocates' Law of Afghanistan uses various criteria to ensure that applicants are both knowledgeable of substantive and procedural laws and have the skills needed to apply their knowledge in practice. As you will learn when we discuss the entry requirements for being a lawyer in Afghanistan, the Advocates Law and the AIBA Code of Conduct specify three ways through which such knowledge and skills can be obtained: legal education institutions, work experience, or a mixture of both. Note that the presumption is that legal education institutions such as Law and Sharia faculties give students both knowledge of law and practical legal skills. Work experience with institutions such as Courts, the Ministry of Justice, or the Attorney General's Office could also give a person useful legal skills. Although work experience can be an advantage, prior work experience is not required to become a lawyer.

The Advocates' Law uses a legal education as a proxy or substitute for individually assessing whether a lawyer has sufficient knowledge and problem-solving skills. One potential risk with this approach is that it does not account for differences in quality of legal education by institution. While there is an accreditation process by the Ministry of Higher Education, there is still quite a bit of diversity in legal pedagogy. Some institutions still rely largely on rote memorization of laws, while others have transitioned to curriculum more focused on critical thinking. Several scholarly sources on legal education in Afghanistan have emphasized the need to update the curricula of law schools across the board and adopt new ways of teaching in order to produce competent lawyers equipped to handle increasingly complex legal problems.

### **1.3.3. Lawyering Values**

In the previous chapters you were asked to compare different regulations and laws by looking at their objectives or purposes. You may have noticed that the objectives of many regulations or laws often relate to social order, justice, equality, and freedom. These values are nearly universal and serve as the foundation of most legal systems. If you look at, for instance, the Oath in Article 16 of the Advocates' Law of Afghanistan reprinted below, you will see some of these terms. What values do you see in the text of this oath that attorneys promise to protect?

#### **The Advocates' Law of 2007**

##### **Article 16: The Oath**

Upon receipt of the license to practice, an advocate shall take the following oath before the Executive Board of the Association:

“I swear in the name of God Almighty to execute my duty as advocate with utmost honesty and righteousness, and shall keep its confidentiality, respect and observe provisions of the holy religion of Islam, the constitution, and other legislation of the Islamic Republic of Afghanistan, and shall not betray my client.”

Similarly, Article 4 of the AIBA Code of Conduct requires lawyers to observe honesty, integrity, and fairness when representing their clients. These are the values that shape ethical duties of lawyers and govern every aspect of their professional works. If you read Article 13 of the AIBA Code of Conduct on the duties of lawyers, you will see how these values shape certain ethical

duties such as “maintaining client confidentiality,” “practicing law with honesty and sincerity, respecting the dignity of all individuals,” and refraining from causing harm to clients or other lawyers.

In Chapter 2, you learned that the legal profession is an independent, service-driven, and self-regulated profession that is based on expertise in law. You also learned that the profession is related to one’s right to defense, justice, and fairness. The values lawyers should be committed to are also in line with these key characteristics of the legal profession. As members of a profession that is based on expertise in law, lawyers should be committed to increasing their knowledge of law and improving their legal skills. Also, as members of a profession that is independent and self-regulated, lawyers should be committed to act independently, impartially, and strive to maintain the independence of the profession. Lawyers, as members of a profession that aims to serve the legal needs of its clients, should be committed to always keeping an eye on the interests of their clients and to serving them competently. Finally and most importantly, since lawyers are members of a profession that is designed to ensure access to justice, they should be committed to promoting justice and fairness and ensuring that the legal institutions achieve justice. This commitment to justice requires that lawyers do pro bono work so that those who cannot afford to pay for a lawyer are still represented and provided with access to legal services.

#### Discussion Questions

1. The AIBA Code of Conduct requires that attorneys respect Islamic values and human rights vales. Should knowledge of those values be included in the definition of competence?
2. What about having knowledge of cultural issues? Do you think a competent lawyer should have knowledge of cultural issues?

#### 1.3.4. Preparation and Diligence

Competence is closely related to preparation and diligence. **Preparation** is the effort one makes to be ready for a challenge or undertaking. For example, a lawyer prepares for trial by meeting with his client to understand the problem and facts, gathering evidence to prove the facts, researching the law and making arguments he thinks the court will find persuasive, among other tasks. **Diligence** is to undertake tasks with care and attention.

In the next section we will discuss the amount of preparation that is required to become a lawyer. Some cases require more attention and preparation than others. Also, substantive and procedural laws are subject to change. Therefore, a lawyer needs to carefully research the issues involved in his case as well as the applicable laws. As you will see later, ethical rules require lawyers to accept only cases they can handle and to represent their clients honestly, in a timely manner, and professionally. A lawyer that only relies on his knowledge and skills but does not prepare for each case would not be able to represent his clients competently. And if a lawyer does not represent his client competently, he may lose the right to be a lawyer. You will learn more about how a person can lose the right to be a lawyer in the last Chapter of this book.

### **Problem**

Jalil is a general practitioner with his own office in Herat. He has handled criminal law and family law cases in the past. But he has never drafted an international trade contract. His cousin Ahmad has a company that produces saffron and exports it to some European countries. One day Ahmad comes to Jalil and asks him if he can assist Ahmad's company with drafting a contract between his company and a French company. Jalil does claims he will be able to do the job and accepts the job without hesitation. He immediately starts drafting the contract. His cousin seems pleased with the contract and emails the contract to their customer in Europe to sign it.

1. Did Jalil fulfill his ethical requirements when he took on this job? Why or why not?
2. What about if Jalil had thoroughly researched the contract and then drafted the contract? What if he did not do any research?
3. Would it make any difference if there were other lawyers with excellent contract law knowledge and expertise in Herat that Jalil could refer to for instruction and help?

## **2. ENTRY REQUIREMENTS FOR PRACTICING LAW IN AFGHANISTAN**

As noted above, the ethical rules in Afghanistan most directly address competence in terms of what one needs to enter the legal profession. The law ensures that those who are considered qualified to practice law have a degree from a legal education institution or have gained legal knowledge through working in a legal position within a judicial institution. In addition to the knowledge requirement, the law has specified other requirements that are mostly about citizenship, age, and having a clean criminal record. Although legal competence is concerned with what a lawyer is capable of doing, the entry requirements focus on what a potential lawyer has already done. In this section, we will first go over the historical evolution of the entry requirement from the previous Advocates' laws and then turn to the current Advocates' Law to explain in depth what each requirement means.

### **2.1. Historical Development of Requirements to Become a Defense Lawyer**

As you learned in Chapter 3, defense lawyers are not new to Afghanistan. In fact, most of Afghanistan's past constitutions recognized the right for an accused to be defended by an attorney and set forth similar requirements for defense attorneys. However, there have been changes in those requirements overtime. The three most prominent developments are: recent laws have put greater emphasis on the educational qualifications of defense attorney applicants, they have also been more flexible about allowing foreigners to practice law in Afghanistan, and they established an independent bar association.

The requirement that an attorney must have a degree from a law or Sharia faculty is a more recent development. The 1964 Advocates' Law permitted a person a person who did not have a degree from law or Sharia schools to become an attorney, provided that a university verified that his legal knowledge is equivalent to the knowledge of a graduate of those schools. The procedure

for such verification was not clear and the wording for this exception was so flexible that it allowed almost anybody to claim sufficient legal knowledge through self-study or practical work and to request that a university verify this level of knowledge. Why do you think earlier laws did not require a law or Sharia degree? Note that at that time only Kabul University, Kabul Polytechnic University, and Nangahar universities existed in Afghanistan. Of these universities, only Kabul University had a law and Sharia school. It is safe to assume that this exception was needed due to the lack of enough law and Sharia schools in the country at that time. You can see the requirements for practice in 1964 directly below.

### **The Law on Regulating Affairs of Advocates (1964)**

**Article 6:** A defense attorney should have the following qualifications:

- a) Should have Afghanistan citizenship.
- b) Should have bachelor's degree from law or Sharia school, unless a university verifies that his knowledge [of law] is equivalent to a bachelor's degree from any of those two schools.
- c) After 9 Mizan 1334 (October 2, 1955) should have not been convicted by a court for deprivation from political rights.
- d) His age should not be less than 25 years old.

During the period of enforcement of this law and 22 Mizan 1346 (October 14, 1967), the Defense Attorney Committee is authorized to license anyone who has the capability of a defense attorney without considering requirement (b) of this Article.

The 1972 Law for Organizing Affairs of Defense Attorneys has essentially the same requirements as the previous law. The only changes you will see in this law is that the *madrassa* is included among the institutions whose graduates can become defense lawyers.

### **Law for Organizing Affairs of Defense Attorney (March 21, 1972)**

**Article 5:** A defense attorney must meet the following requirements:

- a) Shall be an Afghan national.
- b) Shall be a graduate of the college of Islamic Studies (Sharaiat), or the college of law, or an official Sharia *madrassa*, or the aforementioned committee shall certify that said person is competent to engage as a defense lawyer.
- c) After Mezan 1343 (October 1st 1964) shall not have been subjected to deprivation of political rights by a court's verdict.
- d) Shall not be less than 25 years of age.

The Advocates Law of 1986 took a more stringent approach to entry to practice law. In addition to emphasizing legal education as a key requirement for becoming a defense lawyer, the law refers to **legal capacity** and **citizenship** as other requirements for becoming lawyer. The Law considers ten years of practical work in legal fields with respective government bodies equal to

four years of legal education at law or Sharia schools. Also, by not mentioning *madrassa* graduates, this Law restricts graduates of those religious schools from entry into the profession.

### The Advocates' Law of 1986

#### Article 13:

(1) Citizens of the Democratic Republic of Afghanistan who have legal capacity and meet the following qualifications will be accepted as members of the Defense Attorney Association:

1. Graduated from law or Sharia or one of the higher education legal institutions of the Democratic Republic of Afghanistan, or foreign countries.
2. Graduated from law or Sharia institutions of medium level and completed two years of practical legal works.

(2) Exceptionally persons who have completed ten years of legal work in Courts, the Attorney General's Office, and MoJ will be accepted to become a member of the Association.

(3) Members of the Defense Attorney Association cannot work in government, private, and social organizations.

The executive commission can consider exception for those who are working in academic and pedagogic areas.

(4) In places with high demand to legal support services, a defense attorney shall be allowed to serve as consultant to an organization.

The 1999 Defense Attorneys law also allows ten years of practical work to substitute for the education requirement. This law gave more opportunities to graduates of local and foreign (mainly Pakistani) *madrassas* to be able to practice law in Afghanistan. The Code, however, limits it to *madrassas* that are formal and well-known. Despite this limitation, due to the large numbers of *madrassas* that existed in Afghanistan during the Taliban period and the ease of graduating from Pakistani *madarassas*, it was very easy to meet the education requirement. Noticeably, the Taliban law focused on social and religious factors. The Law required that for a person to become lawyer he should have a good reputation. Since a good reputation was defined in the context of religion at that time, a lawyer with a good reputation was one who strictly practiced Islam. Arguably, the aim of that requirement was to hold religious values as equal to education and work experience.

### Law on Organizing Affairs of the Defense Attorneys 1999

Article 6: Any person with the following qualifications may work as a defense attorney:

1. Be citizen of Afghanistan;
2. Not convicted of **felony** crimes;

3. At least have degree from Sharia or law schools or from official well-known Afghan or foreign religious schools (*madrassas*) or having at least 10 years of professional and practical work experience in Courts or the Attorney General's Office;
4. Should have good reputation.

### **Discussion Questions**

1. Do you think having a good reputation should be a requirement for entering the legal profession? Why or why not?
2. How would you determine whether someone has a good reputation?

## **2.2. Entry Requirement in the Advocates' Law of 2007**

The current Advocates' Law establishes criteria that applicants must satisfy in order to become defense lawyers in Afghanistan. These criteria can be considered the entry requirements to the legal profession for defense lawyers. A license from the AIBA is not all that is needed before a lawyer is permitted to represent clients. There are additional requirements that regulate the type of cases a lawyer can take and requirements that regulate which type of courts a lawyer can practice in. In this section we will discuss these two types of rules. We will first cover the rules for admission to the profession and then we will look at the additional requirements and restrictions for legal practice.

The requirements from the current Advocates' Law are reprinted in full below:

### **The Advocates' Law of 2007**

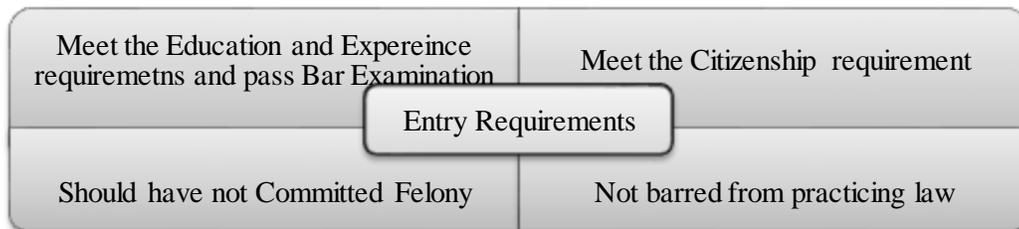
#### **Article 6:** Entry Requirements for Practicing Law

- (1) To practice law in Afghanistan a person must comply with the following requirements:
  - a. Shall be a citizen of Afghanistan;
  - b. Shall not have been convicted of a felony;
  - c. Shall have a valid bachelor's degree in law or Sharia (Islamic Law); or a higher degree from Afghanistan or any other country, after evaluation and approval by the Ministry of Higher Education;
  - d. Shall have successfully passed the training course and obtained certification in accordance with the By-Laws of the Association; however, a person who has worked for three years as a member of the judiciary, prosecutor's office, or the Ministry of Justice is not subjected to the Association's training course requirement.
- (2) A graduate from an official *madrassa* (religious school) or its equivalent may practice as an advocate only when, in addition to fulfillment of paragraphs (1)(i), (ii) & (iv) of this Article, has completed three years of practical work under the supervision of a licensed advocate.

(3) A foreigner may not have a law office in Afghanistan; however, subject to the following requirements a foreigner shall be entitled to defend and represent the rights of his/her client in cases related to foreign natural or legal persons before a court of law and other authoritative tribunals of the Islamic Republic of Afghanistan:

- a. He/she shall have permission to stay in Afghanistan;
- b. He/she shall have a license to practice as an advocate from his/her domestic jurisdiction;
- c. He/she shall pay his/her taxes and perform his/her financial duties in accordance with the provisions of the law.

As you can see in Article 6, the requirements for becoming a lawyer involve having a certain level of legal education, successfully passing the AIBA examination, not being barred from becoming a lawyer due to commission of a felony, and being able to follow the provisions of the Advocates’ Law, the AIBA Code of Conduct and other statutory laws. We will explain each of these requirements separately. The following chart summarizes the requirements set forth in Article 6 of the Advocates’ Law.



### 2.2.1. Legal Education

Like Afghanistan, most countries require prospective lawyers to have acquired a degree in law or its equivalent. However, Afghanistan has a unique legal education system. Graduates of both law and political sciences and Sharia schools are eligible to become lawyers so long that they meet other requirements. You may have learned in other law courses about the existence of this dual court system of Sharia and state courts. Both state law and Islamic Law are two important sources of law in Afghanistan.

The requirement mentioned in Article 6 of the Advocates’ Law is having a bachelor degree in law (also known as a LL.B., a *license* or a *licentiate*) or a higher degree from a Sharia law program. With the rise of Private Law and Sharia schools in Afghanistan, the AIBA does not discriminate between graduates of public and private schools. However, a private law school must be properly licensed by Afghanistan’s Ministry of Higher Education in accordance with the regulations for private universities.

Those with a law degree from a foreign law school must be evaluated and approved by the Ministry of Higher Education (MoHE). The MoHE has a committee that decides whether or not a degree obtained from a foreign law school should be accepted or not. The committee normally reviews transcripts to make sure the credit hour requirements of the program meet the minimum

requirements of higher education regulations in Afghanistan. If necessary, they will also ask the degree holder questions about the degree program.

Like most of the earlier versions of the Advocates' Law, the current Advocates' Law allows for exceptions to the education requirement. As we discussed earlier, under the previous laws, it was possible to become a lawyer by either having a certain number of years of legal work experience (e.g. the Advocates' Law of 1986) or by being a graduate of a *madrassa* (e.g. the Advocates' Law of 1999). In fact, as of 2014, some of the justices of the Supreme Court are graduates of *madrassas*. The number of *madrassas* has fluctuated over time in Afghanistan. Historically, private *madrassas*, both registered and unregistered with the government, and state *madrassas* have operated in Afghanistan. The requirements regarding graduates of *madrassas* under the Advocates' Law of 2007 are interesting. Currently, *madrassas* fall under the umbrella of the Ministry of Education. The institutions that offer education on Islamic teachings are known as Islamic Education Institutions, Islamic Education Schools, and religious *madrassas*. These institutions are of mainly three types: 1) *madrassas* that teach students various Islamic topics including Islamic jurisprudence; 2) Darul Hifaz which teach students how to recite and memorize the holy Quran; and 3) Darul Uloom which teach students in Arabic and religious linguistic subjects. Based on the relation between teachings of these institutions and the legal profession, only graduates of the first category seem to fulfill the requirement set forth in Article 6 of the Advocates' Law. However, note that the same article uses the phrase "or its equivalent," which arguably expands the number of institutions whose graduates meet the requirements for entering the legal profession. However, the Law does clearly specify that only graduates of official *madrassas* can become lawyers. So graduates of *madrassas* that are not registered with the MoE do not meet the requirements of this Article.

There are no statistics available that show how many of defense lawyers have graduated from *madrassas* or other legal education institutions. A study of judges in 2007 shows that 16.1% of judges were educated in non-university settings such as *madrassas* and private homes, and 20.5% were primary, secondary, or high school educated. In the Entry Exam for the 28th round of the Judicial Stage of 2013, for instance, 351 out of 1,183 were graduates of *madrassas* compared to 701 graduates of Sharia and 131 graduates of law schools. The total number of graduates of the Judicial Stage Program for rounds 1 - 26 (years 1969 - 2011) show that 988 of the graduates had Sharia education, 542 of them were graduates of law, and 215 of them were graduates of *madrassas*. The **Stage Program** is an educational program that consists of courses on defense lawyering for those who want to become lawyers in Afghanistan. We discuss it below.

### 2.2.2. Completion of the Stage Program (Legal Apprenticeship)

According to the Advocates' Law, the completion of a special training program in law is a requirement for a person to be able to practice law. This requirement comes in addition to having a bachelor's degree either from a law or Sharia school or being a graduate of a *madrassa*. The requirement was not clearly defined in the Advocates' Law as at the time of drafting such a program was not yet established. However, efforts were underway to found a well-equipped legal training center in Kabul that could be used for training legal professionals including judges, prosecutors, and defense lawyers. This center is called the Afghanistan National Legal Training

Center (NLTC) and was founded on the campus of Kabul University in 2007. This center soon received much attention from donor countries and organizations particularly after the Rome Conference in 2007 emphasized, among others things, the obligation of “ongoing professional development for practitioners” and the development of the NLTC.

Around this same time, the AIBA was established, and its first task was to find a training program that would fulfill the specialized training requirement of Article 6 of the Advocates’ Law. Soon the AIBA signed a Memorandum of Understanding (MoU) with the NLTC and accredited the training program there as meeting the AIBA eligibility requirement. According to AIBA records, the NLTC program was the first and only program that met the AIBA’s eligibility requirements of Article 6. The first NLTC training program in 2009 was designed to offer three months of core legal training and six months of specialized training for future defense attorneys and prosecutors. For better coordination, the AIBA President became a board member of the NLTC and discussions were had on how to develop a continuing legal education program. Later the NLTC transferred to Kabul University to be used jointly by the Kabul Law and Sharia schools.

Note that there is an exception to the special training requirement: three years of work experience with the MoJ, Attorney General’s Office, or courts. In practice, however, the AIBA shows some flexibility in applying this requirement. Most who successfully pass the bar examination state that they will take the Stage program. In practice, however, there are attorneys who have not completed the Stage program and still are licensed to work as lawyers.

### **Discussion Questions**

1. Compare the entry requirements for the legal profession against the requirements of another profession that you know about it. What similarities and differences do you see?
2. In some jurisdictions, the Bar association has the power to accredit law schools. So Law Schools in those countries must comply with Standards and Rules of the Bar so that their law degree programs are approved by Bar. Do you think in Afghanistan it is necessary to empower the AIBA with this power?
3. In discussing what the type of lawyers that Africa needs one legal scholar stated: “Ultimately, Africa needs well-trained lawyers who have the highest levels of competence and responsibility, are alive to the demands of globalization with a global competitive posture, and are in touch with local realities, needs, and aspirations.” After reading this, what type of lawyer do you think Afghanistan needs?

### **2.2.3. Criminal Records**

For applicants to be eligible to become lawyers, and in addition to the previous requirements, they cannot have committed any felonies. Felonies are the most serious type of crime under the 1976 Penal Code of Afghanistan. Article 24 of the Penal Code of Afghanistan defines a felony as a crime the punishment for which is death or continued imprisonment (16 to 20 years) or long

imprisonment (5-15 years). And according to the Penal Code of Afghanistan, a person who is convicted and sentenced to continued and long imprisonment will automatically lose their right to serve in certain positions including as a lawyer, judge, prosecutor, or witness. Below, you can read the full text of Article 113(1) of the Penal Code that explains what rights are lost when a person is sentenced to continued or long imprisonment.

### **Penal Code of Afghanistan**

**Article 113 (1):** a person who is sentenced to continued or long imprisonment of more than ten years shall also be deprived of the following rights and privileges:

1. State employment
2. Service in the armed forces
3. Membership of parliament, municipalities, provincial and local councils
4. Participation in elections as an elector
5. Use of state titles and decorations, both domestic and foreign
6. Membership in boards of directors of companies and banks
7. Executorships, trusteeship, and procuration in transactions and claims
8. Acting as witness in contracts and transactions during the period of conviction
9. Concluding contracts with state departments and/or obtaining concession from the State.
10. Ownership of concession (license), editorship or chief-editorship or magazines and dailies.
11. Administration of goods and estate during the period of conviction, with the exception of dedication and will. If the convicted person is enjoying any of the above rights and privileges at the time of issuance of the verdict, he shall be deprived of it at the instance of issuance of the verdict.

Note, however, that according to the Penal Code one who has been deprived of these rights could regain them after the passage of a certain number of years and under certain conditions. This is known in the Penal Code of Afghanistan as **restoration of honor**. This provision of the Penal Code could be considered as a type of probation after release for those whose punishments fall in the category of continued or long imprisonment. If a person does not commit any offense that will extend this duration, the person will again possess all the rights he was deprived from under Article 113 of the Penal Code. However, since the Advocates' Law has recognized mere commission of a felony as grounds for losing the right to become a defense lawyer under a strict textual interpretation of Article 7 of Advocates' Law, an individual would still be ineligible to become a lawyer even if he meets the requirements for "restoration of honor."

It is routine for countries to limit those who have been convicted of crimes from serving as lawyers. The reasoning is self-evident. An attorney's job is to conscientiously navigate and administer the law. It is reasonable to doubt that those with a history of breaking the law will be able to appropriately fulfill this role. The more important the role of an individual in administering the law, the tougher the entry requirement should be. In some countries, as in Afghanistan, a criminal conviction automatically prevents an applicant from serving as a defense lawyer. Other countries, such as Turkey, maintain a narrower list of crimes that preclude entry into the legal profession. In India and the United States, a previous criminal conviction will not automatically keep an otherwise qualified candidate from practicing law, but will often show that the candidate lacks the "character" or "integrity" required to be admitted to the bar association.

### Discussion Questions

4. In addition to the criminal background check, do you think an applicant should also receive a background check of her honesty and integrity? If there is record of someone cheating at school, should that stop her from passing the bar?
5. Why do you think members of many other professions are allowed to practice their professions in Afghanistan while citizenship is required for defense lawyers?

#### 2.2.4. Citizenship

The 2007 Advocates' Law, like the one that preceded it, requires that lawyers be citizens of Afghanistan. **Citizenship** is the status of a person recognized under the custom or law as being a member of a state. The Citizenship Law of Afghanistan of 1936 defines citizens as all residents of Afghanistan who do not have competing citizenship in another nation, as well as children of Afghan citizens no matter where they reside. Non-citizens of Afghanistan are not eligible to join the AIBA. Few countries other than Afghanistan require lawyers to be citizens. In the United States, any person—citizen or non-citizen—may become a lawyer if she satisfies certain educational requirements, passes the bar exam, and proves her moral character. In Germany, lawyers are not required to be citizens either. Instead, Germany requires that lawyers obtain an undergraduate or graduate law degree, participate in a two-year apprenticeship, pass the bar exam, and meet certain continuing legal education requirements.

In Afghanistan foreign citizens are allowed to represent clients under certain conditions. Under Article 6 of the Advocates' Law, foreign Lawyers can practice law if they are representing foreign clients, have permission from the Afghan government to stay in Afghanistan, and are properly licensed to practice law in their home countries. In addition, foreigner lawyers must pay taxes and perform other financial duties in accordance to Afghanistan laws. Though there are still significant restrictions on foreign lawyers, allowing foreign lawyers to practice in these circumstances is a major change in for the Advocates' Law.

#### Problem Citizenship and the Law

Fahim is a German-born lawyer of Afghan descent. After growing up and establishing a successful law practice in Berlin, he moves to Afghanistan to open a new office in Kabul. Under Article 6 of the Advocates' Law, may Fahim practice law in Afghanistan? Does the answer change if he represents only German clients?

Why do you think the AIBA requires that attorneys be citizens of Afghanistan? What advantages will lawyers who are citizens of Afghanistan have over non-citizens? Can you think of reasons why most countries do not have this requirement, but Afghanistan does? What about those who have dual citizenship with Afghanistan and another country?

## Discussion Questions

1. Do you agree with the citizenship requirement in Article 6 of the Advocates' Law?
2. Which requirement is the most important requirement in your opinion?

### **2.2.5. Authorized to Become a Lawyer**

The requirements you read earlier qualify a person to sit for the bar exam. However, those are not the only requirements for becoming a lawyer in Afghanistan. Those requirements should be read in conjunction with other articles of the Advocates Law, the AIBA Code of Conduct, and provisions of other areas of law. These laws establish additional requirements and restrictions on the right to become defense lawyer. As we discussed earlier, a defense lawyer applicant cannot have committed a felony. However, those who have committed a felony are not the only ones prohibited from becoming defense lawyers. Article 7 of the Advocates Law provides a list of other groups of individuals who cannot—either temporarily or permanently—become defense lawyers. So in addition to the above mentioned requirements, an applicant cannot fall under any category of individuals prohibited from serving as a lawyer. Furthermore, there are other provisions that prohibit a lawyer from representing certain cases. In this section we will cover these other rules that affect a person's eligibility to be licensed as a defense lawyer or to practice law in Afghanistan.

### **2.2.6. Unauthorized Legal Representation**

Under the Advocates' Law, certain people are prohibited from practicing law either temporarily, permanently, or in certain types of cases. There are different grounds for each type of restriction. Generally, a person can be restricted from becoming a defense lawyer because he does not meet the entry requirements, such as the requirement for not having committed a felony, or because he is working as a government employee and is not permitted to work in a second position, or because there is an ethical rule, such as a conflict of interest, that prohibits him from practicing law.

The Advocates' Law and the AIBA Code of Conduct are not the only rules regulating what is permitted and what is prohibited. Other statutory laws also regulate unauthorized practices in different fields. For instance, the Investment Law of Afghanistan specifies what types of investments are not allowed, and the Mineral Law specifies the types of mining operations that are not allowed. The prohibitions in these areas of law are intended to prevent acts that cause harm to individuals or society. In the Advocates' Law and the AIBA Code of Conduct, however, the nature of the prohibitions is different. They are intended to ensure that justice is maintained. For instance, a lawyer is not prohibited from defending the rights of a criminal who may be a serious threat to society. In fact, the ethical rules require lawyers to treat all clients equally and without discrimination.

#### **2.2.6.1. Temporary Un-authorization**

In some circumstances, the law prevents even a fully qualified attorney from representing a client. One of these circumstances is when there is *Conflict of Interest*. You will learn more about conflicts of interest in Chapter 6 of this book. For now, read Articles 22, 23, and 24 of the Advocates' Law that limit a lawyer's ability to represent a client due to conflict of interest concerns.

### **The Advocates' Law of 2007**

#### **Limitations on Representation**

**Article 22:** (1) After suspension from or conclusion of a case, an advocate shall not provide legal counsel, legal representation, or act as a witness for any competing party in the same case. (2) When defending or giving written advice in a case, an advocate shall not serve as a witness in the same case.

#### **No Rights to Work as an Advocate in Some Courts**

**Article 23:** If an advocate or his/her spouse has *blood* or an *in-law relationship* (up to one third removed) with any judge of a court, he/she shall not work as an advocate in a case before that judge.

#### **No Rights to Work as an Advocate in Some Cases**

**Article 24:** An advocate shall not take a case where he/she previously served as a judge, prosecutor, investigator, arbitrator, or technical expert.

Note that, according to Article 22, a lawyer who previously has been involved in a case as a defense lawyer, testified about the case, or served as an expert, cannot represent the competing party in any way. When not representing clients in court, lawyers sometimes provide written expert opinions known as *legal opinions* to one of the parties in a case. Article 22 of the Advocates' Law prohibits a lawyer who has provided a legal opinion to later on serve as a defense lawyer for the opposing party. Article 23 of the Advocates' Law is also important as it prohibits a lawyer from appearing before a judge who is a **biological** or **non-biological relative**. Finally, Article 24 limits a lawyer's ability to represent a client in a case in which the attorney has already served as a judge, prosecutor, investigator, arbitrator, or expert. We will talk about these limitations further in Chapter 6 on Conflicts of Interest.

### **Discussion Questions**

1. In order to be able to present clients competently, one should also only accept cases that he can competently represent. Do you think there should be restrictions on how many cases a lawyer can accept at the same time?

2. Can a person with disabilities become a lawyer? If lawyer is deaf or mute is it possible for them to represent clients in court?

#### 2.2.6.2. Permanent Un-authorization

The law prohibits certain people of a certain status or in certain positions from being able to become defense lawyers. Certain government employees, for instance, are not allowed to become defense lawyers. These government employees are required to first resign from their positions or retire before they can practice law. The rationale for this restriction is basically that any of the individuals listed in Article 7 are government employees and have a duty to do their job as required by the work agreement and work code of conduct. Practicing law would significantly affect their ability to perform that duty. That is why the Civil Services Law, for example, states that “Civil servants cannot undertake other employment during official hours.” However, according to Article 4 of Civil Servants Law of 2008, Judges are not considered as civil servants.

Note that the prohibition for government employees listed in Section 1 of Article 7 is only for the time period when they are officially filling those positions. Once they are retired or resign from the position, they can become lawyers. In practice, some of the older attorneys currently working in Afghanistan have been judges or prosecutors in the past. Once they become defense lawyers, however, they are bound to the ethical and legal standards all defense lawyers must follow. There was one instance where a defense lawyer who used to be a judge, but was no longer a judge, claimed to be judge in advertisements for his defense services. A member of the Monitoring Board removed the word ‘judge’ from his advertisement board because this term was deemed to be deceptive and not allowed under Article 38 of the AIBA Code of Conduct, which prohibits “deceptive, deceitful, irrational” advertisements.

#### The Advocates’ Law of 2007

##### Limitations to Practice Law

**Article 7:** “The following persons are *not* entitled to practice law as an advocate:

- 1) Judges, prosecutors, military officers, police and national security officers, civil servants and municipality’s employees, and members of the national assembly, as well as members of national, provincial, and district councils, so long as they are employed as such, except lecturers of the Faculties of Law and Sharia (with the consent of the University) and legal aid providers.
- 2) Any person convicted of a felony *or* expelled from the office by a court’s order;
- 3) Any person who has been prevented from practicing law by a court order.”

Article 7 goes on to list other classes of people who are also prohibited from becoming defense lawyers. Part 2 of this article prohibits those who have committed felonies. It also prohibits those who have been disbarred from practicing law. In some circumstances, Courts impose disbarment

from a profession as a penalty. This may apply to lawyers, judges, and prosecutors as they are known in the Penal Code as Officials of Public Services. The third section of Article 7, which refers to those “prevented from practicing law by a court order” is referring to this type of disbarment.

Afghanistan, like many other countries, recognizes the principle that people who commit serious crimes should be prohibited for some period of time from holding certain positions of responsibility or authority. In the Penal Code of Afghanistan, a person committing the most serious types of crimes known as felonies are deprived from certain rights including being able to remain a member of the legal profession. In the context of the Penal Code, this is an additional punishment known as disbarment from profession. Below are two decisions of the Supreme Court of Afghanistan disbarring judges who committed bribery:

**Verdict Dated 03/08/2010**

“On 01/03/2010 based on the prior information, a member of one of the Appeal Court’s Divisions in Paktia Province was arrested by Judicial Control and Investigation Department on the spot for taking Afs. 120,000 as a bribe.

After the ratification of his temporary dismissal by the High Council of the Supreme Court and approval of the Presidential Office, his attributed case came under investigation. On 24/05/2010 his case was transferred to the Supreme Court for settlement. During the Court session dated 24/08/2010, of the High Council looked into the case and the following decision was taken based on the Paragraph 8, Art. 24 of the Law on Organization and Competence of Court and Art 275 of Criminal Procedure Law and Articles 255 and Art. 145 Paragraph 2 of the Penal Code. The individual requested judicial compassion because he was the only caretaker of the family. He was convicted to six months custodial imprisonment, Afs. 120,000 pecuniary punishment (equivalent to the amount taken in bribe) as well as *dismissal from the duty* as a judge.”

In a similar case involving a judge accused of bribery, the court decided that in accordance with articles 254 and 255, the accused should receive 3 years of imprisonment, a fine equal to the amount bribed, be debarred from judicial position, and prohibited from practicing law as an attorney. As an example, below is an excerpt from a court order barring a convicted person from becoming a judge or from practicing as a defense lawyer.

**Monthly Report of Approvals by the High Council of the Supreme Court**

“Attributed file of one of the ex-judges of commercial division of the Kabul Appeal Court, who was charged for taking bribe from one of the litigant was also discussed. The case was handled and after hearing the reasoning of the assigned Prosecutor and accused, based on the Art. 255 of the Penal Code, the accused judge was convicted to two years of custodial imprisonment, dismissal from duty (Ed: a punishment in the Penal Code of Afghanistan that allows a judge to remove a wrongdoer from his position and prohibits him from filling the same position in the future), deprivation of taking over defense lawyer’s duty, and pecuniary punishment equaling the amount of bribe.”

**2.3. Other Requirements**

The requirements we discussed in the section above are from the part of the Advocates' Law and the AIBA Code of Conduct that deal with obtaining a license to practice as a defense lawyer. However, there are other regulations that must be met in order to represent someone in court. These regulations deal with the lawyer himself, the agreement he is entering into with his client, and compliance with the administrative rules of the AIBA and other government agencies.

### **2.3.1. Passing the Bar Examination**

As discussed earlier, the eligibility requirements for becoming a lawyer are to have a legal education, be a citizen of Afghanistan, and have not committed felony. However, a person who is eligible does not automatically receive an AIBA license. Applicants must also pass the AIBA entry examination if they want to become an AIBA licensed defense lawyer. The method of examination has changed since the first time the AIBA offered it.

Currently, the examination tests applicants on substantive and procedural laws and on the applicant's knowledge of the AIBA Code of Conduct and the AIBA By-Laws. In most developed countries lawyers must pass a rigorous and comprehensive bar examination in order to practice law. While Afghanistan does have a bar exam, it is short and administered during admission to the bar. Due perhaps to the limited supply and heavy demand for lawyers, it is possible that the AIBA sought to avoid making its admission requirements so burdensome that few could meet them.

### **2.3.2. Meeting Administrative Requirements of the AIBA**

In addition to the requirements outlined in the Advocates' Law, the AIBA also imposes certain financial and logistical obligations on prospective attorneys. Lawyers must travel to Kabul, or another province where the AIBA has a branch, to take the oral and written examinations and swear the oath of office in person. Because the AIBA is self-financed, applicants must pay 1,000 Afghani to obtain a lawyer's license, an annual fee to the AIBA, and, in at least some cases, must also give a percentage of their annual income to the AIBA. While these requirements are not encoded in the Advocates' Law, they serve to practically limit who may practice law in Afghanistan.

### **2.3.3. Legal Capacity**

While not specified in the Advocates' Law, a lawyer must have the legal and mental capacity to practice law. This requirement is based on broader rules of contracts and on other statutory laws, which state that one should have the mental and legal capacity to represent another person or to enter into a legally binding contract. **Legal capacity** refers to a person's authority under law to enter into a contract, and includes being of sufficient age to enter into a contract. Additionally, if a lawyer develops a mental problem, there are rules that stop him from practicing law. Some of these requirements are in the Advocates' Law and the By-Laws.

Many other areas of law also play a role in regulating a lawyer's professional work including his eligibility requirements to practice law. For example, the Civil Code of Afghanistan considers the relationship between an attorney and his client as one type of contract. When a contract is

named in the Civil Code, we call it a *nominate contract*. So in addition to the provisions of the Advocates' Law and Code of Conduct, the general rules of the Civil Code regarding contract formation and its specific rules regarding lawyering are also applicable. These rules add more restrictions on who can enter into an attorney-client relationship. For example, a contract could be void or voidable should one party not have the legal capacity to fulfill the contract.

Other contract issues will also limit a lawyer's ability to represent a case. An attorney-client relationship could be subject to legal issues if the *subject of the contract* does not meet the legal requirements mentioned in contract law. The subject of a contract is closely related to what the contract is all about: the obligation. If the obligation of a lawyer is not properly defined, then the contract has an unclear subject matter, potentially rendering the contract unenforceable. If the subject of a contract is inherently impossible, the contract is also unenforceable. And if the subject of contract is against the law and against Islam, again the contract is unenforceable.

Under general principles of representation in Islamic Law, a person is able to assign an attorney to represent his interest in various ways. Article 1559 of the CCA states that "any contract that may be concluded directly by a client shall be permitted to be concluded by an agent." For instance, in a family case where a man wants to divorce his wife, he can assign an attorney to represent him in the divorce. Here, a man who is authorized to divorce his wife can delegate this power to his attorney. However, a person cannot delegate a power to an attorney that the person does not himself hold. For example, if a father wants to separate his son from the son's wife, the father cannot delegate that power to an attorney. If he did, the attorney could not proceed with the divorce because it did not come from the person—the husband—who is authorized to get the divorce.

Finally note that according to Article 21 of Advocates' Law, once a person becomes a licensed lawyer, all the privileges that come with it will be his own and are non-transferrable. Thus, he cannot, for instance, give his license or stamp to others to use.

### Discussion Questions

1. Ahmad graduated from a *madrassa* and then worked at the Attorney General's Office for four years in Bamyan. Now he wants to become a lawyer. He refers to the AIBA to take the test. Does he have to also complete the special training program?
2. Imagine you know a lawyer who was very successful in the past but has now changed and is acting unprofessionally. He is often not prepared for court, is impolite, and fights with the opposing party. You learn that he is abusing some addictive drugs. What rules do you think could be applied to stop him from practicing law? And why should he not practice law?

## 2.4. Scope of Representation

In this section we discuss the services that defense lawyers licensed by the AIBA can provide that others cannot. Article 10 of Advocates' Law lists the things that are within the scope of a lawyer's work. These things include representing and defending clients in civil and criminal

cases and, whenever applicable, participating in all phases of prosecution. In addition to representing clients in court, an attorney can also provide legal advice to his clients. These are the services that defense lawyers have a monopoly over. This means that only licensed defense lawyers can provide these services.

Note, however, that not every type of representation falls under the Advocates' Law or the AIBA Code of Conduct. A person can represent another person by selling his property or buying an item for him. These types of representations, of course, do not require a license from the AIBA. They may, however, require complying with some formalities such as registering a power of attorney in court. Obviously, defense lawyers who have a license from the AIBA can also represent clients outside of court and can do everything else that other people with a legal education can do.

These other types of representation, all of which are called Wekalat, have caused confusion for some; even for judges. In one instance, the Appellate Court of Kabul Province asked the Supreme Court for instruction regarding a person who wanted to register a Power of Attorney with the court in order to be able to represent his friend in a transaction. The court had officially asked the person who wanted to serve as a representative if he had a license from the AIBA or if he was a family member of the principal who was living abroad. After receiving negative answers to those questions, the Appellate Court referred the issue to the Research and Studies General Department of the Supreme Court for help. The Appellate Court wanted to know if they were allowed to register the power of attorney or not. The Research and Studies General Department, after sharing it with High Council of the Supreme Court, issued the ruling excerpted below and shared it as a judicial circular with all the lower courts.

**Judicial Circulation Number 3176 dated 3250 / December 18, 2010**  
**Secretariat of the Supreme Court of Afghanistan**

The requirement of having a defense attorney license or being a family member of a client as listed in article 34 of the Advocates Law is only applicable in litigation and not in other areas of representation. Therefore, in cases of selling, buying, guardianship, obtaining copies of documents, giving or obtaining a title deed, and other cases other than litigation, having a license to practice law or having familial relationship is *not* necessary. A representative in these cases can represent a person without meeting the requirements of article 34 of the Advocates' Law. This Department presented facts of the inquired issue along with judicious opinion in the meeting of the High Council of the Supreme Court on 1389/09/09 (November 30, 2010). The High Council of the Supreme Court deliberated about the inquiry and through Circular Number 908 affirmed opinion of the Department. The High Council also requested that the answer should be shared with the inquiring court and that a copy of it should be extended to all other courts.

This tells us that the scope of the Advocates' Law, the AIBA Code of Conduct, and other types of representation that fall under Civil Contracts, is limited to initiating a lawsuit, defending a client in a legal dispute in court or other tribunals, or providing legal advice regarding these disputes. In order to determine whether a type of representation falls under those sources two questions should be asked. First, does the representation involve a case in court? Second, is the person representing another person in court to defend him or has he appeared in court in some

other capacity such as witness, expert, or representative of the person in a civil or commercial act (e.g. marriage, contracts, etc). In order for an act to solely fall within scope of the Advocates' Law and the AIBA Code of Conduct, the answer to both questions must be positive.

Note that the attorney-client agreement should stipulate the authority of the attorney. The authority could be broadly worded and allow the attorney to represent the client in all levels of a case and to do whatever else is necessary. However, if the authority of an attorney is not clearly stipulated in the agreement, a court may consider certain actions of the attorney to be unauthorized. In one instance, the High Council of the Supreme Court instructed a lower court that an attorney in a particular case could not file a petition for his client, unless he had specific authority to do so from his client.

## 2.5. Representation by Non-Lawyers

Generally, non-lawyers are not allowed to represent clients in court. However, the Advocates' Law allows a person to represent an accused if they are in a certain relationship to the accused. These relationships are outlined in Article 34 below.

### Article 34: The Right to Practice without a License

- (1) To be able to defend and represent the rights of a relative - such as a father, grandfather [up to one third removed], child, mother, grandmother, brother, nephew, niece, spouse, aunts, uncles, and their blood children up to one third removed, father-in-law, brother-in-law and mother-in-law - or a partner in a partnership, the advocate shall not be obliged to hold a valid license to practice.
- (2) For the purposes of clause 1, advocates shall be appointed by a power of attorney.

Note that the phrase "up to one third removed" or "up to the third level" means that the relationship continues until the third generation. For example, a grandfather can represent his grandson, but not his grandson's children.

This article of the Advocates' Law, therefore, allows for the appointment of a relative or a partner as a representative by way of a **Power of Attorney**. There is still a question, however, about whether the Advocates' Law applies only to those individuals that are in an advocate *status*—i.e., actual lawyers—or to any individual that has assumed the *role* of an advocate. The Advocates' Law provides an answer this question. A person representing a relative under Article 33 has to meet the regulations dealing with the scope of the work of an attorney but not the regulations requiring licensing by the AIBA. However, since the law waives the requirement of obtaining a license, a family member of the accused that is practicing without a license may still be considered an "advocate" even though she has not registered with the AIBA. Because the Law uses the term advocate consistently (even referring to those that are appointed by power of attorney as "advocates") the Law's substantive provisions presumably extend to appointed family members as well.

The provisions that aim to protect clients are also applicable to non-lawyers in the role of advocates under Article 34. If you look at the purpose of the Advocates' Law and also consider the realities on the ground, you will see that the law seeks to balance the need for competent representation against the need for access to representation. Licensing requirements intend to ensure some degree of competence in the legal profession; however, not everyone can find or afford an attorney to represent them. Considering this, the Advocates' Law and the AIBA Code of Conduct gave extra weight to the need for access to representation and thus waived the requirement of having a license in certain cases. Some representation is better than no representation. While this is a practical solution, having an educated and experienced lawyer in court is always preferred.

Keep in mind that many of the regulations in the Advocates' Law do not apply to non-lawyers providing representation under Article 34. The provisions on fees, licensing, and unique duties such as pro bono requirements, and some rights such as the right to vote in the national assembly of the AIBA do not apply to non-lawyers. There are also exceptions in other areas of law that allow non-lawyers to represent someone in court. In the Juvenile Code, for instance, a minor must be represented in court at all times. But it also states that when there is no practicing lawyer, an educated person who does not have a bar license can represent the minor, under Article 65 of the Juvenile Code.

### **Juvenile Code**

#### **Temporary defense counsel**

##### **Article 65:**

Since there are not sufficient defense counsels at present in the country, the suspected or accused child can refer to educated people who have knowledge of legal issues.

To this end, the president of each court shall prepare a list of qualified people that are introduced through the Ministry of Justice in the capital and through the administrative division of the governor's office in the provinces of the appeal courts.

In addition to representation, some people provide professional legal services such as legal consultation and legal drafting without having a law license. There are companies currently operating in Afghanistan that provide these legal services to their clients. While these companies may have lawyers in their organizational structure to deal with litigation, they also offer other types of legal services by legal experts who do not necessarily have license from the AIBA. For example, the Afghanistan Investment Support Agency (AISA) allows firms to provide certain legal services without asking them if they have a license from the AIBA. The number of such firms is increasing. Currently there are around 83 firms registered with the AISA that provide these legal services.

### **3. MAINTAINING AND IMPROVING COMPETENCE**

Lawyers are required to be competent enough to receive their defense lawyer's license, but more importantly, they are also required to competently represent their clients. In some ways, becoming a member of the legal profession is comparable to doing a job that has two levels of evaluation: a written test and an on-the-job examination. Passing the bar exam and receiving a license is comparable to passing the written test, while doing the practical professional work is comparable to the on-the-job evaluation.

Article 15 of the AIBA Code of Conduct, for instance, requires lawyers to represent their clients based on their professional experience and their legal knowledge while remaining honest and complying with the ethical rules. Article 18 of the AIBA Code of Conduct also requires lawyers to be punctual. More importantly, this Article prohibits lawyers from taking cases that they cannot manage either due to a lawyer's time constraints or other issues.

#### **AIBA Code of Conduct**

**Article 15:** An advocate shall be obliged to provide legal advice to his/her client honestly and in accordance with these by-laws, his/her professional experience, and legal knowledge.

**Article 18:** An advocate shall be duty bound to perform his/her duty in an appropriate and timely manner, and he/she shall not accept those cases that he/she is unable to handle.

The AIBA further requires that lawyers satisfy continuing legal education requirements to ensure that they keep pace with changes in Afghan law. Because the law often evolves quickly—especially in a nation like Afghanistan, which has a new Constitution not yet fully tested by the judicial process—continuing education helps to ensure that lawyers remain competent after they join the bar. As two commentators have written, “[l]egal education merits close scrutiny because lawyers form the vanguard of spreading rule of law concepts throughout society and the basic norms, ideals, and concepts that define the rule of law are inculcated early in a lawyer's career.” Ongoing legal education ensures that lawyers will stay aware of developments in the law. It also helps them learn about areas of the law in which they do not regularly practice, but which might nevertheless prove beneficial later in their careers.

The AIBA By-Laws call for the creation of an Education Committee to devise and administer Afghanistan's continuing legal education program. While various institutions organize legal training in Afghanistan, this training is not coordinated. The training in some areas of the law is redundant while in other areas of the law there is no training at all. Further, legal training is organized by multiple organizations with overlapping responsibilities. This makes it difficult to enforce participation in legal training and to determine what impact, if any, the training has on legal practice. In 2009, the AIBA created a Continuing Legal Education Working Group to develop its continuing education requirements. As of this writing, however, the Working Group has not issued any proposal for reforming Afghanistan's continuing legal education regime.

Note that the aims of the continuing legal education requirements are different from the aims of the Stage program set forth in Article 6(4) of the Advocates' Law. The Judicial Stage program aims to ensure that lawyers are qualified when starting their legal practice. Continuing legal education, on the other hand, aims to ensure that lawyers keep up with Afghanistan's changing laws and regulations.

### **Problem**

After graduating from law school, Abdul received his license from the AIBA and started working as a defense lawyer in Kabul. Abdul is not good with technology. After opening his office, Abdul realizes that it is necessary to use a computer and communicate with his clients, most of which are companies, via email. Recently Abdul represented a client in a commercial case. Abdul lost the case, even though it should have been easy to win.

The client discovers that they lost because Abdul inadvertently shared confidential information about a weakness in his client's case with the opposing party due to his poor grasp of how to use email. Because of this, the client accuses Ahmad of failing to competently represent them.

1. Do you think the definition of competence should be expanded so that it includes certain qualifications, including working knowledge of the technology a lawyer will need to use in the workplace? What about other skills such project management and communication?
2. Some choose to work in the legal profession because they do not like mathematics, technology, or science. Do you think that those disciplines are relevant to the practice of law at present time?
3. Some argue that lawyers do not need to have any non-legal technical skills because they can delegate administrative work to their staff. Do you think this is a good justification considering the fact that lawyers are also responsible for the conduct of their staff?

You may be wondering what happens to lawyers that do not comply with the rules on competence. The penalty for noncompliance with the rules you learned in this chapter is the same as the penalty for violating other ethical and legal rules: Lawyers can face disciplinary action and may be sued for legal malpractice. It is very unlikely, however, that someone will be able to represent someone in court without a license because the first thing a court asks from a lawyer is the power of attorney. Also, Article 12 of the AIBA Code of Conduct requires that the agreement between an attorney and his client be prepared in three copies, with one copy being submitted to the court that adjudicates the claim. In practice, there are situations where someone provides legal advice in a criminal or civil case where it is not clear that an attorney-client relationship has formed or not. If such relationship is formed, the rules of contract law may apply on that relation. If a person who does not have a license from the AIBA forges one or lies to a person in order to provide legal advice for a fee, that action could be punished under the rules of the penal code. We will cover the subject of penalties in the last chapter of this book.

#### **4. THE ATTORNEY-CLIENT RELATIONSHIP**

This section will explain when the attorney-client relationship and the duty of competence starts. We will first explain how the attorney-client relationship is formed and then how it is terminated. We will also touch on some of the duties that both parties are bound to when forming or terminating this relationship.

#### 4.1. Formation of the Attorney-Client Relationship

The Attorney-client relationship, as with all other contracts, is a relation based on the mutual consent of the parties. As such, all the rules of contract formation relating to the expression of genuine consent of the parties are applicable to the attorney-client relationship. Article 26 of the AIBA Code of Conduct does not allow an advocate to use any means of coercion to force a client to select him as an attorney. The meaning of coercion in the context of contract law is to force someone to do something against his will. For instance, a lawyer cannot lie to a client or incorrectly explain the rules and facts of the case to the client for the purpose of making the client agree to hire the lawyer. A relation based on consent also means that both parties, the client and the attorney, are allowed to either accept the agreement or reject it. The AIBA Code of Conduct Article 7 allows an advocate to reject or accept a case. The same way that a client could not be coerced to accept an attorney, an attorney cannot be forced to represent a client either.

An important requirement related to the formation of attorney-client relationship is having the agreement in writing. While having a written agreement is not a requirement of the formation of many contracts, in exceptional cases the law requires parties to have their agreements in writing or even have it registered with a court or other authoritative government agencies. The requirement to have the attorney-client agreement in written form is also covered in the CCA Article 1599. The existence of a written agreement is important and necessary to the regulation of the relationship between an attorney and his client. It helps the parties to specify their rights and duties and to avoid future disputes.

Article 16 of the AIBA Code of Conduct requires attorneys to defend only clients that they have agreed to represent or are assigned to represent by other authorized officials (such as the AIBA or Legal Aid Board). A lawyer cannot represent someone without first receiving his consent. Because of the paperwork requirements, it is very unlikely that a case will reach the representation stage without having consent from the client first.

A power of attorney is a broad term that is used in all types of representation, even outside the court. So for the type of power of attorney that gives an attorney the power to represent a client in court, we will use the term **attorney-client agreement**. The procedure for preparing such an agreement in civil cases is different from than in criminal cases. In a criminal case, both the accused and his attorney can fill a standard form and sign it, and that is sufficient for the formation of the legal client relationship. This form can be obtained from courts, the MoJ, prisons, or the police station. Additionally, there is a standard form for requesting free legal aid. An accused person and his family members as well as some other organizations can use that form. Defense lawyers also receive copies of this form and can fill it out with their clients to create the attorney-client relationship.

In addition to filling this standard form, the relationship in a criminal case could also be formed through registering an official document with the registrar of official documents (known as *Wasayeeq* court). A *Wasayeeq court* is an authorized court that issues official documents such title deeds, marriage certificates, and power of attorneys. In Civil Cases, however, it is necessary that the form or agreement be registered with a specific court that registers, issues, and approves official documents. The *Wasayeeq* court where the defense lawyer's office is located

has jurisdiction to register a power of attorney for him. The court will require clients to fill a request with his and the attorney's information on it stating that he is willing to assign the attorney as his lawyer. The information is submitted to the clerk of the court who then takes it to a judicial member of the court or person in charge of registration to endorse it. Both the client and attorney must present copies of their photos and their *Tazkera*. Two witnesses must be present. In the presence of parties and witnesses, a judge will sign and stamp the document. The document normally has two parts that are separable. The original part will be given to the person requesting the document and a copy will be archived at the court. Once approved by the court, this document becomes an *official document* (also known as *Waseeqa*) and will be accepted by the court that is hearing the case. Note that in civil cases, preparing an official document through *Wasayeeq* court is always required and parties cannot form an attorney-client relationship based on a contract that is not registered in court.

#### **4.2. Termination of the Attorney-Client Relationship**

Generally, the rules of contract law ensure that parties enter into agreements voluntarily. The law, however, attempts to ensure that one party cannot unfairly end the agreement or relationship in a way that harms the other party. Depending on the nature of a legal agreement, the law may make it difficult or easy for the parties to end their agreement. In an attorney-client relationship, the law is more flexible and generally allows either party to end the relationship when it is necessary. However, if an attorney chooses to terminate the relationship and that termination will negatively affect the interests of her client, the law can restrict the attorney's ability to terminate the relationship. As you will see below, sometimes the law prohibits a lawyer from resigning when the trial is very near. Additionally, a lawyer who is resigning has a duty to assist his client and the new attorney to ensure that the transition from one lawyer to another goes smoothly.

While a client is always allowed to change his attorney, there are regulations limiting when and under what conditions an attorney can sever his relationship with a client. First, according to Article 17 of the AIBA Code of Conduct, an advocate is required to continue representing a client unless he has a "reasonable excuse" and informs the client and court about his decision to end the relationship. Once such an excuse exists, there is a time limit on when an attorney can rely on the excuse to end the relationship. This time limit differs in civil and criminal cases. In a civil case, an advocate must inform her client about her decision to terminate the contract no later than one week before trial, and in a criminal case, no later than four days before the trial. In addition, the attorney must inform the court and transfer all documents to her client.

#### **AIBA Code of Conduct**

##### **Termination of Instructions**

##### **Article 17:**

- (1) An advocate cannot leave the case he/she is assigned to, without the existence of a reasonable excuse and before notifying his/her client.
- (2) If an advocate leaves the civil case due to the existence of any reasonable excuses, he/she shall be duty bound to notify his/her client one week before the beginning of the trial and to notify his/her client four days before the beginning of the trial in criminal cases.

- (3) If an advocate due to the presence of any reasonable excuse leaves during the trial, he/she shall be duty bound to notify the court. In such a case the advocate shall be duty bound to return all the documents to the client.

Article 17 of the Advocates' Law also regulates the termination of the attorney-client relationship. According to this article, the attorney must have the client's consent to end the relationship and can assist his client in finding a new lawyer. Ethical rules prohibit the attorney from accepting money from the client or the new attorney for this service to ensure that the attorney makes the best referral and not the most lucrative one. Since the court is involved in the relationship between the client and the attorney, any changes made to that relationship must also be brought to the attention of the court that is hearing the case.

### **The Advocates' Law**

#### **Article 17: Appointment of a New Advocate**

- (1) Once an advocate is given a power of attorney, if that advocate is unable to fulfill the commitment he/she has made to the client based on a reasonable excuse and with the client's consent, the advocate can introduce another advocate to the client.
- (2) The client can dismiss an advocate at any stage of the investigation or trial.
- (3) In the case of clause (1) and (2) of this Article, both the client and the advocate shall notify the competent authorities.

According to Article 18 of the Advocates' Law, an attorney cannot terminate the attorney-client agreement later than one week before the beginning of any judicial proceeding. The attorney can, however, inform the court of his reasons for not being able to attend a court session. This notice should be given to the court one week before the court session and the excuse should be convincing enough for the court to consider it. The rationale for this rule is obvious: while the law does not want to be rigid at all times, it does not allow an attorney to end the relationship at a time that would risk a client's interest. Remember the article from the Constitution of Afghanistan about the right to have access to a defense lawyer. As repeatedly mentioned, the goal of the Constitution is to ensure that due process and fairness is followed in all criminal cases.

The CCA provides more conditions for terminating the attorney-client relationship. According to Article 1606, which is presented below in full, fulfilling the agreement, time running out, death of one party, or loss of capacity are grounds for termination of this relationship.

### **Civil Code of Afghanistan**

**Article 1606:** Agency shall terminate in one of the following cases:

1. In case of completion of action for which agency has been made.
2. In case of lapse of the designated period of agency.

3. In case of the death of agent or client.
4. In case of extinguishment of capacity of agent or client.

In addition to the above-mentioned reasons, Article 1607 of the CCA gives authority to a client to terminate the relationship and dismiss his attorney at any time he wishes.

The relationship can also be terminated if continuing representation would involve illegal or unethical conduct. According to Article 12 of the AIBA Code of Conduct, a lawyer must refrain from representing a client if he is aware that his client is committing a crime. Article 13(3) of the AIBA Code of Conduct also allows lawyers to end their relationship with clients in cases of conflicts of interest or when their trust or independence is at risk. Note that if a conflict arises for a lawyer who has to represent two clients in two different cases—one civil and one criminal—at the same time, according to Article 19 of Advocates' Law, preference will be given to the criminal case. The attorney must inform the court is hearing the non-criminal case of the conflict a week in advance, or appoint another advocate to attend the non-criminal proceeding.

#### **Discussion Question**

1. Why do you think attorneys are more restricted than their clients in their ability to end the attorney-client relationship?
2. Why do you think the deadline for an attorney to terminate his relationship with a client in civil cases is longer than in criminal cases?

There are also other grounds, mostly from contract law, that allow both parties to end this relationship. If the client doesn't pay the attorney as agreed, for instance, the attorney would likely be able terminate their agreement. Also note that the type of obligation that the lawyer has toward the client is known as an obligation of mean. Under this type of obligation, the lawyer agrees to use all means such as his knowledge, skills, and experience to achieve the expectation of his client. However, he is not guaranteeing that the result will be achieved at any cost. If an attorney loses his means by, for instance, developing a health problem that affects his memory or communication skills, the client cannot force the attorney to achieve the result at any cost (through, for example, hiring another lawyer to do the job). Obligation of means contracts are different than obligation of results contracts such as sales contracts, which would require the promiser to achieve the result at any cost.

In some circumstances, an attorney can end the relationship when the case imposes an unreasonable financial burden on the lawyer. In this situation, the court has significant authority to analyze the problem and decide whether it is fair to release the lawyer from his duties to his client. Additionally, because legal representation requires a large amount of cooperation from the client, if a client is not cooperating with his attorney, the lack of cooperation can be a ground for ending their relationship.

In addition to regulating the termination of the attorney-client relationship, Afghan law also has regulations governing lawyers that choose to add new lawyers to their client's case. If a lawyer

wants to involve another lawyer in a case or even ask his colleagues to assist him with his case, the lawyer is required to inform his client first. Article 35 of the AIBA Code of Conduct states that “if an advocate assigns a duty to another advocate or his/her assistants or another advocate in the law office based on the guidelines of the Association, he/she shall be duty bound to inform his/her client beforehand.”

## **5. CONCLUSION**

In this chapter you learned about legal competence and what the competence means at different stages of a lawyer’s work. You learned about competence as it applies to the rules on entering into the legal profession. You learned what the requirements are and how the requirements are designed to ensure a person starting her career as a lawyer is competent enough to represent her client in court. You also learned what falls within scope of representation and which types of representation are authorized and unauthorized. Additionally, we covered exceptional cases where it is possible to represent someone in court without having a license from the AIBA.

In the second part of this chapter, you learned how a lawyer’s competence is maintained and developed in practice. The ethical rules and standards not only require minimum qualifications for admission into the profession but also require lawyers to remain competent when representing their clients. In addition to competent representation, you learned that lawyers are required to develop their knowledge of the law by complying with continuing legal education requirements. Finally, in the last section of this chapter, you learned how the attorney-client relationship is formed and how it can be terminated.

## CHAPTER 5: CLIENT CONFIDENTIALITY

### 1. INTRODUCTION TO CLIENT CONFIDENTIALITY

In order to maintain loyalty to their clients, advocates must handle information about their clients carefully. Advocates have a duty and a right not to reveal matters that have been communicated by their clients or that concern their clients. Advocates are not allowed to reveal certain types of client information to any third parties, including judges and law enforcement personnel, and they cannot be forced to reveal this information. In legal ethics, the lawyer's duty toward the client is known as the **duty of confidentiality**. The client also has a right to protection of the information that he shares with his lawyer.

**Confidentiality** refers to "the boundaries surrounding shared secrets and to the process of guarding these boundaries". It is different from **privacy**, which is related to a person's freedom from being observed or disturbed by others, including the government. Confidential information is not necessarily private information, but it is information someone wishes to keep from the knowledge of third parties.

Another concept related to keeping secret information is **attorney-client privilege**, which protects lawyers from having to make coerced revelations in court. The attorney-client privilege and the right to privacy are regulated under the Constitution of Afghanistan, under statutory laws such as the Penal Code and the Civil Code, and under procedural laws such as the Criminal Procedure Code.

Attorney-client privilege differs from the duty of confidentiality in several ways. First, the attorney-client privilege is a topic related to procedural law, while client confidentiality is an ethical duty of lawyers. Second, attorney-client privilege has a narrower scope than the duty of confidentiality. Finally, the method of enforcement differs for both. While a violation of the duty of confidentiality may lead to disciplinary sanctions for a lawyer, a violation of the rules of attorney-client privilege can be used by lawyers to show that procedural unfairness existed in a trial and that any decision affected by the unfairness should be rendered invalid. Lawyers also use the privilege argument to shield themselves or their clients from discovery requests.

In this chapter, we will focus our discussion on the ethical rules surrounding the duty of confidentiality. Anything we cite from the Penal Code, Procedural Law, or Civil Code is simply meant to serve as an example of the wider range of regulations.

The duty to maintain client confidentiality is one of the advocate's most important responsibilities. While it may seem straightforward in theory, in practice it can raise challenging legal and ethical dilemmas. It requires advocates to take reasonable measures to prevent the accidental or unauthorized disclosure of client information. In this chapter you will learn about the scope of this duty, which governs not only communications directly from clients but also information obtained from others, such as the client's family members or business partners. We will also discuss how this duty is regulated under the Advocates' Law and the AIBA Code of Conduct. Additionally, we will explore theoretical debates on the need for having a duty of

confidentiality as well as the exceptions to the duty of confidentiality. You will also learn about how this duty is practiced in Afghanistan among lawyers and about how some controversial aspects of the duty are regulated in other jurisdictions.

### **Problem**

You are a lawyer and the family of an accused asks you to represent their son who is accused of drug trafficking. You meet the accused in a detention center and talk to him for one hour. He shares with you some information about the crime. As you prepare to sign an agreement with him saying that you will work on his case, the accused informs you that he has already hired another lawyer. At trial, the prosecutor calls you as a witness and asks you to reveal what the accused told you during your conversation in the jail.

Without knowing the ethical rules, try to answer the following questions based on your understanding of topics covered so far.

1. What is confidential here? What is privileged?
2. Since the accused decided to hire a different lawyer, should you be able to testify in court even though you spoke to the accused in your capacity as a lawyer?
3. Assume you represented the accused for some time, and then he decided to find a new lawyer. Should you be able to share all the information you obtained from the accused with anyone else? Why or why not?

## **2. REGULATORY FRAMEWORK**

The duty to maintain client confidentiality is mentioned both in the Advocates' Law and in the AIBA Code of Conduct. It is the first of the advocates' duties listed in Article 13 of the 2007 Advocates' Law, and it is a key feature of the AIBA Code of Conduct. Article 11 of the Code of Conduct describes the lawyer's general duty of confidentiality, which prohibits lawyers from disclosing information communicated to them by their clients, colleagues, and staff.

### **AIBA Code of Conduct**

#### **Article 11: Confidentiality**

- (1) An advocate shall be duty bound to preserve confidentiality and to observe professional ethical standards in the performance of his/her duties.
- (2) An advocate shall be duty bound to preserve the confidentiality of colleagues, staff and other individuals who are involved in providing legal services.

Article 13 of the AIBA Code of Conduct provides that lawyers may not reveal their clients' confidential information in exchange for any benefit. Disclosure of information in exchange for goods, services, or benefits may be the most serious type of breach of the duty of confidentiality, and it may even lead to criminal charges against the advocate.

### **AIBA Code of Conduct**

**Article 13(2):** In the course of representing his/her client, the advocate is duty bound to not provide the confidentialities of his/her client to a second party or other person in return for goods, services or benefits.

Article 10(5) of the Advocates' Law indicates that every advocate has a basic right to visit and communicate with his/her clients. This section also says that client meetings and communications should be held in a "secure and confidential environment." In order to protect this right, law enforcement agencies should provide secure and confidential environments for the advocate and his client to meet. This rule also places a duty on advocates, who must ensure that all of their communications with their clients are secure and confidential.

### **Advocates' Law**

#### **Article 10: Rights of Advocates**

Any person, who holds a license to practice, has the following rights:

....

(5) To visit, interview, correspond and communicate with a client who is being held under custody, detention or in prison, in a *secure and confidential environment*.

Advocates also have to make sure that their right to confidentiality is being exercised and protected. An advocate is expected to raise his voice if his client's rights or his own professional rights – particularly those that would affect the client's interests – are not respected. In practice, accused persons may not know about the right to confidentiality, so advocates are expected to inform their clients about this right and ensure that the clients can comfortably communicate with them without any fear. In the past, the AIBA has raised concerns to the Supreme Court about advocates' failure to properly preserve their clients' confidentiality.

### **Discussion Questions**

1. In your opinion, what are the best procedures to protect confidentiality when using computers? Should certain methods of communication be totally banned for lawyers? Or should there be other precautions in place?

Under the AIBA Code of Conduct, an advocate is bound to use all legal means to protect the interests of his clients. If a lawyer violates the duty to protect the client's interests by disclosing the client's confidential information, the lawyer could be held liable for such a violation.

## **AIBA Code of Conduct**

### **Article 10: Interests of the Client**

An advocate shall be duty bound to respect the best interests of his/her client based on the interests of justice, observance of the rule of law and ethical standards.

In an attorney-client relationship, it is also important that the scope of the agreement between the client and the advocate is well-defined. The client generally must authorize all of the work that the advocate is doing on the client's behalf. As you learned in Chapter 4, an advocate's action beyond the scope of his authority could lead to an automatic termination of his contract. Therefore, the advocate must be careful to seek client approval whenever it is necessary. For example, the AIBA Code of Conduct prohibits advocates from speaking about clients in interviews or public statements without the client's express consent.

## **AIBA Code of Conduct**

### **Article 32: Interview or Statement**

An advocate shall not interview or provide statements about his/her client or affairs related to his/her advocacy without the explicit consent of the client.

The AIBA Code of Conduct also requires that a client should be informed in advance if anyone else other than the advocate will work on a case. If a client does not give permission for other individuals to work on the case, the advocate is not allowed to share information about the client or the case with those individuals.

## **AIBA Code of Conduct**

### **Article 35: Informing the client**

If an advocate assigns a duty to another advocate or his/her assistants or another advocate in the law office, based on the guidelines of the Association, he/she shall be duty bound to inform his/her client beforehand.

The advocate's duty of confidentiality is also a part of the oath that lawyers swear to when they receive their licenses from the AIBA. As is common in all types of official oaths, the advocate swears to honor and comply with his most important duties.

## **Advocates' Law**

### **Article 16: The Oath**

Upon receipt of the license to practice, an advocate shall take the following oath before the Executive Board of the Association:

“I swear in the name of God Almighty to execute my duty as advocate with utmost honesty and righteousness, and shall keep its confidentiality, respect and observe provisions of the holy religion of Islam, the constitution and other legislation of Islamic Republic of Afghanistan and shall not betray my client.”

Other articles of law also prohibit lawyers from engaging in any act that would require disclosing confidential client information. For example, Article 14 of the AIBA Code of Conduct and Article 22 of the Advocates’ Law prohibit lawyers from testifying as witnesses in their own cases.

### **AIBA Code of Conduct**

#### **Article 14: Prohibitions on Testifying**

An advocate shall not act as a witness or give legal advice in the case in which he/she is proxy.

### **Advocates’ Law**

#### **Article 22: Limitations on Representation**

(1) After suspension from or conclusion of a case, an advocate shall not provide legal counsel, legal representation, or act as witness for any competing party in the same case.

(2) When defending or giving written advice in a case, an advocate shall not serve as witness in the same case.

Note that witness testimony and expert testimony are dealt with in procedural laws. The reason those are also mentioned in the Advocates’ Law and the AIBA Code of Conduct is to emphasize the ethical aspects based on a lawyer’s duty of confidentiality and the prohibition against conflicts of interest.

Because a lawyer has a duty to protect his client’s interests and confidentiality, he may find himself in a serious dilemma if he does not feel comfortable representing his client. For instance, imagine that a lawyer discovers that his client is committing a crime. Representing this client may be emotionally and morally troubling for the lawyer, and it may even hurt his reputation if the client is charged with these crimes. In that case, the ethical rules allow the lawyer to resign from the case so that neither of the parties has to experience any harm. Under Article 12 of the Code of Conduct, advocates have the option to resign from a case rather than disclosing a client’s confidential information. This option would be applicable to cases where a client tells a lawyer that he intends to commit a crime. It does not, however, apply to the colleagues or employees of a lawyer who may have done something illegal, in which case the lawyer is still bound to report their misconduct to the AIBA.

## AIBA Code of Conduct

### **Article 12: Refrain from representing**

Whenever an advocate notices during the performance of his/her duty that his/her client is committing a crime or violation, he/she shall refrain from representing the client.

The term “crime or violation” in this Article is not clearly defined and therefore might be confusing. Should an advocate resign from representing a client if he knows that the client is committing a less serious crime, such as slapping a witness? Or should he only resign if he knows that the client is planning for something much more serious, such as murder? The Article seems to require that the crime is committed during the time that the attorney is representing the client. Assume, for instance, that you are representing a client who is charged of drug trafficking and released on bail. You find out that he is presently doing drug trafficking. Therefore, you are required to stop representing him. But you still have to meet the formalities of ending your relationship, as you learned in the previous chapter. You will also learn later about the legal requirements of reporting certain serious crimes to the police.

Other ethical principles may also affect a lawyer’s duty of confidentiality and could create an ethical dilemma for the lawyer. Take, for example, the ethical requirement that lawyers should be honest. What if during his investigation or meetings with his client a lawyer finds out that a piece of information or evidence that his client shared is fake? On the one hand, the lawyer’s obligation to be candid requires that he should present that information to the court. According to Article 28 of the Advocates’ Law, an advocate shall not *intentionally* give incorrect information to court. For criminal liability of a person reporting incorrect information to Officers of Public Services, *See, e.g.* Article 379 of the Penal Code (1976). The term intentionally is important as a lawyer will not always be able to assess the accuracy of information and documents shared with him by his client. Also according to Article 380 of the Penal Code (1976), a person will not be held liable if he has good faith and honestly believes the information he has shared with judicial institutions or other government agencies is correct. Thus, under this Article, if an advocate knows his client has provided incorrect information or forged evidence, he should not submit it to the court. But the advocate is also bound to keep the confidentiality of his client. So what should the lawyer do in this case? One precaution the lawyer can take is to inform his client about the crime of perjury and the consequences of lying to the court. As a last option, the advocate may choose to resign from the case.

## AIBA Code of Conduct

### **Article 28: Not to submit incorrect documents**

An advocate shall not knowingly submit incorrect documents to the Court.

Under Article 30, section (1), an advocate cannot communicate with another client represented by a different attorney in the same case unless he gets permission from that attorney. Under section (2), if an attorney wants the information he shares with another attorney to remain confidential, he simply has to inform the recipient that the information he is receiving is confidential.

## **AIBA Code of Conduct**

### **Article 30: Correspondence and confidentiality**

- (1) An advocate shall not directly correspond with a person, who is advised and represented by another advocate in a specific case or issue, unless by the permission of the aforementioned advocate.
- (2) If an advocate dispatches a letter or a correspondence to another advocate and wishes it to be kept confidential, he shall inform that advocate. In this case, the second advocate shall be duty bound to keep the dispatched items confidential.

As we have seen, a lawyer's duty of confidentiality has multiple parts. Lawyers may not disclose their clients' information to any third party, either for free or in exchange for some benefit, nor may they disclose information relating to a legal matter that is revealed to them by their colleagues and staff. The laws we have looked at so far have covered what information is confidential, what the source of that information is, and the recipients with whom the information should not be shared. So far, we have assumed that confidential information is anything mentioned by a client that could jeopardize the legal interests of a client if the lawyer tells it to someone else. Later, we will discuss some possible exceptions to the duty of confidentiality. As we will see, under certain circumstances, the attorney may be allowed to share confidential information with others.

In addition to the Advocates' Law and the AIBA Code of Conduct, the Afghan Penal Code also contains some provisions about the duty of confidentiality of professionals generally. Article 445(1), as reprinted below in full, requires that for a person to be criminally liable for disclosure of certain information, the following elements should be met:

<b>Law</b>	<b>Remarks</b>
<b>Penal Code of Afghanistan</b> <b>Article 445:</b> “(1) A person who discovers, through his job, occupation, profession, or nature of work, a hidden fact (of knowledge), and reveals the discovered fact contrary to the provision of the law or uses this fact for his own or someone else's benefit shall be sentenced to medium imprisonment of not more than two years, or would be fined an amount not exceeding twenty four thousand Afghanis.	For being sanctioned under this article of the Penal Code, the following elements should be met:  1) The information discovered by those professionals should be confidential or secret. 2) A professional should have had access to the information because of his or her work. 3) The professional should have revealed it to others, or used it for benefit of himself or another person.
(2) In the cases where concerned authorities have the permission for revelation of the secret, or the revelation of the secret is for the purpose of informing of an act of felony or	4) The professional should have revealed the information for the purposes explained under part (3) without having legal permission of

misdemeanor, the offender shall not be punished.”	authorities or law.
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It is important to note that being criminally responsible does not necessarily mean that a lawyer is also ethically responsible. Although we cited a rule from the Penal Code, the focus of this chapter is to look at confidentiality from the perspective of legal ethics. Therefore, we will discuss the sanctions for breaching the duty of confidentiality based on rules of legal ethics rather than on rules of criminal law.

Though Afghan law robustly reinforces the duty of confidentiality, it leaves many questions unanswered. How far does the duty of confidentiality extend? Are there exceptions to the duty when the information revealed by the client involves an illegal act? Does the duty of confidentiality protect a client who lies to his advocate or to the court? Afghan law provides no clear answers to these questions. This chapter will therefore survey the law of client confidentiality from other nations and generalize to some basic sound interpretations of the duty. First, however, we will outline the rationales and criticisms of the duty itself.

### Discussion Questions

1. Article 19 of the AIBA Code of Conduct requires an advocate to investigate her client and the client’s case. Arguably, the goal of this requirement is for the lawyer to better help the client. If the lawyer finds out that the client is not honest, she may have the option to resign. But what happens if every lawyer avoids representing a client? How would this affect the legal profession?
2. According to Article 5 of the AIBA Code of Conduct, an advocate should report any misconduct of her colleagues and employees to the AIBA. What if complying with this rule requires that a lawyer must share some confidential information with the AIBA? In your opinion, which of these two duties (the duty to report misconduct or the duty of confidentiality) should prevail?
3. Article 28 of the AIBA Code of Conduct prohibits lawyers from knowingly submitting incorrect information or documents to the Court. Assume that you are a member of the disciplinary committee of the AIBA and an advocate is accused of breaching this Article by intentionally submitting incorrect documents to court. What circumstances would you look into to decide whether or not the lawyer intentionally submitted incorrect documents?
4. In Afghanistan, it is common for some law firms to list the names of their major clients on their websites or other advertising materials. Sometimes prospective clients also ask firms to provide a list of their past clients, so they can find out whether the firm provides good legal services and has a good reputation. Do you think the sharing of such information is allowed under the rules of confidentiality?

### 3. WHY GUARANTEE CLIENT CONFIDENTIALITY?

Before discussing the scope of confidentiality, it is useful to examine why the duty exists at all. Students new to the concept may reasonably wonder why a client should be entitled to have the information he willingly discusses with his advocate kept confidential. Many argue that the judicial process is, after all, the search for truth. One might think that the truth would be more likely to prevail if advocates were not bound to silence regarding important features of their clients' cases.

So why should the duty of confidentiality be regulated at all? First, the duty is necessary to build trust between the client and the lawyer, so the client feels that he can share anything related to the case without being afraid of the consequences. Creating a trusting environment by respecting the privacy of a client presumably encourages the client to seek help from a lawyer and also to remain honest. The duty of confidentiality also ensures the integrity of the legal profession, making sure that lawyers are seen as independent and trustworthy.

Supporters of this duty have offered many additional rationales for it. First, it protects a client's autonomy over his personal information. Second, it respects the close relationship between the attorney and the client. Third, it is a professional pledge that ensures that the lawyer will remain silent. Finally, it is important to society as a whole because it allows people who need help to seek help from professionals. If the duty of confidentiality did not exist, people might not approach lawyers for help or they might not receive a competent defense and end up convicted for crimes they did not commit. Supporters of the duty argue that society is better off allowing lawyers to keep confidential information.

Below we will look in depth at two of the main justifications for the duty of confidentiality. Following that, we will explore some criticisms of the duty. Many skeptics remain critical of the duty and argue that it should be abolished or at least substantially weakened. The justifications and criticisms of the duty of confidentiality are detailed below.

### Discussion Questions

1. In your opinion, how would it affect the legal profession if clients were reluctant to openly discuss their cases with their advocates?
2. In addition to helping clients, how is the duty of confidentiality helpful to lawyers?

### 3.1. The Duty of Confidentiality as Promoting Justice

The most common justification for client confidentiality is that it serves to promote the interests of justice. Supporters of the duty claim that those in need of legal representation are more likely to seek it if they trust that their private information will not be revealed. This argument relies on a theory of **incentives**, or motivations to act in a particular way. Clients have an incentive to hire an advocate and tell the advocate the full truth when they know that their information will be kept secret. The duty of confidentiality also discourages clients from withholding information from—or telling outright lies to—their advocates out of fear that the information may later be used against them. Supporters of the duty therefore claim that it serves the interests of justice by strengthening and protecting the advocate-client relationship.

These supporters believe that a stronger advocate-client relationship benefits advocates as well as clients. When advocates fully understand their clients' cases, they are better equipped to effectively represent the clients' interests. Effective representation benefits the system more broadly, since it improves the overall quality of advocacy. Supporters of the duty argue that, because society benefits from overall effective legal representation, client confidentiality benefits society as a whole.

Supporters of the duty do acknowledge that the costs of secrecy may sometimes outweigh its benefits, however. In some cases, society may suffer when a lawyer is required to keep his client's information secret. To take an extreme example, a defendant accused of murdering his neighbor may confess the murder to his advocate. The advocate, bound to keep the information confidential, would be prohibited from disclosing this confession to the court. Unless there is other compelling evidence proving the murderer's guilt, the murderer may go free. Supporters of the duty recognize this drawback, but they argue that, overall, it is still best to make confidentiality the general rule. Without the rule, it might be too difficult for individual lawyers to determine whether, in any given instance, disclosure of client confidences is justified. Because case-by-case determinations would be too difficult to regulate, a blanket rule of either full confidentiality or no confidentiality is necessary.

### **3.2. The Duty of Confidentiality as Protecting Individual Rights**

Another theory of confidentiality relies on individual rights. The first rights to consider are those of the client. Afghan law guarantees every person, even persons that commit legal wrongdoings, the right to an advocate. Some supporters argue that this right to a lawyer also includes a right to keep one's statements confidential. If lawyers were not required to maintain their clients' confidentiality, the right to a lawyer would be meaningless. Clients, particularly guilty clients, would not be truly able to exercise their right to legal representation if they knew that their advocates were free to reveal their secrets.

Also note that other rights and constitutional principles may be relevant to the duty of confidentiality. For example, Article 25 of the Constitution of Afghanistan recognizes the principle of presumption of innocence, and Article 134 defines the roles and responsibilities of police and prosecutors. These articles indicate that everyone is presumed innocent and that the police or prosecutors can only challenge this presumption by providing acceptable evidence to a court of law. Under the rules of evidence, information shared by a client to a lawyer will not be recognized as a confession. Lawyers are also prohibited by legal and ethical rules from testifying as witnesses in their own cases. Thus, any information exchanged between a lawyer and his client cannot be used as evidence against a client.

#### **Discussion Questions**

1. Are you persuaded by these theories in support of the duty of confidentiality? In particular, do you agree that a rule of total confidentiality is preferable to a rule that permits advocates to reveal their clients' information as they deem necessary?

2. What would be the result if advocates were permitted to reveal their clients' information on a case-by-case basis?

### 3.3. Criticisms of the Duty of Confidentiality

Some legal scholars do not support the duty of confidentiality. These critics argue that lawyers are often in the best position to determine who committed a crime. Preventing lawyers from revealing what they know impedes justice and permits guilty people to walk free. Worse, it increases the likelihood of future crimes, because when criminals walk free they may commit more crimes in the future. While most critics of the duty of confidentiality agree that advocates should be *permitted* to keep their clients' information confidential, they argue that it is unjust to *require* them to do so in every instance.

Critics claim that no harm would come to the legal system if there were no requirement of client confidentiality. Even if wrongdoers might be less likely to seek legal representation because they know that their information will not be kept secret, according to some scholars, that is not a problem. These critics argue that the legal system should not worry about deterring wrongdoers from telling advocates about their bad acts. If people knew that they would not be protected by confidentiality, they might be less likely to commit a wrongful act in the first place.

Still other critics argue that most non-lawyers, and therefore most clients, are not familiar with the duty of confidentiality—or at least not with the full extent of it. According to these critics, most people do not know that their lawyers are prohibited from revealing their confidential information. Therefore, these critics argue, if the duty were abandoned, most clients would behave no differently than they do now, since most clients are unaware that the duty protects them.

Another criticism of the duty of confidentiality is that it is too easy for lawyers to breach this duty. Confidential information could easily pass around either in the workplace or at home, and it is difficult to regulate advocates' daily communications. In one actual case, a client complained to the AIBA about his lawyer's breach of confidentiality. The lawyer was allegedly seen in the office of the opposing party sharing information about his client's case.

Even if the advocate does not intend to share confidential information, it is possible for advocates to reveal confidential information negligently or accidentally, especially in informal discussions. Imagine for instance a young lawyer who agrees to work on a very important case. He becomes excited about it and tells many of his friends about the case, and he even reveals some confidential information. If the advocate was negligent in disclosing this information, that would be considered a breach of confidentiality. In contrast, it would not be considered a breach if the lawyer only discloses such information under threats or duress.

### Discussion Questions

1. Reading about the critics' views of the duty of confidentiality, are you satisfied with their arguments?

2. Do you think that under certain conditions, lawyers should disclose their clients' communications? Explain.
3. What makes the duty of confidentiality such a complicated duty in discussions of legal ethics? Are there any dilemmas between this duty and other ethical duties?

### **Problem**

#### **Keeping Client Information Confidential**

Najib, who is accused of beating another man, asks you if you will be his advocate at trial. Initially, Najib insists that he is innocent, and you agree to take his case. But as the trial date approaches, Najib confesses to you that he committed the beating. He claims that he is normally a peaceful man, but that he flew into a rage and attacked the victim after the victim insulted Najib's sister.

1. In your opinion, should you be required to keep this information confidential? Should you be permitted to keep this information confidential? If you do keep the information confidential, are you assisting in an act of perjury when you permit Najib to plead "not guilty" at trial?
2. Would your answer to these questions change if Najib had beaten the victim for no reason, rather than after being provoked? Would your answer change if you were convinced that Najib would commit another battery in the future unless he was punished for this instance?

#### **4. SCOPE OF CLIENT CONFIDENTIALITY**

Now that we have discussed the arguments in favor of and against the advocates' duty of confidentiality, we will turn to the question of **scope**, or the extent of the information covered by the duty. Clients say many things to advocates over the course of being legally represented. Of all of the information communicated by or about clients to advocates, what must advocates keep confidential?

As mentioned earlier, neither the AIBA Code of Conduct nor the Advocates' Law explicitly addresses the question of scope. Afghan law makes clear that lawyers are prohibited from revealing their clients' information to any source and in any setting—both inside and outside the courtroom—but it does not define exactly which information must remain confidential. One could reasonably infer, therefore, that the scope of the duty is extensive and that most, if not all, information relating to a client is confidential.

More specifically, any information that is related to the interest of the client may fall within the scope of this duty. The information should also primarily be related to the client's legal representation. Information that the lawyer has not accessed as part of representing the client most likely does not fall under the lawyer's ethical duty of confidentiality. However, note that it still might be confidential under other laws. Imagine for instance that an advocate learns some trade or business information about his client during the course of his investigation. This

information may be considered confidential under the Competition Law of Afghanistan, even if it is not confidential by the standards of legal ethics.

This formulation is similar to that found in jurisdictions that explicitly address scope in their confidentiality provisions. In Canada, for example, the ethics code specifies: “The lawyer has a duty to hold in strict confidence all information acquired in the course of the professional relationship concerning the business and affairs of his client.” In Japan, the Code of Ethics for Practicing Attorneys states: “An attorney shall not disclose or utilize, without any good reason, confidential information of a client which is obtained in the course of his or her practice.” All information gathered directly from the client through in-person interviews, documentation, and email is therefore categorized as confidential.

Various ethical codes, including those from the United States, also make clear that the duty of confidentiality applies not only to matters communicated in confidence by the client but to all information relating to the representation, regardless of whether it came from the client or from another source. Examples of information collected from third parties include a client’s medical records provided by the client’s physician, or a statement from a client’s wife that he was at home at the time he was accused of burglarizing a shop in town. Given the extensive scope of the confidentiality requirements, attorneys should also take proper precautions to protect a client’s information when they are using public communication methods or speaking in public places where others can hear them.

Civil law rules concerning the confidentiality of information in the hands of professionals other than lawyers also seem to define the scope of confidentiality broadly. Most civil law systems, including Afghanistan, confer the right and duty of professional secrecy not only on lawyers and doctors, but also on accountants, financial advisers, psychologists, and other professionals via the civil and criminal codes. For example, as you saw earlier in this chapter, Article 445 of the Penal Code affects all types of professionals. As a result, “[t]he total effect under the civil law, as a matter of long established public policy, is that private information is closely shrouded.”

In Afghanistan, mostly due to socio-cultural reasons, anything related to family relations is also considered to be confidential. Because of the same family privacy reasons, the Supreme Court decided to establish separate family courts at primary levels of courts in all provinces in order to protect family secrets. Therefore, courts can use their discretion to keep family cases private.

Another open question about confidentiality is duration—when does the duty of confidentiality begin, and when does it end? You have learned that the legal relationship between a lawyer and his client starts when they sign an agreement with one another. It is not clear under Afghan law whether or not information shared by a potential client with a lawyer prior to the two parties entering an agreement is confidential. It can be argued that the disclosure of any information communicated before the formation of the attorney-client relationship is not a breach of the duty of confidentiality under the ethical rules in Afghanistan. Such disclosure might, however, raise legal responsibility under other domains of law such as criminal liability under Article 445(2) of the Penal Code.

Another interpretation of the duty of confidentiality is that it goes into effect the moment a client consults an advocate about legal representation and imparts any private information. According to this view, the advocate is bound to maintain that individual's information in confidence even if the prospective client does not ultimately appoint the advocate to his case. Once the duty of confidentiality exists, it continues even after the advocate's representation of the client is complete, and even after the death of the client.

In conclusion, the general rule concerning scope is that almost all communications between the client and the advocate are entitled to protection unless the protection is somehow waived (waivers will be discussed shortly). Consequently, most confidentiality disputes involve whether confidentiality was waived—not whether it existed to begin with. However, two questions frequently arise regarding whether a given communication is subject to confidentiality protection at all.

#### **4.1. Was the Communication Made in Confidence?**

In general, a communication is confidential if the client *intends* it to be confidential. This is evident when one considers the Dari word for confidentiality: *ser* (Pl: *asrar*), which implies an element of will or intention. To determine whether the client intended specific information to be confidential, a court will look at a number of factors, such as whether the client has shared the same information with others; whether the information has already been disclosed in the public domain; whether the client communicated the information to her advocate when others were present; and other objective factors indicating the client's intent. If a client has shared with many others the same information that she shares with her advocate, then the court may find that the client did not intend for the information to remain secret—and the communication is consequently not confidential. If a client speaks to her advocate in a crowded restaurant where others can hear, courts also say that it is unlikely that the client intended the information communicated to remain secret. If a famous client disclosed information in an interview for publication in a newspaper or magazine, the information is not considered confidential even if it is later relayed to an advocate in private. If a communication from the client to the advocate is not confidential, it is not protected and the advocate is permitted to share the information.

#### **4.2. Does a Client Have a Right to Keep His Identity Confidential?**

Some clients wish to keep confidential the fact that they are consulting a lawyer at all. Their reasons may vary. Some clients may fear that consulting a lawyer will be viewed as an admission of guilt. For example, if a high-profile crime occurs in a small community, the person who quickly hires an advocate may be viewed with suspicion. Other clients may wish to settle a case anonymously, without revealing their identity. In one American case, for example, a driver in a hit-and-run accident that killed a pedestrian asked his advocate to negotiate a settlement with the victim's family without ever revealing his identity—in other words, he wanted to settle the dispute without ever admitting that he was the wrongdoer. An informer revealing someone else's misconduct may also wish to remain anonymous. For example, a government employee who discloses to a prosecutor that his colleague has been accepting bribes may wish to remain anonymous, since his disclosure may make him unpopular with his colleagues, and may subject him to risk of retaliation.

Different jurisdictions handle this question differently. In France, a client's identity is entitled to the same protection as all communications between the client and her advocate. France has concluded that society has an interest not only in fostering good relationships between clients and their counsel, but also in encouraging clients to seek counsel in the first place. Guaranteeing that clients can confidentially retain legal assistance will further this goal, since clients may be more likely to seek a lawyer if they can do so anonymously.

In Afghanistan, the answer to this question is not clear. The Advocates' Law and the AIBA Code of Conduct do not have any provisions that define the scope of the duty of confidentiality. We also know that due to cultural reasons, courts generally consider family cases to be confidential matters. We might conclude that information related to the honor and family reputation of a client, or information that is culturally sensitive also falls within the scope of the duty. For instance, in some areas information about the names of female family members or about issues related to family disputes will be culturally labeled as confidential information. An advocate should therefore avoid sharing such information with a third party unless he is allowed to do so.

While a lawyer may be able to keep the name of his client secret, the Supreme Court has said that police and prosecutors must report certain identifying information about suspects if they are asking for a search and seizure warrant. The Supreme Court explained through Judicial Circular No. 178 to 238 that such information is not confidential by any means and that courts should not process any such warrants without having the information first. Applying the decision of the court narrowly, confidentiality is not an excuse for law enforcement agencies to not disclose identifying information of a suspect to court. However, for advocates, the name and other personal information of a client can in some cases be considered confidential information.

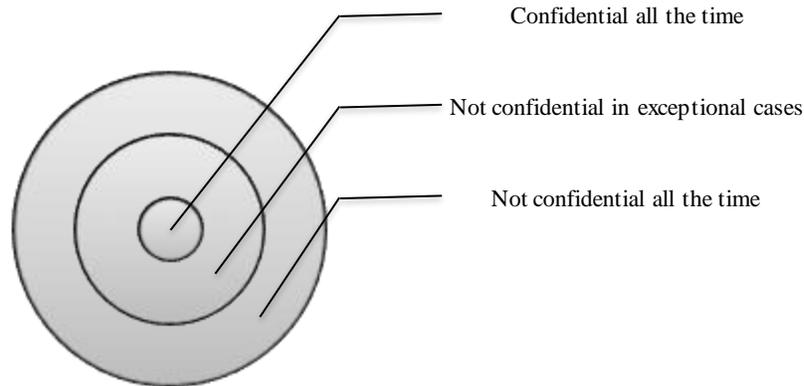
## **5. CIRCUMSTANCES WHERE THE DUTY DOES NOT APPLY**

While the protections of client confidentiality are strong, the duty is not absolute. There are several exceptions to the general rule that confidential communications between clients and their advocates are protected from disclosure. Most disputes involving client confidentiality are disputes about whether any of these exceptions apply. In order to resolve such disputes, it is important to learn about the ethical rules as well as rules about how to interpret the intentions of the parties. Also note that custom in civil matters could play an important role in determining what parties meant when they formed or ended a legal relationship. One Article in the CCA (and also in the Commercial Code and Islamic Law) says that if there is a custom, it is as if it were agreed upon in a contract. An example of custom are common practices within an industry/profession. As you read the below exceptions, think about what actions could imply a waiver in the customary context.

In order for a lawyer to be liable for a breach of confidentiality, the disclosure must have been made by the lawyer himself and not by other persons. Also, a lawyer may not be liable for disclosure if he has a valid legal defense. When presenting a legal defense, the burden of proof is on the advocate to show that he should not be held liable based on certain excuses recognized in the law. One such defense is that the lawyer was forced to disclose information. **Coercion**, the practice of persuading someone to do something by using force or threats, is a legal defense both

in criminal and civil liability claims. It can also be used in ethical contexts to protect an advocate from professional disciplinary actions. Also, if fraud is used to obtain confidential information from a lawyer, the lawyer may not be held liable so long as he has taken necessary precautions to protect the information. **Fraud** is wrongful or criminal deception intended to result in financial or personal gain. As an example, a person may pretend that he is the client and forge an introductory letter or power of attorney that requires the lawyer to disclose information to a third party. In that case, if the lawyer actually believed that he had permission from the client to disclose the information, then the lawyer likely would not be liable for a breach of confidentiality.

Still, a lawyer should be careful to protect the client's confidential information against those illegal means of obtaining it. This may be one of the reasons why the Advocates' Law requires the lawyer to always obtain a written receipt when exchanging documents and evidence with the client. The CCA also requires all agents, including lawyers, to act as if they were acting for themselves.



### 5.1. Waiver of Client Confidentiality

By far the most important exception to client confidentiality is the **waiver** doctrine. Under the waiver doctrine, a client's right to confidentiality is forfeited if the client consents to, or waives, the disclosure of confidential information.

What are some situations in which a client may want to reveal confidential information in the course of legal proceedings? There are many possible scenarios. When negotiating a settlement, for example, a client may choose to disclose private financial documents to arrive at an appropriate settlement amount. In a criminal case, a client may want to substantiate his claim that he did not intend to commit a particular crime. Similar disclosures are made in numerous other transactions in which a lawyer acts for a client.

Before analyzing the waiver doctrine in the Afghan context, it is important to make a note about the relative role of advocates in civil law traditions as opposed to common law jurisdictions. Historically, advocates in civil law jurisdictions have played a more active role with clients than advocates in common law traditions. It was thought that once the client decided to appoint an advocate, the advocate had the right to determine the goals and mode of legal representation. The

client was supposed to play a relatively non-active role in determining the course of representation. This contrasts sharply with the client-centered approach of common law jurisdictions where advocates considered or even deferred to client's goals and strategies. The difference between lawyer-determined versus client-determined advocacy is no longer as obvious since common and civil law traditions have become more similar in modern times. However, many ethics codes still reflect the historical differences between civil and common law structures.

Regarding confidentiality, some civil law systems expressly provide that an attorney should maintain confidentiality regardless of the clients' wishes. Article 5.7 of the Internal Rules of the Paris Bar, for instance, provides that, "any correspondence between the lawyer and his client is covered by professional secrecy that is general and unlimited in time. The duty to maintain confidentiality is absolutely mandatory for the lawyer, who cannot deviate even with his client's consent or upon official request. In Cambodia, Article 7 of the Bar Association of the Kingdom of Cambodia's Code of Ethics states: "The lawyer is absolutely bound by professional confidentiality. Confidentiality may not be waived by anyone, even the client." If one were to literally and strictly interpret these and similar provisions, one would conclude that an attorney is not permitted to reveal anything about the client's interests, evidence, or legal goals in the course of trial or when negotiating on the client's behalf. This would make it very difficult to effectively represent a client; therefore, such provisions are generally not strictly followed in practice.

Because prohibitions on waivers like the ones noted above are increasingly rare and seldom strictly followed, and because the AIBA Code of Conduct and the Advocates' Law explicitly mention that waiver can be obtained with client consent, we will continue our discussion assuming that there can be valid waivers to confidentiality in Afghanistan. Since the attorney-client relationship is based on a contract, an argument could even be made that other types of waiver should be allowed from a contract law perspective. Waiver is relatively common, and it can arise in a number of ways described below.

### **5.1.1. Waiver by Consent of Client**

Perhaps the most obvious way that clients can waive the attorney-client privilege is if they explicitly consent to the information's disclosure. If a client gives consent to her lawyer to reveal otherwise confidential information, then the information is no longer confidential. This happens with some frequency. Documents that a client shares with her attorney may be vital to the client's case, so the client consents to their disclosure. Or a client may wish to reveal certain communications with her lawyer to disprove an element of her opponent's case—for example, her communications may show that she did not tamper with evidence, or that she did not know of a certain event on a given date. Egypt is one such country that allows attorneys to suspend their duty of confidentiality in cases where the client explicitly waives confidentiality.

Issues may arise when a client gives general consent to disclose confidences, but does not specify the exact information to be revealed. For instance, a client may hire an advocate to negotiate a deal for the sale of his business. He may instruct the advocate to "tell the other party the necessary information" in order to achieve his target price of one million Afghanis. In the sale of a business, there will inevitably be disclosures concerning the inventory, production,

status of employees, revenues, and existing contracts. Which ones are “necessary” and therefore in line with the client’s waiver of confidentiality?

It would be very burdensome for the advocate to go through each document and obtain express permission to disclose. Most jurisdictions hold that it is generally permissible for the attorney to use her own discretion in deciding what information to convey without unnecessarily sharing private information. The legal and ethical principle underlying this permission is that the client has authorized the advocate to act as his agent, trusting that the advocate will pursue his best interests.

Refer back and read Article 32 of the AIBA Code of Conduct, which restricts the advocate from giving a statement or interview about his client without first obtaining the consent of the client. Also see Article 35 of the AIBA Code of Conduct on the advocate’s duty to inform a client if the advocate assigns the case to another advocate or to an assistant. As you have seen, the AIBA Code of Conduct does recognize waiver by consent of client so long as such consent is free of any defect such as fraud or coercion.

In practice, ethical and legal disputes often arise over consent when a client claims he did not give his consent, or if there was a misunderstanding about what he consented to.

### **Problem**

Taj is accused of a crime that receives a great deal of public attention. He needs a lawyer but has no money. Lawyer Nangyali agrees to defend Taj in his case and suggests that, rather than paying a fee, Taj should sign an agreement which gives lawyer Nangyali the right to write a book about the case after it is over.

If Taj agrees to this deal, will Nangyali’s act of publishing all information about the case be considered a breach of the duty of confidentiality?

#### **5.1.2. Waiver by Disclosure**

If a client purposefully discloses confidential information to another person, the lawyer’s duty may no longer apply. This means that if a client discusses a confidential communication between herself and her lawyer with a friend or acquaintance, writes about it publicly, or otherwise reveals the communication to another person, the communication is no longer confidential. This directly relates to the principle explained in the previous section that only information *intended* to be confidential is covered by the duty of confidentiality.

For example, if a client accused of breaching an oral contract discusses that breach with her attorney, then that communication is confidential and must remain so. But if the client then writes a public letter in which she discusses the prior conversation with her attorney, or testifies about that conversation at trial, then the conversation is no longer confidential because it has been disclosed to a third party.

Note, however, that the disclosure waiver only flows one direction: from the client. If an attorney intentionally or mistakenly discloses confidential information, that does not relieve her of her duty to mitigate that disclosure and revert to maintaining absolute confidentiality. Only disclosures by the client relieve an attorney of her duty of confidentiality.

### **Accidental Disclosure**

Lawyers accidentally reveal confidential client information with unfortunate frequency. It is an easy mistake to make—especially now that email communication is so prevalent. While students studying client confidentiality spend most of their time analyzing the complicated obligations imposed by the attorney-client privilege, the most important lesson for a soon-to-be attorney may be simply to act carefully at all times.

Lawyers should take care not to reveal confidential information to others. They should avoid speaking of confidential matters in public; they should limit their use of email when discussing confidential information; and they should not leave confidential documents where others may find them. Lawyers should also take precautions to ensure that others cannot *steal* confidential information. They should not throw away old documents where others can access them, and they should never leave their computers in public places. Because it is increasingly easy and common for computer hackers to access lawyers' confidential files, attorneys would be wise to enlist computer specialists who can help ensure that their hard drives are protected against computer hackers.

### **5.1.3. Implied Waiver**

The third way that confidentiality can be waived is through **implied waiver**. A client impliedly waives confidentiality when she puts confidential information “at issue” in litigation. This can be done in a number of ways.

Most often, confidential information is put at issue when a client accuses her attorney of malpractice. Malpractice actions, which will be discussed in greater detail in a later chapter of this textbook, are authorized under Article 28(2) of the Advocates' Law. By making the nature of her attorney's legal advice the focus of a lawsuit against the attorney, the client waives confidentiality with regard to this legal advice. The rationale for waiving confidentiality in these circumstances is that it would not be fair to allow a client to allege that her attorney was incompetent, while at the same time invoking confidentiality to deny her attorney any ability to use the information needed to defend against this allegation.

In many jurisdictions, a client also impliedly waives confidentiality concerning aspects of legal representation when she fails to pay her legal fees. By failing to pay an attorney what is owed, a client puts information about the nature of her attorney's representation “at issue” such that the attorney is entitled to reveal that information in order to collect fees. Implied waiver of confidentiality for clients who fail to pay their legal fees deters clients from failing to make payment. Clients who do not wish for their confidential information to be revealed will be likely to pay their fees in full and on time. This rule is justified on policy grounds. If lawyers were unable to disclose such information in order to collect fees, many would undertake legal work

only where payment is made in advance. This would arguably adversely affect the public's access to justice.

While almost all jurisdictions agree that failure to pay one's legal fees waives confidentiality, some believe that the reasons for the rule are more self-interested. Because it was lawyers who developed the rules regarding confidentiality, some cynics believe that the rule-makers carved out a rare exception to the duty where their own paychecks were at risk.

In Afghanistan, implied waiver is not explicitly addressed in the Advocates' Law or the AIBA Code of Conduct. Depending on the contractual terms between an advocate and his client, some rules of contract law in the CCA allow one party to avoid fulfilling his obligation if the other contracting party is not fulfilling his obligations, such as when one party is not making the payments he promised to make. The CCA also allows the court to look at both explicit and implied expressions when determining the intentions of the contracting parties, unless the contract specifically requires explicit expressions of intent.

### **Problem**

Abbas contacted a local lawyer, Mr. Bashir, about suing a doctor for malpractice. They agreed that Bashir would charge Abbas an hourly fee of 200 Afghanis to prepare for trial and that, if Abbas won the case, he would pay Bashir 15% of the damages awarded. They shook hands in agreement.

The court set the trial for 1 April, 2012. In March, Bashir sent Abbas a bill in the amount of 2800 Afghanis for work he did in February. Abbas was surprised at the amount, given that Bashir had not told him about any work he had done that month to prepare for trial.

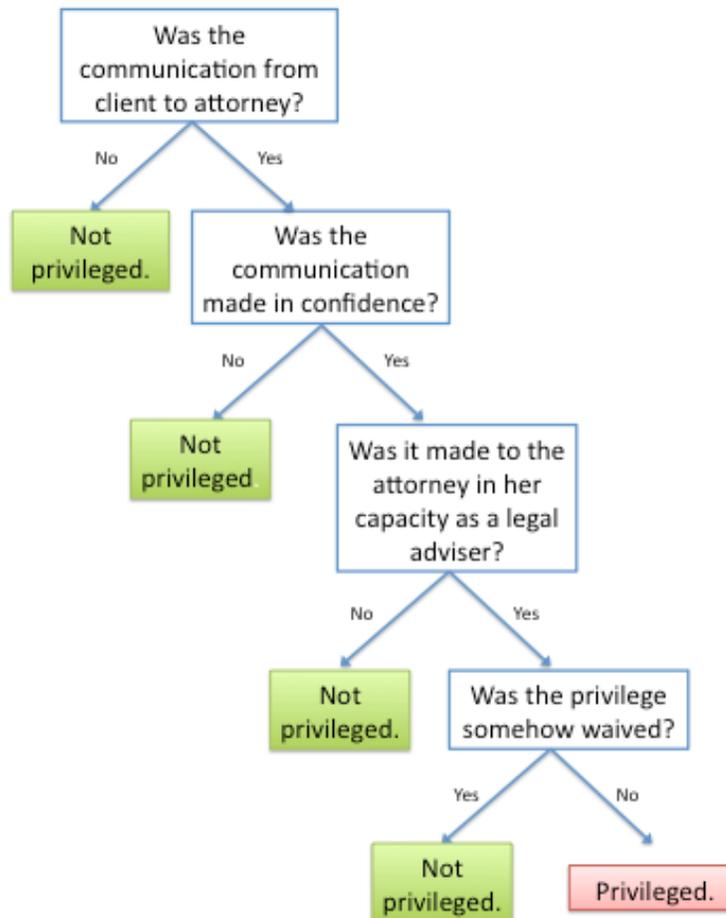
Abbas was unable to pay any part of the bill. His shop was not bringing in any business at that time because of his injury. Abbas called Bashir to tell him, and Bashir said that he would give Abbas until 15 March to pay the bill, but no longer.

On 15 March, Abbas still could not pay. He received a bill and letter from Bashir. It said: "Your account is past due. If amounts due are not paid by the end of this week, I will terminate my legal representation."

On 18 March, Bashir telephoned Abbas and told him that he was withdrawing from the legal representation. Abbas said there was no way to secure another lawyer in time for the 1 April trial. Bashir responded that he did not care.

Is this allowed by the ethical rules? Is it fair?

**Figure 4.1: Basic guide to whether information is confidential**



## 5.2. Information Shared Between Advocates

In general, an advocate must maintain a client's secrets and not share them with anyone, including her spouse and close friends. Not only must she choose not to disclose, she cannot be compelled to do so by a court or government official. In common law jurisdictions, the duty of confidentiality is supported by the related rule known as the attorney-client privilege, which explicitly prohibits courts and other official agencies from inquiring into confidential communications between client and advocate.

The exception to the general principle that an advocate may not reveal a client's information is that she can reveal information to her fellow advocates—both those in her own legal practice, and possibly to opposing counsel as well. As Article 11(2) of the AIBA Code of Conduct indicates, it is not only expected but permissible for advocates to discuss client matters with colleagues in their legal practice.

Imagine a situation in which an advocate was not permitted to discuss the legal representation of a client with anyone in her office. She would not be able to share any document with her secretary or administrative assistant, rendering the assistance virtually useless. She would not be

able to consult a more experienced and knowledgeable advocate for advice on procedure or legal arguments. Because lawyers have a corresponding duty to perform competently, we do not want to prevent them from utilizing the human resources they have available in their offices. Instead, most jurisdictions, including Afghanistan, permit lawyers to share information with colleagues. The duty is then placed on all involved advocates to maintain the confidentiality of such discussions.

In practice, when lawyers want to seek help from their colleagues, they sometimes discuss their cases in hypothetical scenarios by changing key identifying parts of the case. They also check to make sure that the other advocates they are talking to do not have conflicts of interest. Law firms also develop policies that require their staff to be cautious about confidentiality when interviewing clients, recording their communication with them, and disposing of such information. Firms even pay attention to the layout of their offices in order to ensure that advocates and clients have private places to meet and discuss confidential matters. Lawyers and law firms use these and many other practical methods to protect the confidentiality of their clients.

In civil law jurisdictions such as Afghanistan, an advocate is generally also permitted to share information with the advocates representing the opposing party in a legal proceeding. Such disclosures are permissible based on a principle of mutual confidentiality. In these systems, lawyers on each side of the litigation or transaction may make statements and proposals to each other, on the understanding that these communications cannot be disclosed to anyone else. The AIBA Code addresses such situations when this type of communication between opposing counsel takes place in writing.

### **AIBA Code of Conduct**

#### **Article 30: Correspondence and Confidentiality**

(1) An advocate shall not directly correspond with a person, who is advised and represented by another advocate in a specific case or issue, unless by the permission of the aforementioned advocate.

(2) If an advocate dispatches a letter or a correspondence to another advocate and wishes it to be kept confidential, he shall inform that advocate. In this case the second advocate shall be duty bound to keep the dispatched items confidential.

In practice, in order to meet the requirements of these provisions on maintaining confidentiality, lawyers normally use a generic confidentiality notice in their written communications. They may also ask the other party to confirm that they do not have a conflict of interest and that they promise to keep the information shared with them confidential.

### **5.3. Confidences Related to Illegal Conduct**

There is a standing question of whether an attorney must maintain her duty of confidentiality when her client informs her of an ongoing or future crime. Not only is a lawyer obligated to

conform her own behavior to the law, but she is required to avoid assisting a client in unlawful activities. The clearest way for her to do so if she is unable to counsel her client to cease illegal action is to report her client to the authorities. This obviously has serious implications for the duty of confidentiality.

In this case, the rationale of allowing an advocate to break confidentiality is that there is a difference between counseling a client about a *past* misdeed and counseling a client about an *ongoing or future* one. When a lawyer gives advice regarding a past crime, she is merely providing the professional legal services entitled to every person. But when a lawyer counsels a client about a future crime, she is arguably assisting the crime.

This question of whether an attorney may disclose client confidences to prevent or stop a crime is difficult. On one side, advocates owe a duty to society to behave with integrity and honesty, and this duty may be as important as the duty of confidentiality to their clients. On the other side, they are in the best position as legal counselors to discourage clients from committing crimes. Yet clients will only reveal plans related to the commission of crimes if they trust that their advocates will keep them confidential. Perhaps because the ethical questions raised by this issue are so difficult, this **illegality exception** to confidentiality remains controversial, and it is not recognized in many jurisdictions.

### **Problem**

#### **Keeping Client Information Confidential**

Recall the example of Najib who was accused of beating another man. You are representing him at trial. Najib is very upset about his situation because he has lost his job and also thinks his reputation is ruined. He repeatedly tells you that he will kill the person who accused him of this crime.

1. Should you be required to inform police about what Najib told you regarding killing the person who accused him?
2. What are the benefits and harms of mandatory disclosure of confidential information when a lawyer knows that his client will commit a crime?

### **Discussion Questions**

1. Are you convinced that there is a meaningful difference between giving advice about past and future misconduct?

In Afghanistan, Article 12 of the AIBA Code of Conduct makes it clear that there is a duty to refrain from representing a client who engages in a crime or fraud. But the Code is silent regarding whether an attorney who learns that her client is planning a crime is also required—or even permitted—to disclose this information to the authorities. In those cases when primary ethical sources such as the Advocates’ Law and AIBA Code of Conduct are silent about an

ethical question, we must refer to other legal sources to find out how that issue is dealt with in criminal or civil laws.

One source that provides guidance on this issue is the Afghan Penal Code. Article 445(2), which concerns disclosure of people's secrets, states: "In the cases where concerned authorities have permission for revelation of the secret, or the revelation of the secret is for the purposes of informing of an act of felony or misdemeanor, the offender shall not be punished." Remember our discussion in Chapter 1 about the distinctions between different legal and ethical rules and standards. The fact that an action does not violate criminal law does not mean that it does not violate ethical rules. However, there is a clear implication here that disclosure of confidential information may be permissible when the purpose of disclosure is to report an ongoing or future crime. This conclusion is reinforced by practice in Afghanistan. In the course of the AIBA's legal training of registered advocates, the advocates are instructed that they have a moral duty to report when informed of an ongoing or future crime by a client.

In theory, a mandatory disclosure obligation on lawyers to report about future crimes is justified if it saves many lives. Some argue that since it is very unlikely that a client will tell his advocate about real future criminal acts, any rule that requires lawyers to disclose their client's confidential information about committing a future crime should be carefully drafted. Such rules should clearly list the category of intended crimes that must be disclosed, how certain an advocate must be about that intention, and how likely it is that the disclosure could prevent commission of the crime.

In Afghanistan, Article 27 of the Law Regulating Crimes against Internal and External Security makes it obligatory for everyone to report about certain very serious crimes. Also see Article 220 of the Penal Code (1976), which defines punishment for those who know about crimes against national security but do not report them to law enforcement officers. As you read this Article, think about how this and other such mandatory duties may limit the lawyer's duty of confidentiality.

### **Law on Crimes against Internal and External Security**

#### **Article 27: Not informing authorities about crime against internal and external security**

If a person has valid information about perpetration of crimes such as treason to the homeland, terror, espionage, sabotage, disruption, war publicity, or Bandism and does not inform the organizations of peoples' sovereignty, he/she will be convicted to mid-term jail.

According to one commentator, instead of having a mandatory disclosure rule, the better rule about disclosing future crimes is to give discretion to lawyers to disclose information about crimes that they think could be serious. This rule would help an attorney not to disclose all intended crimes, but only those crimes that could cause serious harm. Such a rule would protect a client's interest in all cases except when a greater interest in public safety would require infringing on the interests of the client.

The new Criminal Procedure Code of Afghanistan recognizes the privilege of some professionals, including lawyers, to keep confidential the information they receive from their clients. Article 26 also recognizes that sometimes a greater interest might require that legal advisors and other professionals abandon the duty of confidentiality. The court has to perform a cost-benefit analysis in order to decide whether the benefits of having the advisor disclose confidential information outweigh the harms of breaking confidentiality. Importantly, this Article of the Code distinguishes between a *legal advisor* and a *defense lawyer*. In cases of an advocate working only as a legal advisor to someone, the Criminal Procedure gives discretion to the court to release the advocate from the duty of confidentiality. But if an advocate is serving as a defense lawyer, the law strictly prohibits the court from hearing testimony from the lawyer about his client in the same case in which he is representing the client.

Even if a court decides to release the lawyer's duty of confidentiality, it will still take all precautions to hear from the lawyer in a protected environment where only the intended audience can hear such information. Article 26 suggests that the Court could hear such testimony behind closed doors, away from the disputing parties.

### **Criminal Procedure Code of Afghanistan**

#### **Article 26: Prohibition on Witness Testimony**

- (1) The following persons can avoid giving witness testimony:
  1. A person whose duty of confidentiality as set forth in the binding legal sources is breached such as legal advisors, medical doctors, experts, psychiatric, and other similar professionals.
  2. [text omitted]
- (2) Judicial registrars, prosecutors, and Courts shall inform the persons listed in part (1) of this Article about their right to avoid giving testimony as a witness. Judicial registrars and courts are responsible to inform persons listed in part (1) of this article about their right to not answer questions (right to silence).
- (3) Upon request of one party and in existence of strong evidence showing that testimony is essential for proofing or acquitting an accused, or when public interest of such testimony is better served by keeping the confidentiality, Courts can release a person from a professional duty of confidentiality. In that case, Courts can hear testimony of such witness in special rooms and whenever necessary without the presence\ of disputing parties.
- (4) Witness testimony of the following persons shall not be heard:
  1. Witness testimony of a defense lawyer in a case where he is defending his client.
  2. [text omitted]

Based on our review of various applicable laws in Afghanistan, it is fair to say that these laws tend to allow and sometimes even require lawyers to disclose confidential information regarding the commission of illegal acts. These exceptions to the duty of confidentiality, as you saw above,

are mostly addressed in other areas of law including in procedural laws. Ideally the question of when it is permissible to disclose confidential information will also be clearly addressed in ethical sources like the AIBA Code of Conduct, so that lawyers will have some guidance when they face such ethical dilemmas.

### **Problem**

#### **Corruption and Client Confidentiality**

Daud is an attorney in Kabul who specializes in criminal defense. Most of his clients are businessmen accused of bribing government officials in order to win expensive government contracts building roads, bridges, and other state infrastructure. Daud has had many clients who have been accused of corruption, so he has learned to excel at defending against these charges. He has become one of the most sought-after attorneys in Kabul. Daud's clients usually admit to Daud that they are guilty. Nevertheless, Daud zealously defends these clients. Because Afghan law requires attorneys to honor client confidentiality, he never has to admit to anyone that his clients are guilty. He is paid highly for his work, and he has become wealthy as a result.

Does Daud's work on behalf of his clients violate the ethical obligations codified in the Advocates Law<sup>7</sup> and the AIBA Code of Conduct? Of course, if he were to inform the court whenever he discovered that his client was guilty, he would violate his duty to maintain client confidentiality. On the other hand, does he violate his duty to the court when he claims that his guilty clients are in fact innocent? Perhaps Daud should simply refrain altogether from defending clients he knows, or has reason to suspect, are guilty. But if every lawyer refused to defend guilty clients, then guilty clients would never find lawyers. The constitutional right to representation would hence be limited only to those clients innocent of any wrongdoing.

Although these are difficult issues, most people find it distasteful for an attorney like Daud to become wealthy defending clients he knows to be guilty. Do you agree? If so, what solution would you propose?

### **Discussion Questions**

1. In your opinion, if a client shares criminal plans with his attorney, how credible are these plans? Should a lawyer have discretion to assess whether the shared information about future criminal plans is genuine?
2. Should a lawyer's ethical duty differ if a client is simply planning to commit a crime, versus if the client has actually started a crime that will produce effects in the future (e.g. setting up an illegal recording device that will begin recording in 24 hours)?

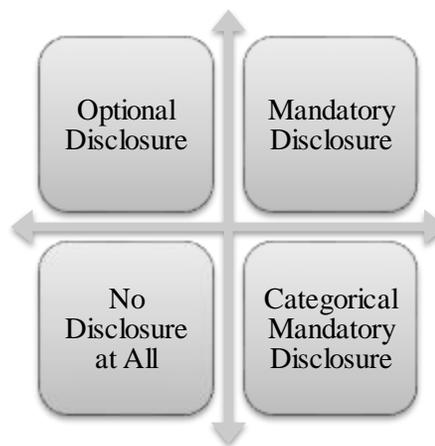
Other jurisdictions have settled on one of four options for how to address the illegality issue with respect to their legal ethics regulations. Afghan law could adopt any of these four options:

- First, Afghan law might prohibit *any* disclosure regarding the future crime. Under this approach, an attorney would be required to end her representation of a client, but would not be permitted to alert the authorities—or the planned victim—that a crime was being planned.
- Second, the law might permit, but not require, an attorney to break confidentiality when the lawyer learns that a client is planning to commit a *violent* crime. Under this option,

attorneys would only be permitted to break client confidentiality when the crime threatened another person with death or serious injury. And even in these situations, attorneys would be entitled to choose whether to reveal the future crime or not. This is the rule in most American jurisdictions.

- Third, Afghan law might permit, but not require, the disclosure of any crime, violent or not. Under this option, lawyers could choose whether or not to reveal that their client was planning to commit a crime.
- Fourth, the law might *require* the disclosure of any future crime.

Different countries have chosen from among these four approaches to the illegality exception of attorney-client privilege. Depending on the level of emphasis placed by Afghan law on respecting client confidentiality, Afghan law could evolve to adopt any of these options.



Models of Rules Regarding Disclosure of Confidences Related to Illegal Conduct

**Comparative Law**  
**Exception to the Obligation of Confidentiality Regarding Past Crimes?**

Generally, information regarding a client's past acts is strictly confidential, and may not be revealed by an attorney in any circumstance. However, some jurisdictions have carved out a narrow exception to this rule permitting lawyers to inform authorities about a client's past crime when the client had taken advantage of the lawyer's services in committing the crime. For example, if a client uses her attorney's legal advice to plan and commit a theft, the attorney is permitted to inform the authorities about that theft. The rationale for this exception is that, but for the lawyer's involvement, the crime would have never occurred to begin with. Thus, disclosure of the information is unlikely to deter clients from seeking legal representation—it is only likely to deter clients from seeking their attorney's help in committing a crime.

#### 5.4. Client Waiver Through Perjury?

The final situation in which confidentiality may not apply is the **client perjury exception**, which occurs when a client perjures himself in court. Even more than the illegality exception, the client

perjury exception is controversial, and it is not recognized in many jurisdictions. Also like the illegality exception, the client perjury exception involves fundamental questions about lawyers' obligations to their clients and their role within the judicial system.

How an attorney should respond to a client who lies in court is a difficult question. It presents a direct conflict of the duties of independence and integrity discussed in Chapter 3. On one hand, a lawyer's duty of independence requires her to be a zealous advocate for her client. But her duty of integrity prohibits her from misleading the court and requires that she adhere to moral conduct.

Under Afghan laws, a lawyer is prohibited from being party to perjury or assisting perjury. If a lawyer agrees to assist a client in committing perjury, not only is the resulting agreement invalid, but the lawyer may also be held criminally responsible. For instance, assume a client tells his attorney during their first meeting that he is not the owner of a property in dispute, but that he wants his lawyer to help convince the court he is the rightful property owner. If the lawyer agrees, this is not a legally binding agreement, because it would be perjury. It is, however, a crime under the Penal Code of Afghanistan.

The AIBA Code of Conduct makes clear in Article 28 that a lawyer may not "knowingly submit incorrect documents to the Court." But the Code is not clear how lawyers should respond when they know that their client has committed or is planning to commit perjury. One argument could be that since perjury is a crime and lawyers are required to end representation when they notice their clients are committing a crime per Article 12, perhaps the attorney should resign and stop representing the client.

**Problem**  
**Responding to Client Perjury**

As a lawyer, you have a duty to maximize the interests of your client and not to harm him. You are also ethically bound to serve the justice system. Consider the following scenarios and explain how you will resolve these ethical dilemmas:

- 1) Ara, a lawyer in Kabul, represents Koshan, who is accused of burglarizing his neighbor's home and stealing a new television set. During the course of Ara's representation, Koshan admits to Ara that he committed the burglary. At trial, when Koshan is called as a witness, Koshan claims that he did not commit the burglary and that he was visiting a friend in Herat on the night of the crime.
- 2) Ara again represents Koshan, but Koshan never admits to Ara that he committed the burglary. Rather, he claims to Ara that he was visiting Herat during the night of the robbery. Ara is almost certain that Koshan is lying. The friend who he claims to have been visiting in Herat does not remember the visit. And when Ara visits Koshan's home, she notices an expensive television set in his living room. At trial, Koshan again claims that he is innocent of the crime.
- 3) Ara represents Koshan, who is accused of burglary. Koshan again claims that he was visiting a friend in Herat on the night of the burglary, and that he is innocent of the burglary. Koshan's

friend confirms that Koshan visited him on the night of the burglary. Ara has no direct evidence that Koshan is lying, but she suspects that he is. Koshan's friend seems untrustworthy, and Ara believes that Koshan himself is also suspicious. At trial, Koshan claims that he is innocent of the burglary.

4) Koshan is accused of burglary, and admits to Ara that he is guilty. However, the prosecutor's evidence that Koshan committed the burglary is flawed. The prosecutor claims that the burglary happened at 4 p.m., and Ara can prove that Koshan was nowhere near the crime scene at that time. Further, Ara can prove that the prosecution's main witness is unreliable. At trial, Ara points to the flaws in the prosecution's case without ever telling an outright lie.

5) Koshan admits to Ara that he committed the burglary. Ara advises Koshan to plead guilty in exchange for a shorter sentence, but Koshan rejects this suggestion. At trial, Koshan pleads not guilty.

How should Ara respond in these different situations? Is she permitted to defend Koshan in some of these situations, but not in others? Does the answer change depending on whether Koshan *admits* that he is guilty, or whether Ara simply *suspects* that he is guilty? If so, how strong must Ara's suspicion be before she should be permitted to refrain from defending Koshan? In any of these cases, should Ara be permitted to inform the court that she believes Koshan has committed perjury?

Scholars of client confidentiality disagree about whether attorneys have an obligation to prevent a client from lying to the court. Some scholars argue that a lawyer's first obligation is to the court, and that therefore lawyers have an ethical duty to ensure that their clients do not perjure themselves. If a lawyer learns that his client plans to falsely testify, the lawyer should thus be permitted to withdraw from representing the client, even though this withdrawal may damage the client's defense. Other scholars argue that an attorney should be entitled to inform a judge that the client plans to commit perjury. Again, this presents ethical problems, since it will prejudice the judge against the client before the trial even begins.

Other scholars believe that a lawyer's greatest obligation is to the client, not the court. According to these scholars, the client's right to counsel also necessarily includes the right to lie in certain situations. If a lawyer prohibited his client from lying or revealed the client's lie to the court, then the right to counsel would be weakened because guilty defendants would be deprived of zealous representation. Further, these scholars argue that such a rule would only deter clients from being honest with their lawyers and would therefore inhibit, rather than advance, the interests of justice.

**Monroe Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions***

In a celebrated article, Monroe Freedman, an American law professor, asked whether it was permissible for an attorney to withdraw from a case when he learned of his client's guilt. Do you agree with Professor Freedman's conclusion that withdrawing from the case violates an attorney's ethical obligations?

“Perhaps the most common way for avoiding the ethical problem . . . is for the lawyer to withdraw from the case, at least if there is sufficient time before trial for the client to retain another attorney. The client will then go to the nearest law office, realizing that the obligation of confidentiality is not what it has been represented to be, and withhold incriminating information or the fact of his guilt from his new attorney. On ethical grounds, the practice of withdrawing from a case is indefensible, since the identical perjured testimony will ultimately be presented. More important, perhaps, is the practical consideration that the new attorney will be ignorant of the perjury and therefore will be in no position to attempt to discourage the client from presenting it. Only the original attorney, who knows the truth, has that opportunity, but he loses it in the very act of evading the ethical problem.

“The problem is more difficult when the client is indigent. He cannot retain other counsel, and . . . it is impossible for appointed counsel to withdraw from a case except for extraordinary reasons. Thus, appointed counsel, unless he lies to the judge, can successfully withdraw only by revealing to the judge that the attorney has received information of his client’s guilt. Such a revelation itself would seem to be a sufficiently serious violation of the obligation of confidentiality to merit severe condemnation. In fact, however, the situation is far worse, since it is entirely possible that the same judge who permits the attorney to withdraw will subsequently hear the case and sentence the defendant. When he does so, of course, he will have had personal knowledge of the defendant’s guilt before the trial began. Moreover, this will be knowledge of which the newly appointed counsel for the defendant will probably be ignorant.”

To balance their obligations to the court and to their clients, many lawyers choose to remain selectively ignorant. Lawyers may try to avoid learning damaging facts that would force them to violate either their duty to the court or their duty to zealously represent their clients. They do not ask their clients about whether they are guilty or innocent, nor do they inquire about whether a given piece of testimony is truthful or not. Thus, they are able fulfill their duty to their clients without ever knowingly presenting false information to the court. Selective ignorance may not be an ideal solution, but it is a way for many lawyers to balance their dual obligations to the client and to the court.

## **6. CONCLUSION**

This chapter has provided an introduction to the duty of client confidentiality established by Afghan law. It has explained the rationales for protecting client confidentiality while also exploring the critical arguments against the doctrine. Readers should now understand the importance of protecting client confidentiality, as well as the reasons for protecting it. Readers should also have a basic comprehension of the scope of confidentiality, and should be familiar with the various exceptions to the duty and how they operate. Most importantly, readers should begin to develop their own thoughts about whether client confidentiality benefits the justice system or harms it.

There are no easy answers. The duty to maintain client confidentiality presents some of the most difficult ethical questions lawyers face. It requires lawyers to protect their client’s secrets even

when they know that the client is guilty. It can also place an attorney's duty to her client in direct conflict with her duty to the court.

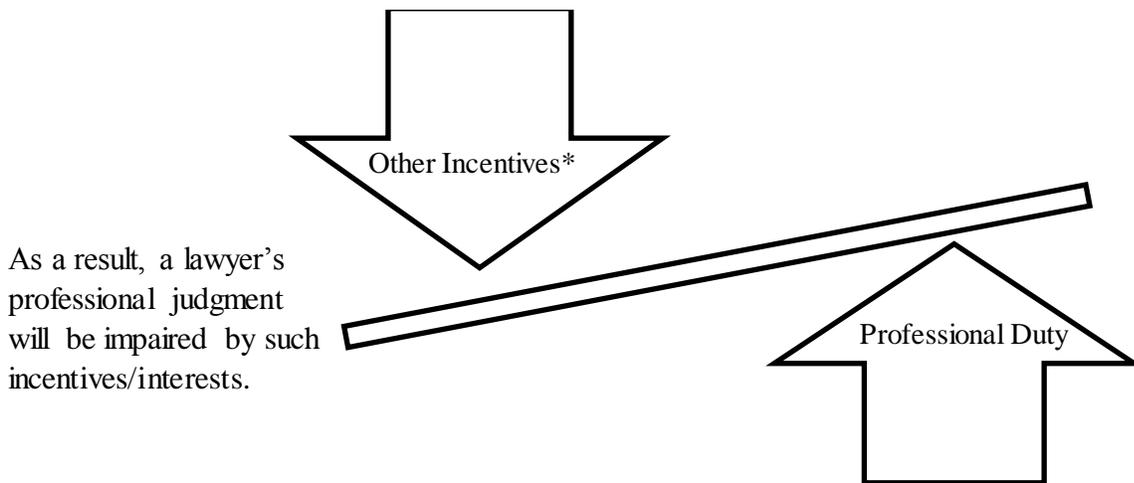
The law of client confidentiality in Afghanistan is in its early stages. Therefore, detailed rules regarding the scope of the privilege and the exceptions that apply to it are not yet fully formed. Consequently, it will be the job of the next generation of Afghan lawyers to more fully articulate the rules governing the limits of a lawyer's duty to protect client confidentiality.

## CHAPTER 6: CONFLICTS OF INTEREST

### I. AN INTRODCUTION TO CONFLICTS OF INTEREST

This chapter will take an in-depth look at the ethical issues surrounding conflicts of interest in the Afghan legal profession. Despite its seminal importance to the ethical practice of law, the term conflict of interest has proved notoriously difficult for scholars and practitioners to define. We can begin to get a sense of the concept, however, if we look at the individual words comprising the phrase. A conflict is a situation where two or more things are at odds with each other. Interests are the benefits or advantages that stand to be gained by a party in a particular situation. A **conflict of interest**, therefore, is a situation where one has potential gains that stand in opposition to each other and cannot likely all be met.

In general, a lawyer faces a conflict of interest when the circumstances calling for the exercise of professional judgment undermine his or her ability to exercise that judgment properly on behalf of a client. Oftentimes, those circumstances involve the lawyer's own personal interests, which conflict in some manner with his fiduciary duties to clients or his professional duties to the court, opposing counsel, and the broader legal system. Conflicts of interest can also arise even where an attorney's personal interests are not at stake. For instance, a single lawyer might simultaneously represent two clients in separate matters, but obtaining benefits for one might necessarily have negative consequences for the other. The attorney cannot fulfill his fiduciary duty to both clients, which constitutes a clear conflict of interest. The below figure illustrates a simplistic way to show conflict of interest in a profession. As you will later learn, however, in practice it is much more difficult to explain what constitutes a conflict of interest.



\* Note: incentives here could include some material gain or loss for a lawyer, his family, or his business, as well as any reason that would affect a lawyer's duty of loyalty to his client.

Afghan law seeks to minimize conflicts of interest in the legal system because such conflicts enhance corruption and harm litigants, especially criminal defendants. Several provisions of the Advocates' Law and the **Afghanistan Independent Bar Association (AIBA)** Code of Conduct govern conflicts of interest. Like in the previous chapters, we will primarily look at the Advocates' Law and the AIBA Code of Conduct to explain conflicts of interest. However, we may refer to other sources, such as the Civil and Criminal Procedure codes, the Law on

Organization and Authority of Courts, and any rules or codes of conduct for judges and prosecutors, to provide more examples or clarify where the line between permissible and impermissible conflicts of interest lies.

This chapter will begin with a general scenario to illustrate the variety of conflicting interests that an attorney may face. Exactly what constitutes a conflict of interest and how the term is used in the legal profession will be discussed further in Part 1.2 below. Part 2 of this chapter will then examine five main types of conflicts of interest and provide examples of frequent problems for you to ponder and discuss. Part 3 will go on to detail the legal regime governing conflicts of interest in Afghanistan. This legal regime includes both statutory and non-statutory mandates, the latter being largely furnished by the AIBA. Finally, Part 4 will end the chapter with concluding thoughts.

### **1.1 Why the Study of Conflicts of Interest is Difficult?**

As stated earlier, a conflict of interest is a complex concept. As the legal profession in Afghanistan develops and become more complicated, the definition of a conflict of interest also becomes more complicated. While some cases are clear examples of a conflict of interest, you will see that it is difficult to easily spot a conflict of interest in other cases. The concept is also complex because of technical terminologies and the existence of different types of conflicts of interest. For example, the current ethical sources in Afghanistan do not provide enough explanation as to what a conflict of interest is and when one could arise. Considering these difficulties, we will first explain general theoretical discussions on different types of conflicts of interest and then touch base on the legal and ethical sources that explain and regulate conflicts of interest under Afghan laws.

Like lawyers, many others—such as doctors, accountants, teachers, editors, researchers, property dealers, or even referees in a football game—are prohibited from having a conflict of interest. You may have heard that when there is an important soccer match between two countries, the referees are selected from a third country. This is to avoid any conflict of interest among the referees. A referee's job is to make impartial decisions about the game and determine if players are obeying the rules. His impartiality could be affected if one of the competing teams hails from the referee's own country.

Clearly, conflicts of interest can arise in many situations for many different people. However, a conflict of interest in the legal profession could be different from a conflict of interest that other professionals may encounter. As you will later learn, the practice of law gives rise to unique conflicts of interest for lawyers, such as personal gain, conflict between clients represented by the same lawyer in the same case, familial relationships, and positional changes of a lawyer regarding a single case.

Considering these factors, this chapter first focuses on different types of conflicts of interest and then turns to ethical rules regulating conflicts of interest in Afghanistan. You will also read several scenarios and ethical dilemmas about conflicts of interest. You are recommended to carefully analyze theoretical discussions and scenarios on conflicts of interest and be ready to apply Afghan ethical and legal sources to those scenarios.

### **Discussion Questions**

1. Have you ever witnessed or faced a conflict of interest in your personal, work, or academic lives?
2. Can you imagine how a conflict of interest could happen for an employee of your university? A student? A professor?

The following scenario is a brief exercise for you to assess your understanding of conflicts of interest. As you read the problem, think about whether some of the conflicts that you notice seem more serious than others. A key theme of this chapter is that lawyers face a multitude of tensions in their everyday practice. However, these tensions do not always rise to the level of a conflict of interest for purposes of Afghan law and one's ethical responsibilities as an attorney.

### **Problem**

You are representing Basir in a civil case. Basir is suing ABC Company for a civil responsibility violation. Your brother, Nawid, is the attorney for the defendant and your cousin, Khalid, is the judge. Nawid is also in the process of being hired for a permanent, well-paid position at the ABC Company. Nawid knows that winning this case means getting the job. And once he gets the job, you know that he can help you get hired by ABC Company as well. He approaches you several times and requests that both of you "work the problem out" and find what he calls "a win-win solution." Nawid suggests that he can get a good amount of money from ABC Company for a quick settlement. Your client, Basir, has no idea how much compensation he could receive if he were to win the case at trial. You also know that Basir trusts you and will choose whatever option you recommend.

Without having read the laws and regulations governing conflicts of interest in Afghanistan, try to answer the following questions:

1. How many potential conflicts can you identify in this scenario? Can you explain what makes them conflicts?
2. Are any of the conflicts that you identified less serious than others? If so, why? What factors went into your determination that one conflict was worse than another?
3. Should you apply for the position? Can you work with the company after the litigation?

### **1.2 What Constitutes a Conflict of Interest in the Legal Profession?**

Having begun to think critically about real-world scenarios where lawyers face conflicts of interest, it is important to discuss in detail what constitutes a conflict of interest. As noted above, a conflict of interest arises when the circumstances calling for the exercise of professional judgment undermine a lawyer's ability to exercise that judgment properly on behalf of a client.

These undermining circumstances may result from the nature of a lawyer's practice, his or her personal interests and professional history, or the interests of his or her employer. An impermissible conflict of interest is one that impairs a lawyer's ordinary legal judgment. As one commentator has framed the issue, "One's judgment, though still competent, is no longer 'independent.'" Just as a lawyer's practice should be independent of undue influence from the government, his or her judgment should be free also from conflicts that might damage relations with a trusting client.

It is important to emphasize that not all conflicting interests give rise to a conflict of interest. A lawyer's role is based on certain tensions that are inherent to the profession. As one scholar has aptly noted, "The lawyer is, for example, supposed to be both 'a zealous advocate' and 'an officer of the court,' to perform a public service and to serve a private client, to be relatively neutral concerning the client's ends and yet scrupulously moral concerning the means employed to achieve those ends." A **zealous advocate** is one who pursues a client's interests with great diligence and care. If all of these tensions resulted in a conflict of interest, then the mere act of lawyering would be outlawed. Because this cannot be, it is only when these tensions impermissibly undermine a lawyer's professional obligations that a recognizable conflict of interest exists. Some have argued, moreover, that the term conflict of interest should be limited to circumstances where the lawyer actually has some control. Thus, conflicts that are neither caused nor curable by the lawyer tend to fall outside the scope of regulation.

### 1.3 Why Regulate Conflicts of Interest?

The rationale behind laws governing conflicts of interest is fairly straightforward: to ensure that lawyers fulfill their duties of loyalty and confidentiality to their clients. One treatise illustrates the rationale as follows:

**Conflict of Interest Laws: Rationale**  
**Except from Legal Ethics: The Lawyer's Deskbook on Professional Responsibility**

One of the lawyer's primary duties is to protect the client's secret or confidential information. This duty survives the client-lawyer relationship, and even applies to conversations with prospective clients. For example, if a lawyer simultaneously represents Client A and Client B (or now represents Client B and previously represented Client A), a conflict may develop because the lawyer may know secret information about Client A (the present, or former, client) and this information would be relevant, material, or useful to Client B, whom the lawyer is representing in a related case. If the lawyer does not reveal the information to B, the lawyer would be violating her duty of loyalty to B because she would not be representing B vigorously. But, if the lawyer does reveal this information to B, then lawyer would be violating her duty to A to keep A's secrets. In the example just given, the conflict derives from the fact that the lawyer either divulges the secrets of one client (or a former client), or fails to zealously represent the other client.

However, conflicts of interest can arise even if there is no breach of client secrets. For example, assume that a lawyer for Client D is paid by the insurer of Client D. The insurer instructs the lawyer (who is defending D, the insured, in a civil responsibility suit) not to dispute the

Plaintiff's claim that D's civil liability conduct was really intentional. If the court believes that D acted intentionally, the insurer will not be liable because the policy does not cover intentional harms. If the lawyer follows the insurer's instructions, she will be violating her duty of loyalty to D, her client.

In terms of their complexity, you can think of conflicting interest as three different types; those that should be clearly prohibited because ethically and logically it does impair a lawyer's professional decisions; those that should be allowed because they are not serious; and finally, those that fall in between the previous two types, sometimes known as a gray area. The latter are the most complicated and require more scrutiny when analyzing and resolving them.

### Discussion Questions

1. Do you agree that "not all conflicting interests give rise to a conflict of interest"? Why or why not?
2. What do you think of the rationale for laws governing conflicts of interest set forth above? Can you think of any other reasons why the state should regulate conflicts of interest in the Afghan legal profession?
3. What are some of the reasons conflicts of interest arise in the legal profession?

In practice, some big law firms in other jurisdictions hire lawyers with expertise on conflicts of interest whose sole responsibility is to spot conflicts of interest and advise how they can be avoided. However, in the case of smaller firms and individual lawyers, it is an important skill for any lawyer to know how to identify conflicts of interest. Representing a client when a conflict of interest exists would cause legal and business harms to lawyers and their business. The legal consequence of violating the rules for conflicts of interest could be disciplinary action, a malpractice lawsuit, or even revocation of the lawyer's ability to practice law. Likewise, the business repercussions could include losing a client or the client's trust, and a lawyer's professional reputation could be negatively affected.

Also note that Article 445 of the Penal Code discussed in the previous chapter is still applicable in some cases where conflict of interest rules are breached. As discussed earlier, there is usually a direct relation between one's duty of confidentiality and one's duty to avoid a conflict of interest. In other words, a lawyer should often avoid a conflict of interest when representing his clients because such conflicting interests could jeopardize the confidential information of another client. If violating a conflict of interest also leads to a breach of confidentiality, a lawyer could be held criminally liable as well. Other provisions of the Penal Code, such as those prohibiting Officers of Public Services from taking bribes, may also apply.

Therefore, most lawyers check for any potential conflict of interest before accepting a case. They do the same when delegating legal work to others by first affirming that no conflict of interest exists between another lawyer and their clients' interests. The goal of such endeavors is to avoid conflicts of interest in the first place. Once detecting a conflict, lawyers try to analyze what type

of conflict it is and if the conflict could be legally resolved. Most lawyers know the importance of resolving conflicts as quickly and cleanly as possible.

### **Problem**

You plan to apply for a bar license as soon as you graduate and decide to work with a lawyer to better prepare for the practice. The lawyer you work with asks you to assist him on a commercial case. During a meeting with the client, you notice the lawyer suggests to the client that he should not settle the case through arbitration. Instead, he recommends that the client sue the other party in court.

After the meeting, you ask the lawyer if he really thinks that a lawsuit is better for that particular case instead of arbitration, considering that litigation will take time and could be expensive. You also explain that, in your opinion, the client is unlikely to win the case. The lawyer confirms your points but says he would have to close his business if all cases were resolved so easily.

1. What problems do you see in the attitude and thoughts of the lawyer?
2. Do you think there is a conflict of interest in this case? What is the interest that may have affected the attorney's sound and ethical decision-making?
3. Why is regulating conflicts of interest important? What would have happened if conflicts of interest were not regulated at all?
4. Why do you think some lawyers want to violate conflict of interest rules?

## **2. TYPES OF CONFLICTS OF INTEREST<sup>1</sup>**

Although a consensus definition of conflict of interest has been difficult to achieve, legal ethics scholars have generally observed five different types of conflicts. Each of these will be discussed below.

### **Reading Focus**

As you read onward, think about whether there are other categories of conflicts of interest that are not discussed. Think also about whether certain conflicts transcend a single category and whether distilling this complicated subject matter into separate categories is worthwhile.

#### **2.1 Simultaneous Representation**

The first, and perhaps best-known, conflict of interest type involves simultaneous legal representation. In the context of legal ethics, simultaneous representation does not merely occur

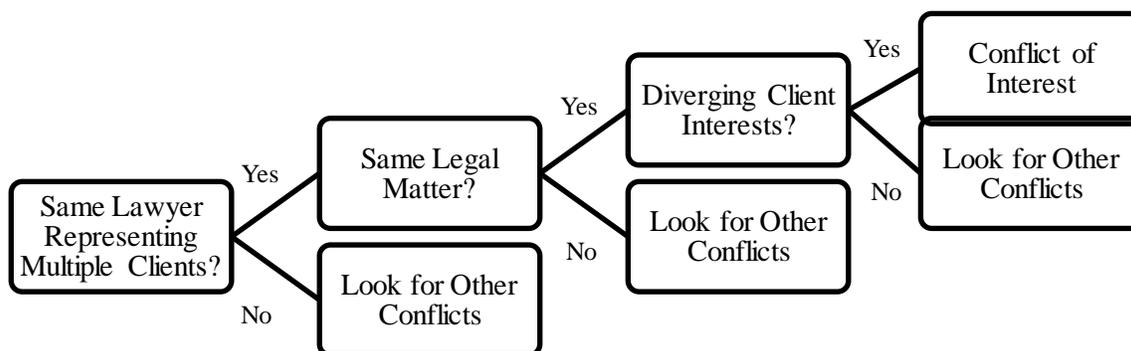
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<sup>1</sup> This section draws heavily on DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 337-66 (1994).

when a lawyer represents multiple clients at the same time. Such a definition would be overly broad and would capture too many attorney relationships that are perfectly acceptable. Rather, **simultaneous representation** is where a single lawyer represents multiple clients with diverging interests in the same matter.

This definition can be broken down into four important components. First, the same lawyer must be acting as counsel. Second, there must be more than one client whom the lawyer is representing. Third, the clients must have diverging interests. And fourth, the representation must be taking place at the same time with respect to the same legal matter. When all four of these criteria are present, an impermissible conflict of interest almost always exists. If, for example, the same lawyer represented multiple clients in the same matter, but each client shared the same interest, then the likelihood of a conflict of interest would be dramatically reduced. As a result, determining whether and to what extent clients have diverging interests (or the likelihood that diverging interests may develop in the future) is critical.

### Simultaneous Representation: Finding a Conflict of Interest



The primary concern about simultaneous representation is that one or more of the clients will have their interests inadequately represented. In agency law and ethics terms, a lawyer’s duty of loyalty to his client is undivided. A lawyer must be loyal to his client and cannot divide his loyalty between his client and the opposing party. As discussed above, lawyers owe a duty to represent the best interests of each of their clients. Where a lawyer is unable to do so because two clients in the same matter have conflicting interests, he or she should resign as counsel to one or both of the parties.

Despite these concerns, there are some benefits to representing multiples clients in the same matter. First, joint representation often reduces costs and saves time for both the lawyer and clients. Second, the clients themselves may prefer to be represented jointly by the same attorney. Generally in such cases, clients will often consent to concurrent representation by waiving any right to receiving separate counsel. In Afghanistan, it is not clear whether or not a client can consent to waive conflicts. Some will argue that a client cannot consent to a conflict of interest in Afghanistan because the representation is prohibited by applicable law. The counter argument could be that the law also respects and values a client’s freedom and instructs lawyers to do so as well. Article 39 of AIBA Code of Conduct, for instance, states that “an advocate shall be duty bound to respect the freedom of his/her client.” However, even if waiver is permissible, lawyers

must ensure that such waiver is based on **informed consent**. Determining whether a client has provided (or is capable of providing) informed consent depends on a number of factors, including the nature of the client's interests, the completeness of a lawyer's disclosure, the client's capacity to understand the disadvantages of joint representation, and his or her ability to exercise independent judgment.

**Problem**  
**Simultaneous Representation**

From an ethical standpoint, do the following scenarios pose impermissible conflicts of interest? Why or why not? Also, think about what other facts you would want to know before making your decision.

1. Farooq and his wife Badriya ask Nadeem, a lawyer, if he would represent each of them in a real estate matter with the local bank. The couple has separate bank accounts.
2. Hamed was driving a car through the streets of Kabul when he collided with Saabir, a wealthy businessman who was crossing the street on foot. However, Hamed did not own the car. The car belonged to his brother, Majid. After requiring hospital care for his injuries, Saabir sued Hamed and Majid for money damages as a result of the traffic accident. Because the two brothers did not have much money, they hired the same lawyer to defend them at trial.
3. Two members of a criminal gang, Saleem and Faheem, are accused of assaulting a policeman outside of a Kabul restaurant. Both gang members deny any involvement. The gang has strict rules about solidarity that forbid its members from incriminating others in the group. Kamaal, an inexperienced defense lawyer, has been assigned to the case. In a meeting with both men, Saleem, the younger of the two, demands that Kamaal represent them both at trial, citing the gang's policy of solidarity. After the meeting, the elder Faheem pulls Kamaal aside and offers to pay Kamaal a considerable amount if Kamaal wins Faheem's acquittal, regardless of what happens to Saleem. Faheem says the elder gang members do not like Saleem and would not be sorry to see him in jail.
4. Sakhi, a solo practitioner, is one of only three lawyers in a Samangan province. Sakhi is presently defending client Samad in a criminal action for assault and battery. This morning, the Samangani Gas Company, one of Sakhi's regular clients, asks Sakhi to sue Samad to recover 100,000 Afghani that is past due on Samad's gasoline and grocery account. Would it be proper for Sakhi to represent the Samangani Gas Company in the overdue account case?

The issue of simultaneous representation carries special significance in the context of criminal defense, especially since criminal defendants have a constitutional right to legal counsel. Article 31 of the Constitution reads: "In criminal cases, the state shall appoint a defense attorney for the indigent." In reality, however, indigent defendants in Afghanistan often go unrepresented in criminal proceedings. Criminal defendants also have the right to a fair and transparent trial, and joint representation can sometimes unduly impair those rights. If, for example, one of the criminal defendants is in a position of power relative to the other, the more powerful one's

interests may often prevail with the lawyer who represents them both. In this scenario, the fair trial rights of the less powerful defendant will have been compromised by simultaneous representation.

In practice there are few cases of clients complaining to the AIBA about advocates violating conflict of interest rules. On one occasion, a client of an attorney complained to the AIBA about the attorney's misconduct. The case arose because the first attorney agreed to represent a client who happened to live outside Afghanistan and needed urgent and professional representation. It took months and the attorney made little progress. One day the client saw his attorney secretly talking to the defendant. The client immediately terminated the attorney's contract and informed the AIBA of the problem. The client stated that the advocate was secretly meeting with the opposing party and had possibly divulged the client's confidential information. The client then contacted another advocate to represent him.

## 2.2 Successive Representation

The second major conflict of interest type involves successive or sequential representation. **Successive representation** is a conflict of interest that arises when the same lawyer represents a current client against a former client in a related legal matter.

As discussed in Part 1.3 above, the rationale behind conflict of interest laws rests on concerns for loyalty and confidentiality in the lawyer-client relationship. With successive representation, however, only the confidentiality concern is usually implicated because a lawyer's obligation of loyalty to a client typically ends when representation ceases. Prohibiting attorneys from accepting all cases adverse to the interests of former clients would unduly inhibit their ability to develop a practice in a particular specialty or geographic area, where certain companies or individuals are frequent participants in litigation. By contrast, a lawyer's duty of confidentiality to clients persists even after legal representation has ended. As such, a lawyer's former clients are entitled to the same confidence protection as his or her current clients. To avoid misuse of client confidences, lawyers should generally refrain from representation that is adverse to the interests of a former client if the two matters are substantially related. The reasoning behind this rule is that former clients should be entitled to the presumption that the confidential information they provided to a former lawyer will not be improperly used against them in a related future proceeding. Determining what qualifies as "substantially related," however, is no easy task.

### **Problem** **Successive Representation**

From an ethical standpoint, do the following scenarios pose impermissible conflicts of interest? Why or why not? Also, think about what other facts you would want to know before making your decision.

1. Adeeb, an attorney in Kabul, has represented several banks over the years. However, he resigned all representation of these banks a year ago when he changed law offices. Adeeb still practices law in Kabul, but he now plans to defend a debtor in a collection matter. He no

longer has any banking clients, and the new collection suit is a matter unrelated to his previous employment as counsel to the banks.

2. Suppose that Karim is a lawyer at Law Firm #1, which represents Rahmatullah Industries in a suit against the Zahir Corporation. Karim himself was not involved in any representation of Rahmatullah Industries, and he has not acquired any secret or confidential information from them that is relevant to the suit against the Zahir Corporation. Now suppose that Karim leaves Firm #1 and joins Law Firm #2, which represents Zahir. At the new firm, however, Karim becomes personally involved in representing Zahir in litigation against Rahmatullah.
3. Hadia, while representing a former corporate client, learns about the client's attitudes towards negotiation and settlement and its method of doing business, though none of this information was strictly confidential. One year after she stops representing this client, she is approached by one of its competitors wanting her representation in a suit against her former client. Hadia's knowledge of her former client would be beneficial in her representation of the new client.

### 2.3 Positional Conflicts

A third conflict of interest type is commonly known as a positional conflict. **Positional conflicts** arise when a single lawyer represents a client whose legal position could adversely affect another client in a factually unrelated matter.

Oftentimes, this type of conflict of interest involves a lawyer who argues on one side of an issue when representing one client, and then switches to the other side of the issue when representing another client. As a general matter, positional conflicts are not unethical so long as the matters in which the attorney takes opposing sides are unrelated and the action of representing both sides of the issue does not reveal client confidences or compromise the lawyer's independent professional judgment. For example, it is not uncommon for a lawyer to argue on behalf of one client that a piece of evidence should be admissible at trial, and then sometime later to argue on behalf of a different client that a similar piece of evidence should be excluded from trial. If there are credible arguments to be made, the same lawyer may make them on both sides of an issue. Many attorneys, however, try and avoid positional conflicts where feasible because it may make some clients uncomfortable and certain judges may find the practice somewhat unprofessional.

#### **Problem Positional Conflicts**

From an ethical standpoint, does the following scenario pose impermissible conflicts of interest? Why or why not? Also, think about what other facts you would want to know before making your decision.

1. Ilaaha and Inaara have a private law practice together, but they typically represent different clients. They do not usually discuss the identities of clients with each other. For years, Ilaaha has represented an energy company in Afghanistan. Inaara, who has not been practicing as

long, is approached one day by an environmental organization and frequent opponent of the energy company in lawsuits. The environmental organization would like Inaara to represent them in a lawsuit against the Ministry of Energy and Water. The president of the energy company reads in the newspaper that Inaara has agreed to represent the environmental organization. Outraged that Ilaaha's law partner had become the lawyer for its longtime opponent, the energy company threatens to fire Ilaaha if she does not convince Inaara to drop the environmental group as a client.

## 2.4 Lawyer-Client Conflicts

Some of the most controversial conflicts of interest fall into the fourth category, which involves conflicts between the interests of the lawyer and his or her client. Generally speaking, a **lawyer-client conflict** arises where the client's interests conflict with the attorney's own financial, familial, or other personal interests.

Unlike some of the previous conflicts discussed, a lawyer whose financial or personal interest conflicts with the interest of his or her client should almost always stop representing that client, even if the client consents or the lawyer believes he or she can separate his or her own interests from those of the client. It can be almost impossible to discern *ex post* (afterwards) whether a lawyer was able to keep his or her own interests from influencing the nature of the legal representation provided to the client. Considering the best interest of the client, the prudent decision is for the lawyer to refuse representation in such a scenario.

### Problem Lawyer-Client Conflicts

From an ethical standpoint, do the following scenarios pose impermissible conflicts of interest? Why or why not? Also, think about what other facts you would want to know before making your decision.

1. Nabil's son owns a 25 percent interest in a restaurant. His client, however, was a customer at the restaurant and suffered severe food poisoning. The client has asked Nabil to file suit against the restaurant for money damages. Nabil's son's interest as an investor in the restaurant would likely be adversely affected by a judgment in favor of the client.
2. Elina has worked at Law Firm #1 for five years. For the last two of those years, she has worked on a case on behalf of Omira against a telecommunications company represented by Law Firm #2. Feeling financial strain after her mother fell ill, Elina decides to explore the job market to see if any firms in town would pay her more money. Elina emailed five other law firms including Law Firm #2, to determine if they had any openings at a higher salary. Law Firm #2 had wanted to hire Elina for several years and took the opportunity to lure her away from its big rival, Law Firm #1. The head of Law Firm #2 wrote back to Elina and informed her that they had an opening with higher pay which she could accept without even interviewing. Elina has yet to make a decision, but while she waits, she continues to represent Omira in litigation against the telecom.

3. Baseer is a new criminal defense lawyer. His first client is an indigent man accused of cheating on his taxes and then lying to government investigators. Baseer knows that all indigents accused of crimes deserve representation under Article 31 of the Constitution, but he is also a devout Muslim. Baseer believes that he has a religious obligation not to support deceivers. Now Baseer feels a tension between his professional obligations and his religious convictions.

### Problem

You represent Ali in a case against ABC Accounting. Nasir, who is also a good friend, is representing ABC. You are at lunch together and you tell him about all the difficulties you are having sorting out your income tax this year. Nasir tells you to contact Khatera who is working with ABC. You ask if that is a problem, given the fact you are representing Ali against ABC in the current case. He tells you it is not a problem because the accountant is not participating in the case in any way. Nasir also asks you not to say anything to anyone.

1. What should you do?
2. Has Nasir responded to the situation appropriately?
3. Do you have a duty to report to anyone if you decide to contact Khatera?

## 2.5 Vicarious Conflicts

The final major conflict of interest type encompasses what are known as vicarious conflicts. The term vicarious is a Latin word meaning performed, exercised, received, or suffered in place of another. A **vicarious conflict** exists when a lawyer is representing a client in a legal matter and another member of the lawyer's firm or office has a recognized conflict of interest with that same client.

A lawyer generally may not represent a client if one of his or her colleagues at a law office has an impermissible conflict of interest with that client. The rule becomes relaxed, however, when former law colleagues are at issue. Accordingly, a lawyer can usually represent a client with whom a former law partner had a conflict of interest unless the present matter is substantially related to the one in which the former colleague represented the client and there is a risk of confidential information being revealed.

Vicarious conflicts can be particularly acute in the context of government service because lawyers may go in and out of government employment. This phenomenon of lawyers going back and forth between private practice and government service is known as the “**revolving door.**” Government service can be a great way for a lawyer to gain insight into the goals and methods of the state, and it can promote an atmosphere of regulatory compliance. But critics of the “revolving door” suggest the practice leads to high turnover and low morale in government service depending on the disparity between public and private sector salaries. In addition, critics argue that the constant shuffling of lawyers in and out of government service erodes public confidence by giving the impression of constant side-switching. But as long as clear, intelligible

rules are devised to govern the relationship between private and public sector legal employment, the revolving door can be tremendously beneficial to the legal profession.

As you learned in Chapter 2, historically the majority of practicing lawyers in Afghanistan have been sole practitioners. Afghanistan has never had a history of big or medium law firms. Perhaps that is why the rules related to ethical duties of lawyers as colleagues in a big organization are not addressed in detail by Afghanistan's current ethical sources.

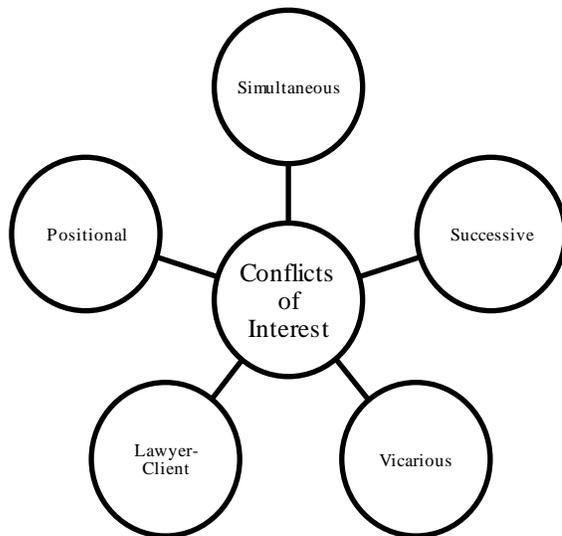
### **Problem 5-6: Vicarious Conflicts**

From an ethical standpoint, do the following scenarios pose impermissible conflicts of interest? Why or why not? Also, think about what other facts you would want to know before making your decision.

1. Ahmad and Babrak are employed in the corporate legal office of Rahmatullah Industries. A government agency is investigating Rahmatullah and is considering whether to initiate criminal charges against the company, some of its employees, or both. The established practice of the agency is not to charge a corporation for offenses committed by corporate employees if the corporation can demonstrate that it actively sought to discourage the offense in question. Such a demonstration would, however, significantly increase the likelihood that an employee would be charged with the offense. Majeed is an employee at Rahmatullah Industries, and he was once represented by Babrak prior to Babrak's employment at Rahmatullah but while Majeed had already begun working there. Additionally, Babrak used to advise Majeed on conduct that is now the subject of the government investigation.
2. For years, Temur worked in the Attorney General's Office. During his time there, he was involved with many investigations of high-profile banks accused of money laundering in support of illegal armed groups. Temur directed a few successful prosecutions that led to prison time for a couple of the banks' leaders. But not all of the prosecutions succeeded, and Temur stepped down from his post in the government. Two years later, while Temur was in private practice, multiple corporations approached him about suing the banks that were unsuccessfully prosecuted. The corporations alleged that after these banks evaded punishment, they had continued to steal money from their customers, including the corporations. Temur, who has an penchant for revenge, jumped at the opportunity and agreed to represent the corporations in their civil suits.
3. Latif recently joined the district prosecutor's office. Previously, he had a short stint representing indigent criminal defendants after law school. The district prosecutor now wants to bring charges against Walid, who happens to be one of the defendants that Latif represented before being hired at the prosecutor's office. Walid complains that his case cannot be tried by any prosecutor in that office so long as Latif, his former lawyer, continues to work there.

Now that the major conflict of interest types have been discussed, this chapter turns its focus to the actual laws and regulations governing conflicts of interest in the Afghan legal profession. So far you learned about general classifications of conflicts of interest. In the next section, we will

touch on actual ethical and legal sources to explain how these sources deal with ethical issues. As you read from the Advocates' Law, the AIBA Code of Conduct, and other relevant sources, see in what ways these classifications are similar or different from classifications of conflict of interest in the Afghan sources.



### 3. GOVERNING CONFLICTS OF INTEREST IN AFGHANISTAN

There are many different instruments that comprise the legal regime governing conflicts of interest for Afghan lawyers. Many of these are based in statute, but some are rooted in regulations and others in AIBA directives. Many of these instruments will be familiar from Chapters 2 and 3, so this part will focus exclusively on the portions dealing with conflicts of interest in the legal profession.

#### 3.1 Rules for Advocates

The most authoritative rules governing legal conflicts of interest in Afghanistan are found in the country's statutes. These rules represent not only the judgment of Afghan lawyers as to what does or does not constitute a conflict of interest, but also the deliberations of the National Assembly, many of whose members are not lawyers. As a result, the statutory regime creates a baseline of acceptable conduct. It is up to the Attorney General's Office (in the case of government prosecutors) and the AIBA (in the case of private attorneys) to expand upon that baseline and provide greater detail through regulations.

##### 3.1.1 Advocates' Law

As discussed in Chapter 3, the Advocates' Law was enacted in 2007 "to regulate the rights and duties as well as other responsibilities of advocates." Importantly, the Advocates' Law applies only to defense attorneys and civil attorneys, not to prosecutors or other civil servant government lawyers. Many of the law's provisions governing conflicts of interest do not actually use the term

“conflict of interest,” nor do they explicitly refer to the issue in many cases. Rather, much of the statute speaks directly about restrictions on the practice of law, many of which are based on the premise that conflicts of interest should be avoided where possible. Article 7 exemplifies this custom.

### **Advocates’ Law**

#### **Article 7: Restrictions to Practice Law**

The following persons are not entitled to practice law as an advocate:

- (1) Judges, prosecutors, military officers, police and national security officers, civil servants and municipality’s employees, and members of the national assembly, as well as members of national, provincial and district councils, so long as they are employed as such, except lecturers of the Faculties of Law and Sharia (with the consent of the University) and legal aid providers who may practice as advocates.

\* \* \* (material omitted)

Article 7(1) forbids judges, members of the National Assembly, and local government representatives from serving as advocates under the meaning of the statute. Why does this prohibition exist? In addition to the reasons you learn about in the previous chapter, one interpretation would be that the statute’s drafters did not want members of the judicial or legislative branches serving as advocates in Afghan courts lest their positions within their respective branches of government create a conflict of interest that might undermine their faithful practice of law. Note as well that the law only imposes this prohibition on the above persons “so long as they are employed as such.”

### **Discussion Questions**

1. In addition to reasons for prohibition under Article 7(1) that you learned about in Chapter 5, do you agree that a concern over possible conflicts of interest is the basis for Article 7(1)’s proscription?
2. What is the significance of the phrase “so long as they are employed as such”? What does this phrase suggest about the intent of the drafters?
3. Do conflicts of interest go away as soon as one is no longer employed in a certain profession? Would it have been better for the law’s drafters to also forbid *former* judges and prosecutors from serving as advocates?

Article 13 details the duties of advocates who practice law in Afghanistan. The fifth duty enumerated in this Article most directly concerns conflicts of interest in the legal profession.

### **Advocates’ Law**

#### **Article 13: Duties of Advocates**

\* \* \* (material omitted)

(5) To refrain from providing any kind of legal assistance to competing parties in the case.

\* \* \* (material omitted)

Article 13(5) is a fairly sweeping affirmation of the principle that conflicts of interest should generally not be tolerated in Afghanistan's legal profession. This provision forbids "any" legal assistance to "competing parties" in a given legal matter.

### Discussion Questions

1. What counts as "legal assistance"? How broad should this term be construed? Think of what types of conduct should or should not be included.
2. Who count as "competing parties"? Must they be on opposite sides of the litigation? Must they be parties in the *same* case? What about competing parties in related cases?
3. Could co-plaintiffs or co-defendants ever have "competing" interests even though they are technically on the same side of a case? If so, would this provision forbid providing legal assistance to both? Or should this provision be construed more narrowly? If so, how and why?

Articles 22, 23, and 24 of the Advocates' Law provide more restrictions on legal representation in Afghanistan.

### Advocates' Law

#### Article 22: Restrictions on Representation

- (1) After suspension, resignation from, or conclusion of a case, an advocate shall not provide legal counsel, legal representation, or act as witness for *any competing party in the same case*.
- (2) When defending or giving written advice in a case, an advocate shall not serve as a witness in the same case.

#### Article 23: No Rights to Work as an Advocate in Some Courts

If an advocate or his/her spouse has blood or an in-law relationship (up to one third removed) with any judge of a court, he/she shall not work as an advocate in a case before that judge.

#### Article 24: No Rights to Work as an Advocate in Some Cases

An advocate shall not take a case, for which he/she has previously served as a judge, prosecutor, investigator, arbitrator or technical expert.

With its reference to “any competing party in the same case,” Article 22 is the most directly on point of these three Articles with regard to conflicts of interest. By forbidding an advocate from providing legal counsel or representation to a competing party in the same case following the advocate’s termination of prior representation, Article 22 focuses primarily on the issue of successive representation discussed in Part 2.2 above. Importantly, Article 22 will apply to any lawyer who has formed an attorney-client relationship even if such relationship is quickly terminated, ended, or if the advocate resigns from his position. Part 2 of this Article also prohibits lawyers to serve as a witness in the same case if they have only provided a legal opinion and not actually defended the case. This covers written legal advice, a common practice among lawyers to write their professional opinion about a specific matter without necessarily representing a client.

Articles 23 and 24, by contrast, appear to focus more on potential lawyer-client conflicts discussed in Part 2.4 above, such as familial relationships and prior professional history. Speaking of family relationships, other sources regulating the professional conducts of prosecutors and judges as well as the Advocates’ Law and the AIBA Code of Conduct do consider familial relationship under certain conditions to be an example of a conflict of interest. As you will learn later, a judge and a prosecutor are not allowed to serve in their professional capacities if they have a familial relationship with one party of a case. These professionals are also not allowed to work in their professional capacities if they have already served in a particular case in the past, whether in a different or identical role.

For instance, a lawyer is not allowed to represent a client if the lawyer has already served as a judge for the same case. Likewise, a judge is also not allowed to hear a case if the judge previously represented one of the parties as a defense lawyer.

### Discussion Questions

1. Article 22 appears to be limited to successive representation by the same lawyer “in the same case” only. As detailed in Part 2.2 above, successive representation is forbidden by the same lawyer in “related legal matters.” What accounts for the difference in terminology here? Why is the proscription in Article 22 narrower? Should it be?
2. Suppose Adeeb represents two men in a lawsuit against a negligent driver: the driver of a truck hit by the negligent driver and the truck’s owner. The truck’s driver was injured in the car crash and is seeking money to compensate for his injuries. The truck’s owner was not in the car while the crash occurred, but is seeking money for a new truck. Adeeb decides that he does not have enough time to represent both men in the lawsuit, so he resigns from representing the truck’s owner and now only represents the truck’s driver. Under Article 22(1), can Adeeb do so? Even though they are on the same side, do the truck’s owner and its driver have “competing” interests? If so, does this fact necessarily make them “competing part[ies]” under the meaning of Article 22(1)? Could Adeeb quit representing both plaintiffs at the same time that his law partner, Fahar, begins to represent the negligent driver defendant?

3. Should Article 23 ever be subject to waiver if all sides agree that the lawyer's familial relationship to the judge is immaterial to the case's outcome? What happens if one of the lawyers does not realize that he or she is related to a judge until after the case has been decided? Should the losing side be able to have the case reheard in front of a new judge? Does it matter whether the related attorney was on the side that won or lost?

Chapter 5 of the Advocates' Law contains the statute's miscellaneous provisions, including Article 30, which governs the funding sources for what was at the time the prospective association of advocates and is now the AIBA.

### **Advocates' Law**

#### **Article 30: Funding Sources for the Advocates' Association**

The Association may raise funds through any of the following:

1. Membership fees.
2. License fees.
3. Donations by individuals and charity organizations.
4. Sale of publications.
5. Financial support by the government.
6. Fees for research and training programs.
7. Financial support by international organizations.
8. Movable and real assets.

As mentioned earlier, goals of conflict of interest are overarching and could cover a variety of objectives such as protecting the interests of a client, prohibiting corruption in the legal profession, preserving credibility of the profession, and maintaining trust between a lawyer and his client. The goal of Article 30 of the Advocates' Law, however, seems to be ensuring that the organization remains independent and does not involve any corrupt activities.

### **Discussion Questions**

1. What is the purpose of listing all of these permissible sources of funding for the Advocates' Association? Is it your reading of Article 30 that all other funding sources are prohibited?
2. You noticed that due to a lack of defense lawyers in Afghanistan, the ethical sources had some flexibility with regards to some ethical duties of lawyers, including the duty of competence. Do you think that, for the same reasons conflict of interest are interpreted narrowly, not all conflicts should be considered as conflicts of interest?

Note also that as a social organization, the AIBA is regulated by the Law on Social Organizations. This law prohibits founders and managers of a social organization to be involved in a conflict of interest. Article 15 of this Law prohibits founders of any social organization to include any provision in the organization's by-laws that would allow transfer of the organization's properties to those founders, family members, or heirs if the organization dissolved. Article 16 of the Law further requires that all sources of funding of a social

organization be transparent and public, and that assets of an organization be used only towards achieving the organization's objectives.

In addition to the statutory requirements concerning legal conflicts of interest, the AIBA has issued more specific guidelines on the subject. As discussed previously in Chapter 2, the AIBA is an independent professional organization of registered lawyers. The AIBA's chief mission is to promote and protect the rule of law by regulating how, where, and by whom law is practiced in Afghanistan. The directives issued by the AIBA—found in the group's Code of Conduct and By-Laws—are not “laws” per se, but they have binding effect on the AIBA's membership to the extent that they are enforced.

### 3.1.2 AIBA Code of Conduct

The AIBA Code of Conduct, adopted in 2009, refers explicitly to conflicts of interest in the chapter concerning client relations. Article 13(1) forbids an advocate from providing legal advice where doing so would conflict with his or her interests or those of his or her law partners. Interestingly, however, this provision does not mention the interests of the advocate's client. In addition, Article 13(2) reinforces the sanctity of the duty of confidentiality, which should never be broken for the sake of pecuniary gain. Finally, Article 13(3) appears to be a catch-all provision that requires an advocate to cease legal representation when his or her professional independence might be at risk.

#### AIBA Code of Conduct

##### Conflicts of Interests

##### Article 13:

- (1) An advocate shall not provide legal advice to his client in a manner to *conflict* between his/her interests.
- (2) In the course of representing his/her client, the advocate is duty bound to not provide the confidentialities of his/her client to the second party or other person in return for goods, services or benefits.
- (3) An advocate shall be duty bound to end the advocacy in case there is the conflict of interests set out in this article, or his/her confidence might be at risk or his/her independence might be compromised.

#### Discussion Questions

1. Does Article 13 cover all five conflict of interest types described in Part 2?
2. Can a lawyer's independence be compromised where no conflict of interest exists? If so, does the last phrase of Article 13(3) actually broaden the scope of prohibited conduct?

Also read below Articles 14 and 21 of the AIBA Code of Conduct. In Article 14, lawyers are prohibited from serving as witnesses in cases in which they represent a client. This prohibition, which is repeatedly addressed in many statutory laws (particularly in procedural laws) is to prohibit conflicts of interest. For instance, imagine that your old client, Farid, wants to sue Hamad for stealing his new car and selling it to someone in another province. He tells you that he does not have any evidence but is sure that Hamad stole his car. You remember that you have seen Farid's car and that a few days ago you saw Hamad driving Farid's car just outside of town. If you agree to be Farid's lawyer, you can serve as a witness. And if you decide to serve as a witness, you cannot become Farid's lawyer.

Though not specifically, Article 21 also prohibits any action by a lawyer that leads to unlawful gains. This broad provision could apply in many instances and relates to different duties, including the duty of confidentiality and the prohibition of conflicts of interest. Under this Article, a lawyer cannot use the information he has about his client, or the fact that he has certain lawful power to represent his client in court, in a way that leads to gaining illegal privileges at cost of harming his client. Similar arguments could be made based on Article 15 of the AIBA Code of Conduct, which requires lawyers to base their professional decisions solely on provisions of law and their professional experience. It prohibits lawyers from taking into consideration other issues, such as familial relationship, material interest, or any other incentive that would impair a lawyer's professional decisions.

### **AIBA Code of Conduct**

#### **Prohibitions on testifying**

**Article 14:** An advocate shall not give testimony or advice as a witness in a case that he/she is defending.

#### **Misuse of Privileges**

**Article 21:** An advocate shall not misuse his/her position/authority to gain unlawful privileges.

### **Problem**

You are assigned to represent a client who is known to be a member of XYZ gang, which is known to kidnap children. A few years ago, the fifteen-year-old daughter of your close friend was kidnapped. The police at that time announced that XYZ gang was probably responsible for the kidnapping. Your friend paid the group's ransom, and the child was freed. But the child developed a psychological illness. She is now fearful of living alone and needs assistance from her parents.

Since that incident, your friend has been an active member of an association fighting against kidnapers. Even though you are not a member of that association, your friend asks you to work as a volunteer for the association. On a few occasions, you volunteered to take part in some campaigns organized by that association.

1. What, as an attorney, do you do in this situation?

2. Would you consider revealing your friend's daughter's history to your client or the court?
3. Would you disqualify yourself in this case? If so, what reasons, if any, would you state?

Likewise, Article 25 of the AIBA Code of Conduct requires all lawyers to preserve the honor of the legal profession. The requirement is so broad that it could cover many unethical behaviors, including a violation of a code of conduct which, as mentioned earlier, could affect a lawyer's reputation in particular and the legal profession in general. Playing on both sides is prohibited by cultural norms, as well. Consider, for instance, the Afghan proverb "banging on the nail and the horseshoe at the same time," which advises against assisting both sides of a fight at the same time. While lawyers can assist disputing parties to reach a friendly settlement outside of the courtroom through **alternative dispute resolution** methods, such as mediation and arbitration, they are not allowed to assist and represent both parties in litigation. Also, when a conflict occurs between the interests of colleagues and clients, Article 29 of the AIBA Code of Conduct requires advocates to protect the client's interests over the interests of their colleagues. Article 29 of AIBA Code of Conduct does not directly mention conflicts of interest. However, when reading it in conjunction with other provisions regarding the duty of confidentiality, one could infer that the AIBA Code of Conduct has taken other measures that would prohibit vicarious conflicts of interest.

#### **AIBA Code of Conduct**

##### **To Uphold the Honour of the Profession**

**Article 25:** An advocate shall be duty bound to preserve the honor of the profession while providing legal advice and advocacy.

##### **Relationships with other advocates**

**Article 29:** An advocate shall maintain a good relationship with fellow advocates, however he/she shall not place their interests above those of their clients.

#### **3.1.3 AIBA By-Laws**

Finally, the AIBA's By-Laws do not refer directly or indirectly to legal conflicts of interest. Article 32(6), however, instructs AIBA members to follow the rules contained in the Advocates' Law and AIBA Code of Conduct, including those governing conflicts of interest.

#### **AIBA By-Laws**

##### **Article 32: Obligations of Members**

Members of the Association have the following obligations:

\* \* \* (material omitted)

(6) To observe the provisions of the Advocates' Law, these By-Laws and the Code of Conduct.

\*\*\* (material omitted)

Finally like other duties covered in the previous chapters, it seems that defining conflict of interest could be influenced by social and cultural realities in Afghanistan. There might be rare instances where a lawyer's reputation or family honor conflicts with the interest of his client. Imagine an attorney who is representing his sister in a criminal case. Considering cultural issues in Afghanistan, there might be instances where defending this client in a certain way, such as encouraging the client to plead guilty, could be good for the client but harmful for the reputation of her advocate brother. Thus, an advocate in this situation may prefer to protect his personal and family reputation rather than protecting the legal interests of his client sister.

### **Problem**

Wahal is the only living child of Ramin, age 83. Ramin's main asset is a 51% partnership interest in Kashana, Ltd., a wealthy real estate company that owns and operates residential development land in Kabul.

Wahal is married to attorney Badria. One of Badria's regular clients, Fawad, asks Badria to represent him in negotiating the sale of 3,000 hectares of property to Kashana Ltd. which is represented by its own lawyer in the matter. May Badria represent Fawad?

### **Discussion Questions**

Do you see any type of conflict of interest in the following scenarios? If yes, what type of conflict of interest?

1. When a family relationship between attorney and clients exists.
2. When an attorney wants to serve as a witness in favor or against a client.
3. When an attorney is representing a client against his family member.
4. When an advocate is representing both a defendant and a witness who is testifying in the same case.

See pages 38-45 of Global Rights Manual

You know now that the AIBA Code of Conduct does not provide an explanatory guideline on different possible conflicts of interest for complex scenarios, nor does it specify whether such conflicts are waivable. However, note that the AIBA can use its authorities to fill these gaps. In accordance with Article 8 of the AIBA By-Laws, the AIBA can amend the current ethical standards, make more regulatory codes of conduct, or suggest amendments to the Advocates' Law for the purposes of better defining and regulating conflicts of interest.

### **3.1.4 Other Statutory Rules Governing Advocates**

You learned in the previous chapters that, even before the enactment of the Advocates' Law and the establishment of the AIBA, the Civil Code contained some broad provisions about attorney-client agreements. In the Civil Code, lawyering or representation is categorized as an attorney for

sale, attorney for purchase, and attorney of dispute. The Civil Code contains provisions that prohibit the existence of conflicts of interest mostly in representations other than representation in a lawsuit (i.e. defense lawyering). The Code, however, does not define the term conflicts of interest. As you read the below provisions, think what type of conflict of interest the CCA refers to:

### **The Civil Code of Afghanistan**

**Article 1565:** Agent may not utilize property of his client for his own personal interest, otherwise, he shall be obligated to compensate for the utilization amount since the date of utilization.

**Article 1584:** Agent for purchase may not sell his own property to client.

**Article 1588:** Agent for sale may not sell the object that he is assigned to sell to persons whose testimonies to his interest are not permissible, unless consideration is more than its price.

**Article 1590:** Agent may not purchase for himself the object for sale of which he is assigned, even if client has explicitly stated it.

Likewise, the Criminal Procedure Code of Afghanistan allows lawyers to represent more than one party in a case so long as there does not exist a conflict of interest between the represented clients. This is an additional prohibition based on any conflict of interest between lawyer and his clients. For instance, if a lawyer is jointly representing two persons accused of a crime and such joint representation would benefit one of the accused persons and harm the other, such representation is not allowed.

### **Criminal Procedure Code (2014)**

#### **Right to Defense**

#### **Article 9:**

1. Suspected and accused persons can personally or by a defense lawyer defend himself/herself in any stage of prosecution.
2. Suspect and accused can have up to three defense lawyers at the same time.
3. A defense lawyer can defend one or more suspect or accused person in a specific case provided that no conflict of interests exists among those suspected and accused persons.

### **3.2 Rules for Prosecutors**

Since the conduct of government prosecutors is not covered by the Advocates' Law, we must look to the Code of Conduct and Professional Standards for Prosecutors of the Attorney General's Office for the Islamic Republic of Afghanistan (Prosecutors' Code) for guidance (adopted in August 2009). The main provision governing conflicts of interest for prosecutors can be found in Article 8.

### **Prosecutors' Code of Afghanistan**

## **Article 8**

Prosecutors shall perform their duties without fear, favor or prejudice, and will commit to the following:

\* \* \* (material omitted)

- (f) Consider disqualifying themselves from participation in any prosecution in which there is a conflict of interest. A conflict of interest will arise when the prosecutor is unable to act impartially. Such prosecutions and/or conflict of interest include, but are not limited to, instances where the prosecutor has an actual bias or prejudice concerning an accused, complainant or witness, or the prosecutor, or a member of the prosecutor's family, or friend, has an interest in the outcome of a prosecution.
- (g) In all the above instances, the prosecutor has an obligation to bring to the attention of the appropriate senior prosecutor or supervisor any circumstances which might reasonably lead a member of the public or party having an interest in a case to perceive any conflict of interest or lack of impartiality on the part of the prosecutor.

### **Discussion Questions**

1. Should government prosecutors abide by an even higher standard of integrity than private attorneys? Would it make more sense to have one uniform definition of conflicts of interest for advocates, prosecutors, and judges in Afghanistan?
2. Article 8(f) defines a conflict of interest as anything that precludes government prosecutors from acting impartially. Is this definition more or less broad than the definition introduced at the start of the chapter? Do you agree with this definition?
3. Article 8(f) expressly mentions personal biases and familial interests as possible conflicts of interest. Does this provision contemplate additional conflicts as well? If so, does it encompass all of the conflict of interest types discussed in Part 2? Should the Prosecutors' Code list as many covered conflict of interest types as possible? Or is the phrase "include, but are not limited to" sufficient?

According to Article 11, the Chief Prosecutor is responsible for deciding whether a particular prosecutor should remain on a case despite the existence of a conflict of interest. Notably, Article 11 covers not just actual conflicts of interest, but potential conflicts of interest as well.

### **Prosecutors' Code**

#### **Article 11:**

In compliance with Article 8(f) of this code, any prosecutor who becomes aware of a conflict of interest in the conduct of any investigation or prosecution, or any other circumstance that could raise doubts over the prosecutor's impartiality or the public perception of impartiality, must

report such at the earliest possible opportunity to the Chief Prosecutor (Rais). A decision shall then be taken by the Chief Prosecutor as to whether that prosecutor retains conduct of the case.

Article 19 restricts the types of organizations to which prosecutors may belong and the business ventures with which prosecutors may associate. The main impetus for Article 19 appears to be a concern over possible financial conflicts of interest that may arise as a result of these prohibited associations.

#### **Prosecutors' Code**

##### **Article 19:**

Prosecutors shall not belong to any organizations that bring into question the values and impartiality that inform the prosecutor's professional conduct, and that would undermine public confidence in impartial and fair prosecutions. Nor shall a prosecutor be engaged in business, commercial or social activities that adversely affect the prosecutor's impartiality, interfere with the proper performance of prosecutorial duties, exploit the position of the prosecutor or involve the prosecutor in activities likely to lead to a conflict of interest.

Article 27 governs conflicts of interest at the level of the High Council of the Attorney General's Office, which provides internal review of disciplinary measures taken against government prosecutors accused of misconduct. Article 27, however, is more akin to a conflict of interest rule for judges, rather than lawyers.

#### **Prosecutors' Code**

##### **Article 27:**

There is a right of appeal against the decision of the Dispute Settlement Commission of the Attorney General's Office to the High Council of the Attorney General's Office. The High Council of the Attorney General's Office shall sit as a tribunal of three or five, comprising eligible officers of the Attorney General's Office (Rais level or above). Members of the High Council of the Attorney General's Office shall have no conflict of interest through prior involvement in a matter before the tribunal, through involvement in the matter of the complaint or through involvement in previous adjudication of the complaint.

\* \* \* (material omitted)

#### **Discussion Questions**

1. After reading Article 11, do you think that Article 8(f) covers potential conflicts of interest? Or does Article 8(f) only concern actual conflicts?
2. Article 11 vests with the Chief Prosecutor the authority to decide whether a conflict of interest requires reassignment of the prosecuting attorney. Should this authority be vested with someone from outside of the prosecutor's office?

3. Both Article 8(g) and Article 19 allude to the perception of the general public. Why is the public's perception important to government prosecution? What is the relationship between public confidence and the laws governing conflicts of interest?

Finally, the Criminal Procedure Code prohibits a prosecutor from prosecuting any case in which he would have an interest in the outcome that impairs his professional decisions. The Code explains the situations that the prosecutor is prohibited from serving in his capacity as prosecutor.

### **Criminal Procedure Code (2014)**

#### **Prohibition on prosecutors to attend prosecutions**

**Article 14:** A prosecutor cannot attend [as a prosecutor] prosecution proceedings in the following scenarios:

1. When the crime was committed against him/her or one of his/her relatives.
2. When the accused is a relative of the prosecutor.
3. When the prosecutor has previously served in the same case as a defense lawyer, judge, legal advisor to either of the parties, expert, or witness.

### **3.3 Rules for Judges**

Although not the focus of this chapter, the laws and regulations governing judicial conflicts of interest merit brief mention here because of the interrelation between lawyers and the courts in which they practice.

The Criminal Procedure Code does not explicitly mention judicial conflicts of interest. However, much like certain parts of the Advocates' Law, concerns over conflicts of interest probably informed the drafting of Article 16, which describes when a judge is not authorized to hear a case.

### **Criminal Procedure Code (2014)**

#### **Prohibition on Judges to Adjudicate Criminal Cases:**

##### **Article 16:**

(1) A judge shall not have authority to adjudicate criminal cases in the any of the following scenarios:

1. When crime was committed against the judge or one of his/her relatives<sup>2</sup>.
2. When the accused is a relative of the judge.

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<sup>2</sup> Article 4(17) of the Criminal Procedure Code (2014) defines relatives as "wife, husband, and their respective lineal descendants and ascendants for the other spouse up to second level, father, mother and their ascendants up to second level, brother, sister, uncles, aunts, and their descendants up to second level."

3. When the judge has served in the same case as a judicial police, prosecutor, defense lawyer, legal advisor to either of the parties, expert, or witness, or has made a decision about the case prior to hearing all appropriate evidence and/or testimony.
4. In any other situation that the law requires.

\* \* \* (material omitted)

The Regulation on Judicial Conduct for Judges, which was adopted by the Supreme Court in 2007, contains even more specific prescriptions governing judicial conduct, with a particular focus on conduct affecting the impartiality of judges.

### **Regulation on Judicial Conduct**

#### **Article 21:**

A judge shall not accept any gifts or favors that put him or her under suspicion of graft or corruption, and shall not let any of his or her relatives or dependents receive such gifts or favors in regard to his or her position as a judge. A judge, or any of his or her court staff, or family members, shall not request or accept any gift, reward, loan, or favor in relation to anything done or to be done in connection with the performance of judicial duties. A judge shall not use his or her judicial position to enhance his or her personal interests, the interests of his or her family members, or any other person.

### **Discussion Questions**

1. How do the rules governing judicial conflicts of interest in Afghanistan differ from those regulating conflicts of interest in the legal profession? Should the rules concerning judicial conflicts of interest be more stringent to ensure that judges are impartial?
2. Should Afghan judges be barred categorically from hearing cases where they previously represented one of the parties involved? Or should they be barred from hearing such cases only when they became privy to confidential information? If a categorical ban is improper in your view, what is unique about the context of criminal defense requiring a special rule of abstention under Article 11?

## **4. CONCLUSION**

This chapter has sought to use real-world examples to help explain the complexity surrounding conflicts of interest and how these conflicts are regulated in Afghanistan. By discussing the meaning of conflicts of interest, outlining five different categories of conflicts, and analyzing the applicable laws of Afghanistan, this chapter aimed to improve your ability to identify conflicts of interest, especially those that may run afoul of existing law.

As a practicing lawyer, it is important to always be on the lookout for both actual and potential conflicts of interest. Oftentimes, lawyers are in the best position to discern whether a conflict of

interest has arisen. It becomes your duty as an advocate to assess the situation as objectively as possible, communicate the situation to your superiors (if possible), and then make a decision regarding whether to abstain from further representation. While many laws and regulations exist concerning conflicts of interest in Afghanistan, ultimately the onus is on lawyers to police themselves and their colleagues. This obligation, like so many others in the legal profession, is one worth embracing. For your duties of loyalty and confidentiality to your clients demand as much.

In the next chapter you will learn what happens if conflict of interest rules and other ethical duties are breached.

## CHAPTER 7: LEGAL MALPRACTICE AND DISCIPLINARY ACTION

### 1. INTRODUCTION

This Chapter will cover the concepts of legal malpractice and disciplinary action. These two concepts are the legal consequences of breaching the duties and rules that you learned about in the previous chapters. Thus, this Chapter will end our discussion on the professional responsibility of lawyers. Both concepts are used in the Advocates' Law and the AIBA's Code of Conduct and are two official pillars upholding the integrity of the legal profession. They are concepts that an advocate must know and understand well to enjoy a successful career that lives up to the ethical standards of the legal profession.

#### 1.1. What Is Legal Malpractice And Disciplinary Action?

As explained above, the two key concepts in this Chapter are Legal Malpractice and Disciplinary Actions. **Legal malpractice** refers to an advocate's civil liability for professional misconduct that is imposed by a court in a lawsuit with a client or possibly another injured party. **Disciplinary action** refers to the community of legal practitioners' process for penalizing fellow lawyers' professional misconduct. This sanctioning process (or process of deciding penalties) can be carried out through the mechanisms specified in the Advocates' Code and the AIBA Code of Conduct. Courts can review sanctions imposed on an advocate. Courts can also impose disciplinary action independent of the AIBA.

While complaining to the AIBA about a lawyer's unethical conduct seems straightforward, bringing a successful malpractice lawsuit against a lawyer is more difficult. As you will learn later, the area of law governing professional malpractice is not yet well developed in Afghanistan. There are almost no examples of legal malpractice lawsuits in Afghanistan and it is not common to sue professionals for doing their job improperly. Furthermore, both a lack of legal awareness and the time-consuming, expensive nature of litigation make people less likely to sue their lawyers for malpractice. The procedural and legal requirements for suing a lawyer for malpractice are very complex. Such complexity significantly increases the cost and length of legal malpractice lawsuits. Additionally, the idea of a legal profession based on an independent bar association is relatively young in Afghanistan. Therefore, more rules and regulations are needed to regulate this area. Finally, even in the most developed countries, the number of legal malpractice suits is very low and only a very small of number of those cases is successful.

#### 1.2. Legal Malpractice Versus Disciplinary Action

Legal malpractice lawsuits and disciplinary actions differ in fundamental ways. First, a legal malpractice lawsuit takes place before a civil court, not in a disciplinary hearing. Second, in a malpractice lawsuit, the advocate's opponent is an injured party, not a disciplinary authority. Third, the main purpose of a malpractice lawsuit is to provide compensation for the injured party, not to punish an advocate or to protect the public. Finally, the source of legal malpractice is normally substantive law such as the Civil Code, while the source of disciplinary actions is the AIBA Code of Conduct.

That having been said, there are some similarities between disciplinary sanctions and legal malpractice: mainly, both can be imposed on a lawyer who violates certain ethical rules and standards. When there are grounds for legal malpractice, there are probably grounds for disciplinary action too. For example, a lawyer can be disciplined for the violation of ethical duties *and* the lawyer may need to pay for the loss caused by the breach of legal duties. Recall the overlap between ethical duties and legal duties. Keep in mind, however, that just because an advocate is punished with disciplinary action does not mean that the advocate is always liable for compensation. Because of the substantial overlap between these two types of sanctions, this Chapter covers both disciplinary actions and malpractice at the same time.

Disciplinary actions serve three main functions: protection of the public at large; protection of the administration of justice; and protection of public confidence in the legal profession. It is possible to think about disciplinary actions within the framework of traditional justifications for legal punishment:

- (1) **Incapacitation** – Positively preventing future offensive conduct by removing an offender from the area in which the offense can be committed.
- (2) **Rehabilitation** – Using education or treatment to bring an offender into an improved state of mind and pattern of behavior so they can lead a useful and productive life rather than allowing the repetition of an offense.
- (3) **Deterrence** – Punishment so that an offender (and those considering similar offenses) are convinced that it is not in their interest to risk the consequences of a bad act.

### **Problem**

Awrang is upset with the advocate he hired to take his neighbor to court for an unpaid business debt. Though Awrang feels his claim is clear, his advocate has taken little action to investigate the issues involved. The court will hear the case in a few days and Awrang is worried that he will lose. What actions might he take?

It is a week later and Awrang has lost his case in court. He feels his advocate was not prepared and did a poor job. What actions are now available to him? What is his incentive to take any action?

### **Discussion Questions**

1. Whose interests does malpractice law protect? Whose interests do disciplinary actions protect?
2. Only a client may bring a malpractice claim, but a complaint against an advocate about the performance of his/her duties may be brought by “a client or *other relevant authorities*.” What accounts for the difference? Do you think anyone should be able to submit a complaint against an advocate to the AIBA? If not anyone, who should be excluded and why?

## 2. LEGAL MALPRACTICE

We will first explain legal malpractice, the legal sources of malpractice claims, and the legal elements of malpractice claims. Next, we will cover the role of the AIBA Code of Conduct in malpractice suits against lawyers. Then we will discuss how insurance can be used as a legal means to protect lawyers from malpractice suits and to benefit their clients. Finally, we will turn to disciplinary actions before the AIBA.

Article 28 is the only provision in the Advocates' Law that refers to legal malpractice and recognizes the right to be compensated because of such malpractice. Read it carefully and think about the list of offenses in Paragraph 1, and the grounds for malpractice in Paragraph 2. How do the paragraphs relate to one another?

### **Advocates' Law**

#### **Article 28 – Request for Compensation of Damages**

- (1) An advocate shall be held responsible if he/she abuses his/her power, neglects his/her affairs, or he/she causes a loss to his/her clients.
- (2) If a client suffers due to a deliberate action of the advocate, the client may request compensation through court.

As you can see above, this Article has divided harm into two categories. First, there is unintentional harm caused by a lawyer, such as through negligence. Second, there is intentional harm. Article 28 broadly defines the actions for which an advocate may be liable. Therefore, both unintentional and intentional harms can be grounds for liability.

Notice the subtle differences in the two paragraphs. The first paragraph of Article 28 only says that the advocate is “responsible” while the second paragraph says that a client “may request compensation.” Furthermore, the first paragraph is silent about how a lawyer will be held responsible, while the second part explicitly mentions courts. As a result, some may argue that compensation is only legally required when an advocate causes harm intentionally. Because the law is silent about compensation for unintentional harm, there is some doubt as to whether the legislature meant to refer to the lawyer’s criminal, civil, or ethical responsibility for unintentional harm. Remember that being ethically, or even criminally, responsible does not mean a person has to compensate the harm they caused. An argument could be made that legislatures often protect certain professionals such as doctors and lawyers by only holding these professionals liable for certain gross professional errors and intentional acts. These measures are intended to provide some legal protections for professionals who may make honest, human mistakes, so that no one is discouraged from going into a profession out of the fear that they will be sued.

Despite these arguments, it seems likely that lawyers can be held liable for unintentional acts. First, the title of the Article (which covers both paragraphs) specifically refers to compensation. Second, being “responsible” usually means being liable for compensation. Finally, this Article must be read in light of the overall rules that govern private legal relationships in the legal

system of Afghanistan. The rules of Civil Responsibility are designed to ensure that most harms are compensated. It does not make sense for lawyers to get away with not doing their work properly. Thus, it makes more sense to read this Article as allowing compensation for both a lawyer's intentional and a lawyer's unintentional acts that cause harm to a client. Hopefully, in the future more detailed statutes will elaborate on such rules.

## 2.1. Legal Malpractice Theories

There are three primary theories for a malpractice claim against an advocate. Each theory provides the basis for a duty between an advocate and the client. Those pleading a malpractice claim may choose multiple theories in order to maximize the chance of success. However, when proving one theory is easier than proving the others, it might be better to emphasize only that one theory. Therefore, the decision of which theory to select for malpractice should be made on a case-by-case basis.

As you read these three theories, it may be helpful to recall a Hadith from the Prophet (PBUH) that emphasizes honesty and trustworthiness:

“There are three signs of a hypocrite – whenever he speaks, he lies; whenever he makes a promise, he breaks it; and whenever he is trusted, he betrays his trust.”

The first theory is intentional malpractice based on an intentional or negligent act against the client while serving as an advocate. For example, an advocate can be sued for misuse of funds, abuse of process, or misrepresentation to a client.

The second theory is a breach of the contractual duty between an advocate and a client. The relationship between a client and an advocate should involve the creation of a contract specifying the nature of ongoing duties between each party according to the Advocates' Law Article 12. Such contracts often cover issues like expected payment for specific services, duration of the relationship, and expected responsibilities as the relationship progresses. Note that in order to prove contractual breach, a client must prove: 1) that a valid contract existed, 2) that the lawyer breached the contract, 3) that the client suffered harm, and 4) that the harm was caused by the lawyer's breach of contract. Respectively, the legal terms for these elements are: 1) contractual relationship, 2) breach, 3) harm, and 4) causation. In extra-contractual or civil responsibility claims, however, there is no need to prove a contractual relationship as most of the times there is no contract in a civil responsibility case. Instead, the client must prove: 1) that either the lawyer did something that they should not have done or that they did not do something that they should have done, 2) that the client suffered harm, and 3) that the harm was caused by the lawyer's action or inaction. These elements in a civil responsibility claims are known as: 1) fault, 2) harm, and 3) causation. We will explain each of these elements in detail later in this Chapter.

The third theory is breach of fiduciary duty. As you learned in previous chapters, **fiduciary duty** refers to the relationship of special trust and faith that exists between an advocate and a client. A fiduciary duty to a client extends to issues like keeping a client's confidences, looking out for a client's monetary and property interests, avoiding conflicts of interest, adequately informing the client of the case's progress, and following a client's instructions.

Note that fiduciary duty in Afghanistan is regulated under agency relationship in contract law. A fiduciary duty will not be formed if there is no contract. Therefore, legal malpractice based on violation of fiduciary duty is mostly governed by rules of contract law. In contracts, fiduciary duty is viewed as an obligation of one contracting party to another. In the ethical context, however, a fiduciary duty is the lawyer's ethical duty to a client and the breach of this ethical duty can result in disciplinary action.

Although not the subject of this course, certain serious breaches of malpractice law can result in a lawyer's criminal responsibility. For example, as you learned in the previous chapters, disclosing certain confidential information can lead to criminal liability. A prosecutor can file a criminal case against a lawyer who disclosed confidential information. As you will learn later, according to Article 27(4) of the AIBA Code of Conduct, if a case is criminal, the AIBA also *can* refer it to the attorney general's office. However, the AIBA does not have to report criminal misconducts based on this provision unless another law requires so.

### Discussion Questions

1. Look through the Advocates' Law. Can you identify specific articles that correspond to each of the three malpractice theories? Could some articles apply to advocates though more than one of these theories of malpractice?
2. The concept of a fiduciary duty is vital for advocates. Why is it so important? What other relationships enjoy the same level of trust as an advocate and a client?

#### 2.1.1. Civil Responsibility Lawsuits

The AIBA Code of Conduct and Advocates' Law do not provide guidelines about how a lawyer's liability can be proven or how compensation should be calculated. The Advocates Law simply states in Article 12(1) that, "The rights and obligations of an advocate and the client shall be determined by written contract between both parties in accordance with the relevant provisions provided by the Association's By-laws." Therefore, we have to refer to other statutory sources that explain general rules for liability and compensation. In private law in Afghanistan, the Civil Code is the primary statutory source of context.

Sometimes a malpractice case is simple, such as a lawyer accused of mishandling money that belonged to a client. Read the provision below from the CCA and think about what proof you need in order to convince a court that the lawyer should compensate you.

#### Civil Code of Afghanistan

**Article 1565:** Agent may not utilize property of his client for his own personal interest, otherwise, he shall be obligated to compensate for the utilization amount since the date of utilization.

If there are clear financial records, the client can probably prove the lawyer's liability and calculation of compensation is relatively straightforward (amount of money lost with interest).

Other times, however, the client wants compensation for the harms of losing a case as a result of the lawyer acting unprofessionally. This second type of malpractice lawsuit is more complicated. The case the lawyer lost for the client and the case the client brings against the lawyer will likely be closely connected to each other. In order to succeed in the latter case (the malpractice lawsuit), a client must prove that the first case (the original suit) failed because of the lawyer's malpractice.

When it comes to suing a lawyer for not winning a case, note that a lawyer does not have to win all cases. In fact, winning every case is probably impossible. Sometimes there will be strong evidence against a client and even if the lawyer does everything correctly, the client will still lose. Therefore, merely losing a case is not grounds for malpractice; the lawyer must have made a *significant* error or an *intentional* breach that *caused* the client to lose the case. The technical term for such an error or mistake is **fault**. Fault could be intentional or unintentional, such as negligence, reckless acts, or **omissions**. An omission is the failure to do something that one has a legal obligation to do.

For all of these reasons, in many jurisdictions legal malpractice is considered "a case within a case." A client suing his lawyer for malpractice must prove that the lawyer was at fault for the client losing the case and experiencing harm. This is a difficult requirement because not all faults lead to losing a case. For instance, imagine that a lawyer negligently forgot to introduce a witness, but the other party had such strong evidence that even if the witness had been introduced, the other party would have won the case. In this case, the lawyer's omission did not change the result. The fact that the client lost the case was not due to the lawyer's faulty action and so the lawyer cannot be held liable.



### Problem

Kamal is an advocate responsible for writing a contract for his client, Rastin, to buy a piece of land. To perform this duty he is given access to his client's bank account, which has a great deal

of money in it. While Kamal is negotiating for the land, his law office rent comes due and Kamal is unable to pay all the rent. Kamal uses money from Rastin's bank account to pay his rent, then one week later replaces the money before Rastin knows it is missing.

One month later, rent is due again and Kamal again cannot afford to pay. This time Kamal tells his law partner to access Rastin's bank account to pay the rent. However, Rastin notices the withdrawal before it is replaced. Rastin is very upset and Kamal quickly replaces the missing money. Rastin is considering a malpractice claim against Kamal.

Kamal has violated several provisions of the Advocates' Law and AIBA Code of Conduct. Can you identify some of the articles he has violated?

Has Rastin suffered "a loss" as required by Article 28 of the Advocates' Code for malpractice in the first instance? What about in the second?

In addition to the grounds described in the first paragraph of Article 28, a client could also prove that the advocate acted **culpably**, meaning that the advocate intended to cause a harm that is forbidden by law. From criminal law, recall the two culpable mental states: "purpose" and "knowledge." A person acts with purpose if that person takes an action with the desire for a specific outcome to occur. A person acts with knowledge if he knowingly assists another person in an action that is forbidden by law, even if he does not commit the illegal act himself.

If an advocate deliberately runs a red light and causes a traffic accident with another car, there certainly is a loss to the other driver, but the nexus between the deliberate action and the loss does not relate to the role of the advocate. Therefore a malpractice claim is not appropriate. However, the lawyer could still be sued as a person who caused harm to another.

### Comparative Law

In Ankara, Turkey, malpractice claims against advocates have been rejected when they were not related to the advocate's work. In one case a lawyer and a client engaged in a physical fight outside the courtroom after a case had ended. Both men were arrested. The client sued his advocate for malpractice stemming from the fight, along with hospital bills from assault. The court dismissed the malpractice claim, though the case for assault was allowed to proceed. The court eventually found in favor of the client and ordered the advocate to pay for his client's hospital bills.

Afghanistan does not have detailed legal malpractice regulations yet. One reason might be that there was no need for it in the past. Now that lawyers play more prominent roles, maybe it is the time for the Afghan parliament to enact new specialized laws for legal malpractice (as well as other forms of professional malpractice).

### Discussion Questions

1. What types of evidence do you think would prove that an advocate acted "deliberately?"

2. What kind of acts might qualify as “deliberate actions” causing a loss to a client? What acts might cause loss to a client that are not “deliberate actions?”
3. In Kamal’s case above, does it matter that he intended to replace the money from his client’s account?

### 2.1.2. Breach of Contractual Duty

You learned in the previous chapters that the legal relationship between lawyers and their clients is based on a contract. All contracts produce **obligations** for the contracting parties. When a person does not fulfill their obligation, that is considered **breach of contract** and the breaching party is usually liable.

Contract law experts distinguish between different types of obligations that various contracts produce. Some contracts produce obligations that will be considered performed so long as the person who has the obligation has used all possible means and tools to reasonably complete the obligation. This type of obligation is known as obligation of means. If the desired result is not achieved, but the person making the promise, also known as the promisor, used all possible means, the promisor is not liable. Most of the promises a surgeon or a lawyer makes are obligations of means. Other contracts have an obligation of result, a duty to achieve a pre-defined result. If the promisor does not achieve such result, the promisor will be held liable even if they tried all reasonable ways to achieve the result. Most sellers promising to deliver goods are contracting to provide an obligation of result. The seller is expected to deliver the good, or to compensate the buyer if she cannot deliver the goods. A lawyer does not, and also most of the times cannot, guarantee that your case will win. However, that does not mean a lawyer cannot be held liable if the lawyer causes harm to their client.

#### Problem

Hamasa has been serving as an advocate for Fardin for several weeks – preparing his paperwork for a criminal case, giving him legal advice about the case, and getting ready to represent him in court. The day of the court hearing comes, and Fardin does not appear to argue the case. Hamasa loses his case and must pay a large fine.

Fardin appears later that day and explains he was stuck in terrible traffic near Abdul Haq traffic circle. Though the case was lost, Fardin would still like to be paid for the long hours he put in to his legal work. Hamasa does not want to pay Fardin and, in fact, wants Fardin to pay the fine that he did not think he deserved. Who should pay whom? How much? Why?

Clients may assert breach of contract claims based on nonperformance of promises. Culpability is generally not an issue with respect to such claims because contract law cares little about why a breach of the contract occurred. Both intentional and unintentional breaches of a contract can lead to contractual liability. In some exceptional cases, however, an unforeseeable reason causing the breach could be an excuse for a party who fails to perform his obligation.

Every client-advocate relationship should begin with the negotiation and signing of a contract. According to Article 12(2), a copy of the contract shall be given to the advocate, the client, and the relevant court. The responsibility for specific actions by the advocate and by the client should be specified within the contract.

When making a contract, an advocate should take special care with all its provisions. The advocate is liable for any failure to perform up to the standards that are negotiated and courts tend not to be sympathetic to advocates' failures to abide by their own contracts.

### **Comparative Law**

In Turkey, an advocate was held responsible for a malpractice claim even though a fire had caused the destruction of the building where the legal documents involved in the case were held, leading to the loss of the case. The court found that responsibility for the failure to perform a contract most fairly rested on the side of the advocate in such cases. After all, the loss must fall on one of the parties and the lawyer did not perform the duty he had promised.

### **Discussion Questions**

1. Article 12 also states that the rights and obligations of the client shall be determined by written contract. What obligations do you think a client should promise, besides paying a reasonable fee? What can an advocate do if a client fails to perform their duties as written in the contract?
2. If you have an advocate-client contract available, take the time to review its provisions in class. Do you think it is a good idea for an advocate to have a general contract for legal services ready at all times? What would your general contract say?

### **2.1.3. Breach of Fiduciary Duty**

The final theory for suing a lawyer is for breach of fiduciary duty. You learned in the previous chapter that a lawyer's main job is to represent and remain loyal to the client. This job is not only an ethical duty, but is also a legal and contractual duty.

According to contract law, each contract produces main obligations and secondary obligations. The main obligations in a contract are those that define the contract. For instance, the main obligation in a sales contract is the exchange of goods or transfer of property ownership between two parties. The additional or secondary obligations are obligations that the parties explicitly or implicitly agree upon to achieve the primary obligation. For sales contracts, the additional obligations could be when the payment should be made, how and when the sold item should be delivered, warranty terms, and return policies. Arguably, the main obligation in the contract between a lawyer and a client is to lawfully assist a client in their case by using all legal means. Therefore, the fiduciary duty of a lawyer to his client is a primary component of the attorney-

client relationship. Any additional agreements – such as fees, timeline, and methods of communication – are secondary obligations in comparison to the main goal of the contract.

The CCA has clear rules about certain types of misuse of power or breach of fiduciary duty by lawyers. Article 1583 of the Code, for instance, prohibits a representative who is assigned to buy something for a lawyer to buy such item for himself or herself. Also Article 1584 does not allow attorneys to sell goods to the client because that would cause a conflict of interest. In other words, someone could be a seller or an agent for buying an item for a client, but he or she cannot be both at the same time. These examples show how the legal, contractual, and ethical rules, as well as custom, require a lawyer to act solely in the interest of the client. If a lawyer breaches these rules and as a result causes harm to the client, the client could pursue a legal malpractice lawsuit against the lawyer.

### Problems

Read these scenarios and discuss which theory or theories you would choose to use in a malpractice lawsuit against each lawyer:

1. Setara and her husband, Pazhman, discover that a valuable piece of land is for sale for a very low price. They meet with an advocate to write a contract to buy the land from its owner. After they tell the advocate about the land, the advocate tells Setara and Pazhman that he cannot help them. The advocate then goes and buys the land for himself and ends up making a great deal of money by doing so.
2. A lawyer drafts a contract for an international trade deal, but he does not have expertise about jurisdiction. A few months into the contract, there is a dispute, and the other party relies on the fact that the contract is silent about dispute resolution mechanisms to change jurisdiction to a country in the European Union. The client must pay for foreign lawyers and even though those lawyers do their best, the client still loses the case because the law in the E.U. is not favorable to the client. The client must pay damages to the other party.

Throughout the Advocates' Code, lawyers are given the responsibility to protect the client and the client's interest. Consider the words in the oath that one takes as an advocate.

### Advocates' Law

#### Article 16 – The Oath

“I swear in the name of God Almighty to execute my duty as an advocate with the utmost honesty and righteousness, and shall keep its confidentiality, respect and observe the holy religion of Islam, the Constitution and other legislation of the Islamic Republic of Afghanistan and *shall not betray my client.*” (emphasis added)

Consider also the statement of the Prophet (PBUH):

“Anyone who has been given charge of people, but does not live up to it with sincerity will not taste even the fragrance of Paradise.”

It is extremely important to understand when a fiduciary duty exists between an advocate and a client. The last section discussed Article 12 of the Advocates' Law and the use of contracts to define the relationship between an advocate and a client. But can a fiduciary relationship exist even before a contract is signed?

#### **Advocates' Law**

##### **Article 13 – Duties of an Advocate**

Advocates shall have the following duties:

(2) To practice advocacy with honesty and sincerity, respecting the dignity of all individuals.

#### **AIBA Code of Conduct**

##### **Article 25 – To Uphold the Honour of the Profession**

An advocate shall be duty bound to preserve the honour of the profession *while providing legal advice* and advocacy. (emphasis added)

Most legal systems hold that an advocate owes a fiduciary duty even to a non-client in three situations:

**(1) Prospective clients.** Suppose a prospective client shares important confidential information with an advocate before signing a contract with him/her to ensure that the advocate will not be engaging in a conflict of interest as set out in the AIBA Code of Conduct Article 13. If an advocate takes that information and uses it for personal gain or the gain of third party, an advocate will have breached the duty of care to the prospective client. Though a lawyer cannot be sued under contract rules for breaching contractual duties, all other statutory rules – including rules of the Penal Code on prohibition of disclosure of confidentialities and ethical rules for lawyers to preserve honor of the legal profession – may still apply.

**(2) Invited reliance.** An advocate owes a duty of care to a non-client if the advocate invites the non-client to rely on work the attorney does for a client, and if the non-client relies on that work. For example, an advocate can draw up a contract between two parties even if the client is only one of the parties. If the contract is found to be fraudulent because of the advocate's actions, then either party can hold him responsible for the losses they suffered from the attorney's faulty legal work.

**(3) Non-client is the intended beneficiary.** An advocate owes a duty of care to a non-client if the advocate knows that one of the client's primary reasons for getting the legal service is to benefit the non-client. Suppose an advocate is told to create a will for a man leaving his property to his children and instead the advocate drafts a will leaving the property to the advocate's friend. Then, the advocate has violated the fiduciary duty of care both to the man and to the man's children and is likely liable to all parties. Additionally, Article 1607 of the CCA prohibits a lawyer from terminating a contract that the lawyer could terminate otherwise if such

termination will affect rights and interest of a third party. The law requires the advocate to first obtain the consent of the **third party beneficiary** who has interest in the case.

### Discussion Questions

1. Did the advocate in the last problem owe Setara and Pazhman a fiduciary duty? If yes, did he violate it? If he did violate it, what do you think he owes them?
2. How can an advocate charge a client a fee for her legal work if she must not take financial advantage of her client? Look at Article 22 of the AIBA Code of Conduct and consider how to balance charging a fee with your responsibility to protect your clients and put their interests above your own.

## 2.2. Elements of Legal Malpractice Lawsuit

As mentioned earlier, in order to win a legal malpractice lawsuit, the plaintiff must select one or more theories and prove certain elements. These elements are: fault of the lawyer, harm caused to the client, and causation between the fault and harm. This Section describes these elements, noting the difference in the meaning of each element between contractual breach and civil responsibility claims. Since these elements are covered extensively by two other types of law – namely contracts and civil responsibility – we only describe the concepts very briefly here and leave advanced discussions to those courses.

### 2.2.1. Fault or Breach of Contract

Depending on which theory a client chooses to sue a lawyer for malpractice, the client must either prove that the lawyer was at fault or that the lawyer breached the contract. You already learned in Chapter 5 about the formation of an attorney-client relationship, so here we mainly focus on fault. **Fault** means doing something one should not do or not doing something one should do. In the context of private law, the term **obligation** is used to refer to those things a person is required to do or required not to do. Different sources or actions may create an obligation. For the purpose of our discussion, the two main sources are law and agreement of parties. For instance, if a law requires that a lawyer should not represent a client when the lawyer has a conflicting interest in the case, violating this rule means that the lawyer is at fault. Likewise, when lawyers are required by law to give back all of the client's documents at the end of the case and the lawyer does not, either intentionally or negligently, the lawyer is again at fault.

Agreements between two or more people can also create obligations, so long as the agreements are not against the law. If a lawyer agrees not to settle the case for any amount lower than what is specified by the client, the lawyer would be at fault if they settled at a lower amount. Similarly, if a lawyer agrees to communicate with his client in writing every week and the lawyer neglects to do so, then the lawyer would again be at fault.

In order to prove malpractice, a plaintiff client must first prove that the lawyer was at fault. If lawyers do everything as agreed or as the law requires them to do, then there is no malpractice

case. Note that the law does not require lawyers to be perfect or even to do an excellent job at all the times. The law merely defines certain minimum standards that are expected from lawyers because of their expertise, training, and experience.

The contracts section of the Civil Code suggests that professionals have a duty to act reasonably, that is, to follow the same standard of care that other professionals in the same profession follow. Therefore, in the legal profession a lawyer's conduct will be compared with the conduct of other lawyers. If it is proven that the lawyer accused of malpractice has not taken precautions or acted with reasonable care, then that lawyer has breached their duty. In addition to looking at other lawyers' practice, the court will also look at other applicable laws (such as the Advocates' Law), and may be influenced by AIBA standards.

Below are some of the mistakes lawyers reportedly do in other jurisdictions that have led to malpractice lawsuits and disciplinary actions. As you read about these mistakes, think about some of the mistakes lawyers may commit in Afghanistan.

### **Comparative Law**

One commentator lists the following as the common mistakes made by lawyers that lead to malpractice liability in the United States:

1. Ignoring conflict of interest.
2. Suing your former client for an unpaid fee.
3. Accepting any client and any matter that comes along without looking to see if you have the ability or expertise to take the case.
4. "Doing business" with your client.
5. Practicing outside your areas of expertise.
6. Ignoring a potential claim and representing yourself in a professional liability dispute.
7. Settling a matter without written authorization from your client.
8. Failing to communicate with your client.

#### **2.2.2. Harm**

The second element of malpractice is that the client must have experienced harm because of the intentional, negligent, reckless, or illegal act of the lawyer. There is no definition of harm in the statutory sources. It may seem simple to define harm, but legally, the concept is the subject of much debate. Harm clearly includes financial loss, but what about intangible harms like emotional distress? Such intangible harms are particularly controversial because compensation is so difficult to calculate.

There can only be compensation if there has been harm. The main goal of compensation is to restore the client to the position the client would have been in if the lawyer had not committed malpractice. For example, in a contractual context, the goal of compensation is to place the client in the position the client would have been in if the contract was fulfilled by the client. Suppose a lawyer misses a deadline, intentionally or negligently, but the court gives him another chance and thus the case is not negatively affected. Then the lawyer can argue that while the lawyer is at

fault for the missed deadline, the fault has not lead to any harm to the client and the lawyer should not be held liable. Therefore, there is no need for compensation. However, the lawyer might still face disciplinary actions because harm is not a requirement for imposing disciplinary actions.

### 2.2.3. Causation

In malpractice law the idea of causation is crucial to understand. It is also a complex concept to describe. Look again at Article 28 of the Advocates' Law on the second page of this chapter. The second paragraph states that the client's loss must be "due to" the deliberate actions of an advocate. While a deliberate action may have many effects, some effects are too unexpected or removed from an action to say that an effect is "due to" a certain action. Further, while many factors may influence the eventual outcome of a case, that does not mean that the outcome is "due to" all of those factors.

In a malpractice claim, a simple question to ask is: "Was the advocate's deliberate action a substantial factor in the loss to the client?" If there is another cause that is substantially responsible for the loss, then it becomes more difficult to conclude that the loss was "due to" the advocate's actions.

#### **Problem**

Fahran is upset. After negotiating with another businessman, Fahran spoke to his advocate, Parsa, about creating a contract to purchase a small shop in the Share Naw area in Kabul. Parsa drew up the contract and told both men to meet him at the shop to sign the documents. As they were getting ready to sign the contract, Fahran made a joke that offended the other businessman. The shop owner then refused to sell his shop to Fahran.

Fahran sued Parsa for malpractice stating that it was Parsa who suggested they all meet at the shop in Share Naw to sign instead of getting the signatures separately from each man. If Parsa had not suggested the meeting, Fahran claims, then he could not have made the joke and the shop and its profits would now belong to him. Fahran claims Parsa owes him the money he lost from the failed deal.

1. In the problem above, which action is the "substantial cause" of the loss of the deal for the shop's sale? Who is responsible for that action?

Parsa's action suggesting the meeting at the shop was deliberate, in that he did not make it accidentally. It was an intentional act. But was it deliberate in the sense of intentionally leading to the business contract's failure? Does this matter?

### **2.3. AIBA Code of Conduct and Malpractice**

An important aspect of malpractice law that is not yet settled is the relationship between the AIBA Code of Conduct and the Advocates' Law Article 28 provision allowing malpractice claims for a client's loss. As you learned in the earlier chapter, the **AIBA Code of Conduct** is not a law. But is a binding arrangement between members of the legal profession. All advocates

are legally required to be members of the AIBA and to perform their legal duties in accordance with AIBA rules. Unlike the Advocates' Law – which is a statute that was enacted by the Parliament of Afghanistan – the AIBA Code of Conduct is not a law. Therefore the Code of Conduct cannot create duties for individuals who are not members of the AIBA and also cannot regulate issues of contract and compensation in a broader sense. Furthermore, judges are only bound to apply laws to cases brought to them, so the Code of Conduct is not a binding source of law for judges deciding issues of compensation.

Courts can refer to the AIBA Code of Conduct as an arrangement between a group of professionals and supported by some statutory laws. For example, imagine a business created by individuals who signed an agreement together. Issues regarding governance, operation of the business, and accepting new partners in the business are decided based on the initial agreement. If a partner breaches an agreed rule and the case is brought to court, the court will look at the applicable laws as well as the initial agreement between business partners – also known as letter of association or by-law of the business – and any lawfully-made amendments made to such agreement later on. The AIBA and its by-laws (of which the Code of Conduct is one aspect) are also somewhat similar to that business and its initial agreement, except that the AIBA is a much more important entity than a simple business entity: it is an integral part of the judicial system in general and has been directly and indirectly supported by a number of legal and administrative sources.

As discussed earlier, other statutory laws – the most importance source of which is the Civil Code – explain compensation and liability for contractual breaches or civil wrongs. The AIBA Code of Conduct does not discuss compensation, but it is the primary source of description of a lawyer's ethical duties.

### **Comparative Law**

In the United States the American Bar Association Code states that:

[V]iolation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed for civil liability.

Other nations like Germany and France have bar associations with rules that create the presumption of legal liability when they are violated.

### **Advocates' Law**

#### **Article 13 – Duties of Advocates**

Advocates shall have the following duties:

[Materials omitted]

(16) To defend the code of conduct as provided for in the Association's By-Laws.

(17) To carry out other duties in accordance with the By-Law's of the Associations.

Article 13 would seem to give the AIBA Code of Conduct (which is part of the by-laws) the force of law. But Article 28 requires a deliberate act in order to commit malpractice. The AIBA Code of Conduct imposes certain **affirmative duties** (things one must do) and forbids certain actions (things one must not do). Some of the duties are very general and some are quite specific. Some are in tension with one another as discussed in previous chapters.

Afghan courts have not yet ruled as to whether the AIBA Code of Conduct is to be given the force of law in determining the liability of an advocate for malpractice. The courts of different nations have looked carefully at the issue of bar association rules and the issue of malpractice liability and have come to different conclusions. Part of this may be due to how effective bar associations are at ensuring that all advocates know and understand their nation's bar association by-laws. The AIBA is intended to govern all advocates in Afghanistan and all advocates must know the Code of Conduct.

### Discussion Questions

1. What force do you think the AIBA Code of Conduct should have? If you violate the Code and your client suffers a loss as a result, should you always be found responsible for the loss?
2. Do you think the Code actually *is* commonly known among all Afghan advocates? Is it reasonable to hold all advocates to the rules in the AIBA Code of Conduct?
3. Look again at Article 6 of the Advocate's Code. Is it possible to become an advocate without learning about the AIBA Code of Conduct?
4. Look at Article 8 (1) of the Code of Conduct. It imposes a duty to notify the client of the progress of a case in a timely manner. No portion of the Advocates' Law specifies this duty. If an advocate fails to inform a client of a case's progress and the client must pay a large fine because of their ignorance of the case, should the advocate be legally responsible to pay the fine automatically? Should the court consider why the client was not informed? Should that provision matter to a court at all?

### Problem

If the following cases are brought to you, how would you decide whether the wronged client has a malpractice lawsuit or not? Discuss the elements that you need to prove each case:

1. A client seeks advice from a lawyer about a payment she made to someone who denies receiving the payment. Without properly interviewing the client and asking if she has evidence to prove her claim, the lawyer suggest that repaying the amount makes more sense

because litigation will be more expensive. Later the client sues the lawyer for malpractice since the claim could be supported by testimony under oath.

2. An attorney provides incorrect advice to his client about the **statute of limitations**, telling the client that too much time has passed for the suit to be successful. As a result, the client does not initiate the lawsuit he had intended to file. Later on the client learns that his lawyer was wrong and he could have filed a lawsuit at the time he consulted with his lawyer. However, now he cannot start the case because the limitation period actually lapsed since the time he originally spoke with the lawyer.

## 2.4. Malpractice Insurance

Finally, **malpractice insurance** is an important aspect of malpractice lawsuits. The remedy for malpractice normally requires the lawyer to compensate the aggrieved client for their loss as a result of the lawyer's (in)actions. However, advocates often cannot make up the loss, especially if the losses are very large. This is a problem in legal systems around the world.

In many nations, large numbers of lawyers pay for insurance for malpractice claims against them. All the payments are pooled by an insurance company and when an advocate in the insurance pool is found liable for malpractice in court, the insurance company pays for the client's losses. Often, the insurance will also cover other charges associated with the case, such as lawyers for the lawyer who allegedly committed malpractice. These insurance policies are supposed to ensure that the client's losses are covered while protecting advocates from going out of business because of a huge malpractice award.

But insurance payouts can have limits and may be inadequate for the task of covering extremely large malpractice claims. Sometimes the policy will not cover claims where dishonesty or crime is the cause of the claim. Sometimes the insurance companies themselves are fraudulent.

As a result, there is debate among advocates in many countries as to whether insurance should be required for all advocates. Neither the Advocates' Law nor the AIBA requires an advocate to carry insurance.

Finally, there are a few other ways to ensure that clients receive compensation when they experience losses as a result of lawyer malpractice. For example, the government could compensate the harms. There could be a fund for these types of lawsuits, managed by the bar association and paid for with yearly fees from bar association lawyers. However, malpractice insurance is the most commonly used option in many jurisdictions. Currently in Afghanistan, however, there are not malpractice insurance providers. Yet provisions in the CCA, Commercial Code, and Insurance Law of Afghanistan do not prohibit such type of insurance. If the number of malpractice suits grew in Afghanistan, it is possible that Afghan insurance companies would offer malpractice insurance too.

## DISCUSSION QUESTIONS

1. The legal system in Afghanistan is still being formed. The Advocates' Law and the AIBA are only a few years old. The AIBA Code of Conduct is even newer. Many problems exist throughout the nation and the legal system is famous for its inefficiencies. In the system as it currently exists, does litigating malpractice claims make any sense?
2. How does having malpractice insurance affect the purposes of disciplinary actions and sanctions for legal malpractice?
3. If you were a client who had suffered a loss because of the deliberate action of an advocate, would you want to pursue a malpractice claim? Why or why not?

### 3. DISCIPLINARY ACTION

**Disciplinary action** refers to a formal process of addressing professionally-related behavior that does not meet expected standards. Disciplinary action is different from the criminal law concept of punishment in many ways. First, punishment applies to criminal behavior, while disciplinary action applies to violations of codes of conducts and other work-related standards. Also, the main goal of disciplinary action is to help a person who has violated such standards to understand his misconduct and try to avoid it in the future. Punishments have multiple goals and traditionally the focus of such goals has been on past criminal conducts. However, the focus of disciplinary actions is correcting future acts. In fact, most disciplinary procedures for professionals such as doctors, judges, prosecutors, and lawyers are almost the same. Disciplinary action starts with a simple notice (usually a notice of reprimand or warning), and could end up with removal of the accused professional's license, preventing the professional from practicing in that profession.

The AIBA can only impose disciplinary action, not punishment because the Constitution of Afghanistan, the Law on Jurisdiction and Authority of Courts in Afghanistan, Criminal Procedure Code, and the Penal Code, only authorize courts to hear criminal cases and impose punishments.

The AIBA Code of Conduct refers to complaints made by clients or other officials about a lawyer's unethical conduct. The Code of Conduct (and the AIBA's broader by-laws) is not very clear about whether unethical behavior in areas outside of the lawyer's professional work can be reviewed and sanctioned by the AIBA. For example, assume that a lawyer cheated when he was a student or when obtaining his driving license. In some jurisdictions, the bar association has the power to look into this type of conduct and impose disciplinary action on the lawyer. Do you think it is good for the legal profession to empower the AIBA with such power?

#### Problem

Wali is a nice, fair, and intelligent attorney. Unfortunately, he is lazy about meeting court deadlines. The plaintiff in one of Wali's cases has to leave the country soon. This client wants Wali to regularly follow up with the court and the defendant to figure out the quickest legal way to finalize the case. However, Wali once again misses an important deadline.

1. What is Wali's ethical responsibility?

2. What could his client do?
3. Do you see any malpractice here?

### 3.1. Complaint

#### Problem

A prominent poster near Chaman-e-Hozori advertises the services of an advocate and proclaims “500 Afghani to Draw Up Any Contract – No Questions Asked.” Nahid needs a contract to purchase a piece of land for a garden next to her house. Nahid and her husband visit the advocate who listens to their needs and then tells them that their contract will cost 700 Afghani because it is related to a purchase of land.

Nahid is surprised and tells the advocate about the poster she saw near Chaman-e-Hozori. The advocate laughs and says that the advertisement is just to get clients to come to his office, but that obviously it would be ridiculous to guarantee a price before hearing about the contract.

As they leave, without agreeing to use this advocate’s services, Nahid and her husband discuss how deceptive the poster they saw was and how upsetting it is that advocates can get away with such blatant falsehoods. They wonder what can be done.

#### Advocates’ Law

##### Article 27 – Hearing Complaints Filed Against an Advocate

(1) Any complaint against an advocate either proposed by a client or other relevant authorities in relation to the fulfillment and performance of the advocate’s duties and responsibilities shall be submitted to the Association of Advocates.

Article 27 is the starting point for the disciplinary system in the Advocates’ Law. A client whose lawyer has acted unethically could complain to the AIBA about such conduct. Not only do clients know more than anyone else about their attorneys’ misconduct, but as people who have potentially been harmed, they are entitled to complain about their lawyers’ unethical behavior. In addition to clients, other organizations and institutions involved in a legal case can also report unethical behavior to the AIBA. According to Article 391 of the Civil Procedure Code, courts are required to report to the AIBA when a lawyer does not show up in proceedings and has no valid excuse. Furthermore, those who hire a lawyer to provide legal services to third parties is involved, such as when the Ministry of Justice or Independent Legal Aid Board provides an attorney for a criminal defendant, they may also report a lawyer’s misconduct to the AIBA. Finally, as you learned earlier, a lawyer’s colleagues are also bound to report fellow attorneys’ violations of the Code of Conduct.

#### AIBA Code of Conduct

##### Article 36:

(1) Any individual may submit his/her complaints in writing regarding the behavior of an advocate to an advocates' employee to the Monitoring Board.

(2) The Secretary of the Monitoring Board shall notify the advocate against whom the complaint has been filed within two weeks.

The Advocates' Law makes it clear that the AIBA disciplinary system is designed to be used by members of the general public as well as attorneys. The basis for complaints is quite broad; article 27 states that "any complaint . . . in relation to the fulfillment and performance of an advocate's duties and responsibilities" may be considered for disciplinary action.

The only restriction placed on a complaint in the AIBA Code of Conduct is that the complaint must be submitted in writing. As you may know, in Afghanistan all official requests, complaints, and petitions should be submitted in written, standard formats. Having something in writing helps to record complaints, to process the paperwork without the problems that might arise from an oral complaint. However, complainants are not limited to their written report. Other evidence, such as photos, printed material, testimony from third parties, and even video and audio evidence are accepted along with the written complaint.

The Monitoring Board is required to inform an advocate of a complaint, regardless of what actions the Monitoring Board chooses to take. Beyond that notice, however, the law does not guarantee that every complaint will result in disciplinary action or even that it will be investigated.

### **Discussion Questions**

1. Why must a complaint be made in writing? Will this deter some clients from making complaints? Who will have the most difficult time making written complaints?
2. What purpose does it serve to notify an advocate of a complaint that is found to be without merit? If you found out that a complaint had been filed against you, would it alter your behavior? How?
3. Look through the AIBA Code of Conduct. Which provisions do you think would be the most common grounds for complaints? How would you structure your law office to avoid complaints to the AIBA? Pay special attention to articles 6, 18, 21, 22, 23, and 38.
4. If you were advising Nahid and her husband, which AIBA article(s) would you tell them had been violated by the advocate they visited? What evidence would you advise her to submit along with her written complaint?

### **3.2. The AIBA Monitoring Board**

## **Comparative Law**

The Integrated Bar of the Philippines has existed since 1972 and has one disciplinary committee for all advocates. Despite the diversity of geography, languages, and religions in the Philippines, all complaints are sent to the same committee for consideration and disciplinary ruling.

The Bar Council of India has existed since 1953 and has a disciplinary committee that only considers appeals from disciplinary committee decisions in state bar associations that exist throughout the nation. This is due in part to the large size of the Indian population, the diversity of the languages and cultures and the desire that bar associations keep in touch with local standards and practices in the nation.

Having a single Monitoring Board creates more uniformity in disciplinary decision-making between cases because the same Board members hear all the complaints. Unfortunately, a single AIBA Monitoring Committee located primarily in Kabul with a few branches of the AIBA in other provinces could not adequately hear about and investigate complaints in other parts of Afghanistan. Consider for a moment the current situation in Afghanistan. Travel can be difficult and the country is made up of many ethnic and linguistic groups, as well as peoples with varying tribal and religious backgrounds.

Opening several regional offices in different parts of the country could have solved this problem. However, regional bar associations would cost a lot of money, as each regional association requires a supporting staff, a work location, and the ability to communicate with the AIBA headquarters in Kabul. Therefore, the Monitoring Board released a Procedure Manual in 2013 on how to solve this problem. Before reading about this solution, note that bar associations in different nations approach these difficulties in different ways, as the bar associations in India and the Philippines demonstrate. Read Article 13 and 14 and think about how you would structure the AIBA Monitoring Board.

#### **AIBA By-Laws**

##### **Article 13 – Monitoring Board**

- (1) The Monitoring Board consists of five members who are elected by the General Assembly for a period of two years. The president of the Board shall be elected by other members of the Monitoring Board;
- (2) At least one of the five members of the Monitoring Board shall be a female advocate.

#### **AIBA By-Laws**

##### **Article 14 – Powers of the Monitoring Board**

- (1) The Monitoring Board has the following powers and duties:
  - a. To monitor the implementation of instructions given by the General Assembly and the Leadership Council;
  - b. To monitor the observance of the provisions of these By-Laws;
  - c. To investigate complaints of the members of the Association;
  - d. To monitor the financial affairs of the Association; and

e. To impose disciplinary measures on advocates acting in violation of these By-Laws.

### Discussion Questions

1. Why do you think the Monitoring Board is made up of five members? Why not one? Why not more than five?
2. Why do you think at least one member of the Monitoring Board must be a female advocate? Why is it not mandatory that one of the Monitoring Board members be a male advocate?
3. Read Article 7 of the AIBA By-Laws. As an advocate you will be a member of the AIBA, and thus a member of the General Assembly. You will have the chance, every two years, to vote for the members of the Monitoring Board. What characteristics would you look for in the candidates for the Board?

The AIBA Monitoring Board and Leadership Council created the AIBA Monitoring Board Procedure (hereafter “Procedure”) in 2013. The Procedure is based on Article 14(2) of the AIBA By-Laws and prepared for the purpose of regulating the structure, authority, activities, and duties of the Monitoring Board. The Board has the authority to supervise implementation of General Assembly decisions, implement the by-laws, monitor the financial affairs of the AIBA, adjudicate complaints, and impose disciplinary actions on advocates violating ethical rules. Article 11 of the Procedure proposes that between one and three lawyers should be selected as representatives of the Monitoring Board in each province. The Executive Board must approve each representative. Each representative is authorized to hear complains, to fill out the **complaint form** against advocates, and, if a complaint is valid, to issue a reprimand to the advocate. If the advocate commits the same violation again, the issue must be reported to the AIBA’s office in Kabul. The Monitoring Board meets once a week in the main office of the AIBA, and can have extraordinary meetings in Kabul or in the provinces. During the ordinary meetings, the board hears complaints. When complaints are urgent or when the load of work requires, the Board holds extraordinary meetings.

### 3.3. Hearing Process/Summons

#### The Case of Abanullah<sup>3</sup>

In 2009, Abanullah received his license to practice from the AIBA. He claimed to have the proper educational documents, but upon closer inspection, the documents were discovered to be inadequate. Specifically, the Ministry of Education had not approved his bachelor’s degree as fulfilling the requirements to practice law in Afghanistan.

A complaint against Abanullah was filed under Article 6 of the Advocates’ Law and the AIBA Monitoring Board began an investigation. The Monitoring Board eventually decided to seize his license and refer his case for criminal action.

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<sup>3</sup> This case comes from a real situation in Kabul. Names and details have been changed for the textbo ok.

However, Abanullah had a number of connections with judges and prosecutors inside Afghanistan. He claimed that the AIBA Monitoring Board's standards were arbitrary and unfair and received support from these legal officials. As of 2012, the government has not yet pursued criminal charges, though Abanullah is no longer working as an advocate.

As stated above, before the Monitoring Board Procedure, the procedures for complaining about an advocate were not very clear. While the Procedure has clarified certain aspects, many questions remained unanswered, as you can see below.

#### **AIBA By-Laws**

##### **Article 39 – Summoning Procedures Before the Monitoring Board**

- (1) The Monitoring Board may summon the advocate and the complaint and investigate the case.
- (2) The Monitoring Board may ask the parties for additional evidence.
- (3) The advocate shall respect the orders of the Monitoring Board.
- (4) If the advocate ignores the instructions of the Monitoring Board for one week from the date the instructions were given, the advocate may be warned once again.

Once a complaint has been received, the Monitoring Board may conduct an investigation. However, this is not required. The Monitoring Board may summon the advocate and the person who submitted the complaint to testify, but is not required to do so. It is not clear from the AIBA By-Laws that an accused advocate has the right to present any defense before the Monitoring Board. The AIBA By-Laws also do not give the standard of proof required to determine whether disciplinary action is “justified” under Article 37, Paragraph 2.

#### **AIBA By-Laws**

##### **Article 37 – Monitoring Board Decisions**

- (1) After an allegation has been submitted to the Monitoring Board, the Monitoring Board may, after examining the matter:
  - a. Conduct an investigation into the complaint;
  - b. Require the parties to appear before it;
  - c. Refer the allegations to the Executive Director for mediation.
- (2) Where the allegation [is] found to be justified, the Monitoring Board shall take disciplinary action.

Though the Monitoring Board may ask the parties for more evidence, there is no guidance in the Advocates' Code or the AIBA By-Laws about what evidence may be considered and what may not be considered. Nor do the AIBA By-Laws specify what the Monitoring Board may do if their instructions are ignored by an advocate after a second warning.

According to the new Procedure for the Monitoring Board, hearings will be held in the presence of both the person complaining and the advocate. Therefore the Board must inform both parties two weeks before the hearing date. For advocates in the provinces, this period is extended to three weeks. Missing the hearing is considered a violation and reprimands will be issued against advocates who fail to attend. If the advocate does not attend a second time, he or she will receive a second reprimand. Finally, if the advocate is absent a third time, the advocate's license will be suspended for six months. Each summons is effective for two weeks. If an advocate does not attend any hearings, the license will be temporarily suspended. If the complaining party does not attend, the hearing may be delayed twice and then the Board will reject the complaint.

The hearing is held in front of at least three members of the Board. These members will hear the advocate's defense. The Board's deliberations are held privately and then the final decision is announced to both parties. Any license suspension for more than six months is only effective if the Leadership Council approves. All decisions about an advocate are recorded in the advocate's file.

Under Article 28 of the Procedure, the Board can monitor advocates' activities by visiting their offices, attending judicial proceedings when the lawyer is representing a client, and checking the advocate's logs in accordance with Article 15 of the Advocates' Law.

### **Discussion Questions**

1. Think about the rights guaranteed to all Afghans in the Constitution of Afghanistan. Should an advocate have the same rights as a person has in a criminal case, such as the right to a defense lawyer and the right to refuse to answer questions?
2. Some bar associations allow disciplinary actions to be imposed if the complaint is proven by a preponderance of the evidence – meaning that the complaint is more likely true than not true. Other bar associations require clear and convincing evidence before punishment can be imposed – meaning it is substantially more likely that a complaint is true than not true. Which do you think is more appropriate for the Monitoring Board and why?
3. What do you think of Abanullah's case? If the Monitoring Board has no General Assembly approval, is Abanullah's restriction from practicing fair?

### **3.4. Types of Discipline**

#### **Problem**

Below are five violations of the Advocates' Law/AIBA By-Laws that are perceived as relatively common in Kabul. As you read them, ask yourself what the appropriate discipline for these cases should be.

(1) An advocate refuses to represent a widow accused of a crime without the permission of her closest male relative. The woman has no family that she knows about. The same advocate also refuses to represent anyone who is not from his tribal group. Both of these actions violate Article 9 of the AIBA Code of Conduct.

(2) An advocate failed to defend three pro bono (free of charge for indigent persons) criminal cases last year, in violation of Article 43 of the AIBA By-Laws. In fact, he has never defended a pro bono criminal case in his three years as an advocate.

(3) An advocate set to appear before a judge was told that he would lose his case unless he matched the “court appearance fee” paid by the opposing advocate. He paid the “fee” to the clerk of the court in violation of Article 6 of the AIBA Code of Conduct.

(4) An advocate has appeared repeatedly before a judge in Kabul who is his father’s first cousin. The rulings the advocate has gotten before the judge have all been in favor of the advocate’s clients. He knew the judge was his close relative, in violation of Article 23 of the Advocates’ Law.

(5) An advocate observes each of these offenses occurring and never reported any of them to the AIBA in violation of Article 5 of the AIBA Code of Conduct.

#### **Advocates’ Code**

##### **Article 27 – Hearing Complaints Filed Against an Advocate**

(2) When a case is found to be a disciplinary case, the Association may take the following disciplinary measures:

(i) Reprimand.

(ii) Warning.

(iii) Suspension of the advocate and closure of the advocate’s office for up to one year.

(iv) Ban the advocate from the Roster of Practicing Advocates for up to five years.

(3) Disciplinary decisions against advocates shall be notified in writing.

(4) If the case is considered to be a criminal case, the Association may refer it to the Office of the Attorney General.

The wording in Article 27 seems to suggest that not all complaints become disciplinary cases. The Monitoring Board decides what is worth making into a disciplinary case. Complaints without evidence or valid bases can be rejected without further processing.

The sanctions listed above all concern the lawyer’s license. The AIBA can reprimand the lawyer or issue a letter of warning to notify the lawyer that such actions can result in serious consequences, including suspension of the lawyer's license to practice law for a definite period not to exceed five years. The effects of reprimands are often underestimated. In the legal profession an advocate’s success depends largely on reputation, especially when colleagues refer

many of an advocate's clients. The effect of a public reprimand can be powerful, not only within the community of practicing advocates, but also throughout the general public if the Monitoring Board releases reprimands publicly.

Note that these disciplinary actions are almost the same as the regulations related to misconduct by judges, prosecutors, civil servant employees, and other similar professions. In other words, disciplinary actions are very similar in many professions.

Internationally, there is broad agreement about the most important factors for imposing disciplinary actions on an advocate. "Those factors are:

- (1) the extent to which the lawyer's conduct injured others;
- (2) the 'blameworthiness' of that conduct;
- (3) the lawyer's general character, demeanor, and prior disciplinary history;
- (4) the need for incapacitation or supervision;
- (5) and general or specific need for deterrence for a specific type of behavior"

Beyond those commonly held factors, there is much disagreement even within the bar associations of various nations about the blameworthiness of varying infractions. It is commonly believed that courts and bar associations are reluctant to impose severe penalties on other members of the profession, because suspension of a license essentially removes an advocate's ability to earn a living.

At the same time, those watching from outside the legal community often criticize the leniency with which advocates treat one another. Criticism can be particularly harsh when comparing the treatment of lawyers who have committed malpractice with the treatment of imprisoned people those advocates prosecuted or unsuccessfully defended.

The following Articles from the AIBA Monitoring Board Procedure further explain the grounds for disciplinary action.

**AIBA Monitoring Board Procedure  
(June 6, 2013)**

**Article 24:**

The Monitoring Board shall issue Reprimand against an advocate in the following cases:

1. Not obeying court orders
2. Providing advice to the opposing party
3. Not giving a written receipt for getting and giving documents and evidence.
4. Doing malicious advertisement against another advocate
5. Not informing the AIBA when changing address of law office
6. Not using advocates' uniform in court
7. Not participating in AIBA affairs that are designed for advocates
8. Not being honest towards colleagues and judicial agencies
9. Not securing legal interests of client

10. Putting pressure on a person to sign a lawyering contract
11. Publishing misleading advertisements
12. Not doing proper research to defend a case as required.

**Article 25:** If a reprimand is issued against a lawyer for the second time, this reprimand is considered a warning.

**Article 26:**

Warning shall be issued against an advocate in the following cases:

1. Not preserving dignity and prestige of the legal profession
2. Discriminating in professional affairs of advocacy
3. Not complying with ethical rules
4. Opening a law office in a location different than the address that is the license of the advocate
5. Not using sample agreements and other documents that are prepared as samples by the AIBA

**Article 27:**

Part (1): If an advocate commits one of the following violations, his/her license shall be suspended for 6 months:

1. Not complying with approvals of the leadership and decisions of the monitoring board
2. Providing illegal and inaccurate advice
3. Allowing name and title of the law office to be used by others
4. Using his position to gain illegal interests
5. Not attending to hearings of the Monitoring Board after three notices
6. Insulting officials of the AIBA
7. Requesting money or additional advantages other than what is agreed in the agreement
8. Disclosing confidential information of clients without their consent or incorrectly
9. Not representing three cases for free (pro bono) in a year that AIBA assigns him

Part (2): If a second warning is issued against an advocate, his license will be suspended for 1 year.

In some other jurisdictions, the Bar has power to permanently take an advocate's license, prohibiting the person from ever serving as a lawyer. However, note that permanent **disbarment** (taking away an advocate's license) is not allowed in Afghanistan. In other words, currently the AIBA is not empowered to permanently deprive a person from practicing law in Afghanistan by revoking a lawyer's license (if the license was properly obtained). Disbarment is in the sole jurisdiction of courts. Under the previous version of the Advocates' Law, however, permanent disbarment was allowed.

### Discussion Questions

1. Is banning an advocate from the practice of law for five years after a complaint is found credible a form of incapacitation, of rehabilitation, or of deterrence? Or is it some combination of all three? Why is it important to consider what the goal of a disciplinary action is when imposing it on an advocate?
2. Should the disciplinary proceeding be a public proceeding?
3. Should the AIBA be able to permanently disbar an advocate in Afghanistan?

As you read in Chapter 5, only the AIBA can issue licenses for lawyers. The AIBA is fairly new in Afghanistan, so not all advocates meet the entry requirements. It is not clear, however, who has the primary authority to stop illegal representation. Multiple agencies play a role. The AIBA is required to share the names of its members with the police, the Ministry of Justice, prisons, and the Attorney General's Office. Both government and non-government organizations seeking assistance from advocates should only contact AIBA-registered lawyers. The court is also required to receive and verify all necessary documents, including proof of a license to practice law, before initiating a proceeding. Police and prosecutors are also instructed to cooperate with advocates and to inform accused people and suspects about their right to an advocate. The AIBA also cannot impose criminal penalties like fines or imprisonment. The AIBA has no authority to order damages for the injured person. It cannot remove a public official from office or require a lawyer to withdraw from a case. The AIBA can, however, require members of the Boards to either quit their jobs or resign from the AIBA Board.

While the AIBA cannot impose criminal sanctions, criminal or civil cases can proceed independent of disciplinary complaints. This means that a disciplinary case at the AIBA does not terminate when a related civil or criminal matter is dismissed, and vice versa. Technically, the only parties to a disciplinary case are the AIBA and the accused lawyer. According to the plain meaning of the AIBA By-Laws, other persons such as injured clients are not parties to proceedings before the AIBA although they may be called as witnesses.

Currently there are no published records of the AIBA imposing serious disciplinary actions on advocates. According to an advocate, in two instances clients reported lawyers who promised to bribe officials in order to win the clients' cases (both a criminal and a commercial case). The AIBA adjudicated the complaints and suspended the license of one of the lawyers for five years.<sup>4</sup>

### **Discussion Questions**

1. The AIBA Monitoring Board currently has very little disciplinary precedent. Think about the five cases presented at the beginning of this sub-section.
  - a) Rank the cases from most severe to least severe

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<sup>4</sup> Interview with a defense lawyer in Kabul, graduate of Kabul University (Oct. 6, 2014) (notes on file with the author).

- b) Assign each of the cases a punishment from Article 27, or, if you think any of the cases should not be punished, mark it down for dismissal
- c) Should any of the cases be referred to the Office of Attorney General as a criminal case?

If you can, take time in class to compare your decisions on these cases to other students. Does your class agree on the appropriate actions for each case?

### 3.5. Alternate AIBA Disciplinary Process

#### AIBA By-Laws

##### Article 9 – Leadership Council

- (1) The Leadership Council is the second highest authority in the Association and consists of 15 members, including the Executive Board.
- (2) Of the 15 members of the Association, at least 3 shall be female advocates.
- (3) Candidates for the Leadership Council shall have the following qualifications:
  - (i) Citizens of Afghanistan.
  - (ii) Three years of professional experience for advocates who hold a Bachelor’s degree or higher...
  - (iii) At least five years professional experiences for graduates of recognized national or international religious seminaries or its equivalent; and
  - (iv) Good standing.

#### AIBA Code of Conduct

##### Article 41 – Violations of these By-Laws

In the case of a violation on these By-Laws, the advocate in question will receive a disciplinary action with accordance to the provision of these By-Laws. In case of a complaint, the Leadership Council can take a disciplinary action in accordance with clauses 3 and 4 of paragraph 2 of Article 27 of the Advocates’ Law and Article 40 of the By-Laws with a two-thirds majority.

#### AIBA Code of Conduct

##### Article 40 – Consistency of Action with Standards

An advocate shall be duty bound to conform his/her actions with the standards contained in provisions of the Advocates’ Law and these By-Laws while providing advocacy services and legal consultation.

Though the Monitoring Board is the primary means of enforcing violations of the AIBA By-Laws and Code of Conduct, it is not the only means. The Leadership Council of the AIBA also holds disciplinary power. However, the Leadership Council can only impose two types of disciplinary action:

- (1) Suspending an advocate’s license and closing a legal office for up to one year;

- (2) Banning the advocate from the Roster of Practicing Advocates for up to five years.

These disciplinary actions may only be imposed with the agreement of ten of the fifteen members of the Leadership Council. The Leadership Council is second only to the General Assembly in terms of authority. It is noteworthy that its powers are restricted to the two most severe methods of discipline that the Monitoring Board has under Article 27 of the Advocates' Law. It is not unreasonable to see this power as one designed to allow the Leadership Council to review a decision by the Monitoring Board. The AIBA has no formal review process if there is a change of circumstances after a Monitoring Board decision is announced. The Leadership Council disciplinary power ensures the AIBA has a method to review Monitoring Board disciplinary decisions that other lawyers or the general public might feel are excessively lenient. Because leniency is a common complaint about most bar associations' disciplinary procedures,<sup>5</sup> Article 41 maintains the credibility of the AIBA in the face of an error or bias by the Monitoring Board.

The two-thirds vote requirement ensures that the Leadership Council uses the power of review infrequently. In fact, under Article 34 of the AIBA By-Laws, it is easier to remove a member of the Monitoring Board with a simple majority vote of the Leadership Council than for the Leadership Council to impose its own disciplinary sentence on an advocate.

### Discussion Questions

1. Can you think a situation in which a Monitoring Board's disciplinary decision would need to be overturned by the Leadership Council?
2. Look at articles 10 and 28 of the By-Laws that set out the Leadership Council's role. Does the Leadership Council have the power to investigate complaints against an advocate? How would they know when use of their disciplinary power is appropriate?

### 3.6. Appeal

#### The Case of Abanullah, continued<sup>6</sup>

Recall the case of Abanullah, the advocate accused of practicing without a proper license for two years. The Monitoring Board investigated him, concluding he had not received the appropriate approval for his bachelor's degree, and the Board took away his license. That is where the facts of the real life story ended.

If it bothers you that the Monitoring Board investigated Abanullah without procedures approved by the General Assembly, think about the role the Leadership Council could play. Was this a

<sup>5</sup> Rhode, *supra* note 1, at 990-1020.

<sup>6</sup> This case comes from a real situation in Kabul. Names and details have been changed.

case where the Leadership Council should or could have intervened? What ethical and political considerations should the Leadership Council consider before intervention?

**AIBA By-Laws**  
**Article 40 – Appeals**

The advocate has the right to appeal disciplinary punishment imposed by the Monitoring Board, the Leadership Council of the Executive Board to the court.

The AIBA is an organization whose rules and procedures are still being formed. Even in nations with longstanding bar associations, there are disagreements on what are reasonable and fair rules for legal practitioners.

As you have seen in reviewing the many rights and duties of advocates, it can be difficult to balance competing principles. An advocate must always protect his/her client. But an advocate must also always protect the integrity of the judicial system. What makes sense to one advocate may not make sense to another advocate.

Though the Afghan government has recognized the need to empower an independent bar association to protect the citizens of Afghanistan, the government has not left advocates at the mercy of an organization that operates independently from the democratic government. At all times, the actions of the AIBA are reviewable by the Afghan court system. This oversight allows decisions to be reviewed in a system of justice governed by the Constitution of Afghanistan and accountable to the will of the Afghan people through their elected representatives.

**The Constitution of Afghanistan**

**Article 24:**

Liberty is the natural right of human beings. This right has no limits unless affecting the rights of others or public interests, which are regulated by law.

Liberty and dignity of human beings are inviolable.

The state has the duty to respect and protect the liberty and dignity of human beings.

The ability to appeal a disciplinary matter to the court system does not ensure a more favorable outcome for an advocate than the outcome that the Monitoring Board imposes. The AIBA is restricted in its disciplinary powers to a five-year ban on an advocate's practice according to Article 27 of the Advocates' Law. However, the court has jurisdiction in some cases to permanently deprive a legal professional from ever becoming a lawyer in the future. The criminal justice system in Afghanistan allows consequential punishments for those committing serious crimes, including losing one's civil or political rights. The right to appeal to court is a new provision in the current Advocates' Law. In some previous iterations of the Advocates' Law, appeal of bar association disciplinary actions could only be made to the Ministry of Justice, who could make a final, binding decision.

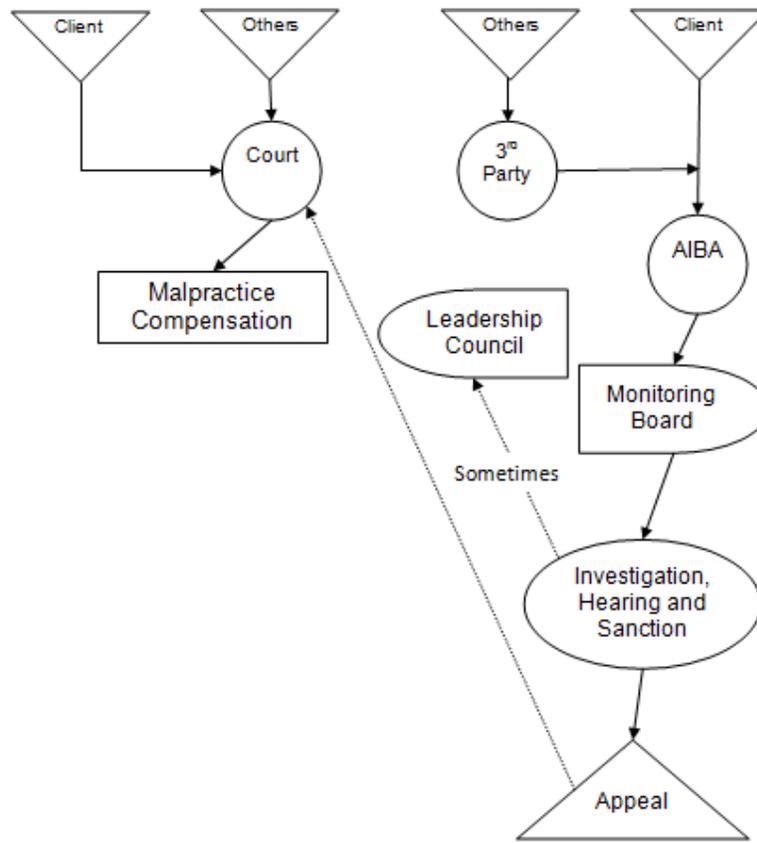
**Advocates' Law**  
**Article 7 – Restrictions to Practice Law**

The following persons are not entitled to practice law as an advocate: . . .

- (2) Any person convicted of a felony or expelled from office duty by a court's order;
- (3) Any person who has been prevented from practicing law by a court order.

**Discussion Questions**

1. Why is it important that AIBA disciplinary decisions are reviewable by the courts?
2. The AIBA Code of Conduct prescribes disciplinary actions that could be applicable to a lawyer as an individual. Do you think it is necessary to consider disciplinary actions for a law firm (as a legal person) as well? If yes, under what circumstances should a law firm be disciplined and how?
3. Article 7 allows a permanent ban on an advocate from the practice of law. Additionally, conviction for a felony or expulsion from public office mandates a ban on practicing law. Why do the courts enjoy this power but not the AIBA?



#### 4. RELATIONSHIP BETWEEN ADVOCATES

**AIBA Code of Conduct**

**Article 29 – Relationship with Other Advocates**

An advocate shall maintain a good relationship with fellow advocates, however he/she shall not place their interest above those of their clients.

The more familiar one becomes with the practice of law, the more one realizes that it is a specialized field with some of the most capable minds in the nation. The desire to find approval from one’s peers is powerful; much of one’s success as an advocate depends on the approval of other advocates in the AIBA. But the desire for success and approval from peers should not overwhelm the critical duty of an advocate to protect those without special knowledge of the legal system from injustice.

**Discussion Questions**

1. Should the AIBA have the power to impose fines on an advocate? Why or why not? For what would money from fines be used?

2. Why do you think the AIBA felt the need to write Article 29?

### **Research and Writing Assignment**

1. Select a country and research the most common legal malpractice suits in that country.
2. Divide the class into four person law firms. Within each firm, decide on hypothetical firm size, practice areas, business models, and management structures. List all the duties you learned about in this class in the order of their importance. Explain the consequences of breaching each of such duties, and discuss how you can avoid breach of such duties.

#### **4.1. Ten Ways to Avoid Malpractice**

The surest way to avoid malpractice claims and complaints to the AIBA is to provide excellent service and always treat clients well. In practice, lawyers use all possible means including researching past cases and consultation with other lawyers or the bar association to make sure that they are not violating any rule that would lead to legal malpractice or disciplinary actions. To end this chapter, here are ten common ways that successful advocates around the world avoid malpractice:

- Be honest and accurate in all charges to your client. Follow the same rules you would want a lawyer to follow if you were paying for the service.
- Always return phone calls promptly.
- Hire staff members who are polite and naturally inclined to be helpful. Trying to teach rude or condescending staff members to be kind to clients is rarely effective.
- Make sure all communications with clients use good grammar and proper punctuation, and that it is professional and polite. This shows respect for the client.
- Early in your relationship with a client, discuss the best methods, and desired frequency, of communication. Make a record of those instructions and follow them as closely as possible.
- Congratulate, publicly and privately, staff members at the firm who provide excellent service. This will reinforce good practices and habits.
- Ask clients and partners how the law office can improve client services.
- Clarify any limitations on the scope of what you can do as an advocate with each client.
- Keep copies of all important communications to, by, or on behalf of a client.
- Let clients know that you appreciate the opportunity to work for them.

## 5. CONCLUSION

This chapter has introduced you to the two important ways that advocates are regulated in order to maintain professional, ethical standards within the legal profession. As you have seen in previous chapters, the difficult decisions an advocate must make do not lend themselves to simple solutions.

Malpractice law rests on the fundamental duty of an advocate to always put the needs of the client first and to never take advantage of a client for personal gain. Where an advocate's deliberate actions cause a loss to the client, the Advocate's Law aims to ensure that the advocate, not the client, absorbs such losses. The court system is still not easy to use for most citizens of Afghanistan, but as the judicial system becomes more accessible and more efficient, malpractice claims can be expected to become more common.

The AIBA disciplinary system is simpler than pursuing a malpractice claim through the court. Though the Monitoring Board's procedures are not yet fully approved, it is currently operating. Clients and advocates alike may file complaints for violations of the Advocates' Law and AIBA By-Laws. Be sure that you understand your duties and responsibilities under those guidelines and can explain your actions as an advocate with relation to those duties and responsibilities if called upon to do so.

In the end, the best advocates understand that even a successful defense against a malpractice claim or disciplinary complaint can be costly, both in terms of time and damage to one's reputation. It is crucial that one treats clients and other members of the legal community with the highest courtesy and respect; advocates should err on the side of respecting the rules of the profession.

The official, organized community of advocates is only a few years old. This is an exciting time to be an advocate. Your views and actions can shape the legal culture of Afghanistan. It is worthwhile to take the time to think carefully about how you want your career to shape that legal culture for future generations.

## GLOSSARY

- ❖ **Advocate:** a person who pursues a career in the legal profession and obtains certification from a relevant governing authority. Alternative words for advocate are lawyer and attorney.
- ❖ **Advocates' Law (2007):** a law passed in 2007 pursuant to Article 31 of the Constitution. The law governs the rights and responsibilities of civil and defense attorneys.
- ❖ **Affirmative duties:** Things one must do (rather than simply allowing something to happen, affirmative duties require action).
- ❖ **Afghan Independent Bar Association (AIBA):** a professional association of Afghan lawyers whose primary purpose is to promote and protect the rule of law by regulating how, where, and by whom law is practiced in Afghanistan.
- ❖ **Agent:** a person who acts on behalf of another person in a particular matter.
- ❖ **AIBA Code of Conduct:** The part of the AIBA By-Laws that explains how lawyers should act.
- ❖ **Alternative dispute resolution (ADR):** the use of methods such as mediation and arbitration to resolve a dispute instead of litigation.
- ❖ **Amanullah Khan:** the King of Afghanistan between 1919 and 1929. Hero of the Third Anglo-Afghan War, he attempted to modernize the Afghan state by creating Afghanistan's first Constitution, reforming education, secularizing the judiciary, and recognizing religious freedoms and civil rights. He was forced to abdicate the throne when his reforms faced increasing hostility.
- ❖ **Amir Abdur Rahman Khan:** the King of Afghanistan between 1880 and 1901. He presided over an effort to centralize power in Afghanistan that was often unforgiving. He is credited with establishing the foundations of a formal legal system by enacting royal edicts and creating a judge's manual of judicial procedures and legal ethics.
- ❖ **Attorney-Client Privilege:** A legal protection for lawyers against coerced revelations in court.
- ❖ **Bar Association:** A group that trains, licenses, and regulates lawyers in a region or country.
- ❖ **Breach of contract:** Not fulfilling an obligation in a contract.
- ❖ **Citizenship:** is the status of a person recognized under the custom or law as being a member of a state.

- ❖ **Client perjury exception:** A possible exception to the duty of confidentiality permitting an advocate to inform the court when she learns that her client plans to commit perjury.
- ❖ **Coercion:** the practice of persuading someone to do something by using force or threats.
- ❖ **Competence:** in the context of legal ethics, is a set of qualifications that ensure a lawyer is be able to perform his work professionally.
- ❖ **Complaint Form:** A standard form prepared by the AIBA and used when a person complains to the AIBA about the professional conduct of a lawyer.
- ❖ **Confidentiality:** This term refers to the boundaries surrounding shared secrets and to the process of guarding these boundaries.
- ❖ **Conflict of interest:** when the circumstances calling for the exercise of professional judgment undermine a lawyer's ability to exercise that judgment properly on behalf of a client.
- ❖ **Contravene:** to conflict with or violate.
- ❖ **Culpability:** Acting while intending to cause a harm that is forbidden by law.
- ❖ **Deterrence:** The use of punishment as a threat to deter people from offending.
- ❖ **Disbarment:** Taking away an advocate's license to practice law, so that they no longer have the right to practice. This is the most serious disciplinary action possible.
- ❖ **Disciplinary Action:** (Dari: tadib, pl. tadibat) In the legal context, the sanctioning process imposed on an advocate by the community of fellow legal practitioners (usually the local bar association).
- ❖ **Discovery materials:** any materials not protected by the attorney-client privilege that contain information regarding the detection and investigation of a client. One of the important changes made by the 2007 Advocates' Law was to guarantee lawyers' right to access discovery materials.
- ❖ **Duty of care:** a lawyer's duty to competently and carefully perform his or her work.
- ❖ **Duty of confidentiality:** An ethical duty of lawyers not to disclose the confidential information of their clients during and after representation, unless they have permission to do so.
- ❖ **Duty of loyalty:** a lawyer's duty to remain loyal to his or her client.
- ❖ **Enumeration:** an item featured numerically in list form.

- ❖ **Ethics:** Derived from the Greek word ethos, which means "character;" ethics are the accepted principles and rules of conduct governing an individual or a group.
- ❖ **Ethical dilemma:** a situation in which two or more ethical obligations, duties, or rights come into conflict with one another.
- ❖ **Experts:** professionals who have sufficient expertise and experience in specific fields and who testify in court based on their expertise.
- ❖ **Fault:** Doing something one should not do, or not doing something one should do.
- ❖ **Fiduciary duty:** the legal duty of a lawyer, who occupies a position of trust with respect to clients, to represent the best interests of his or her clients.
- ❖ **Fraud:** wrongful or criminal deception intended to result in financial or personal gain.
- ❖ **Frivolous claim:** a claim that has no possibility of succeeding on the merits.
- ❖ **Illegality exception:** An exception to the duty of confidentiality when an advocate learns that his or her client is planning a future crime or fraud.
- ❖ **Implied waiver:** One way that the duty of confidentiality can be waived is through implied waiver—when a client puts “at issue” confidential information, such as by suing an advocate for malpractice.
- ❖ **Incapacitation:** Positively preventing future offensive conduct by removing an offender from the forum in which the offense can be committed.
- ❖ **Incentive:** Something that induces action or motivates effort. When a law encourages people to take a certain action, it provides an “incentive” for people to take that action.
- ❖ **Indigent:** according to Article 5 of Advocates’ Law, “any person who cannot afford to pay for a defense attorney in criminal cases.”
- ❖ **Informed consent:** a party agreeing to allow something to happen only after all the relevant facts have been disclosed, explained, and understood.
- ❖ **Kantian ethics:** a theory of ethics that argues that actions are considered ethical when they conform to universal, generalizable principles and duties.
- ❖ **Lawyer-client conflict:** when the client’s interests conflict with the attorney’s own financial, familial, or other personal interests.
- ❖ **Legal ethics:** the system of laws and regulations governing the professional conduct of lawyers.

- ❖ **Legal aid:** the provision of legal services to the indigent. Different countries have adopted different models for providing legal aid. Afghanistan's approach is to provide legal aid through pro bono work. Legal aid in Afghanistan is administered through the Ministry of Justice's Office of Legal Aid.
- ❖ **Legal Aid Provider:** according to Article 5 of the Advocates' Law, "an advocate who is appointed by the Ministry of Justice as a defense attorney for indigents in criminal cases."
- ❖ **Legal capacity:** refers to a person's authority under law to engage in a particular undertaking such as the authority to form an attorney-client relationship.
- ❖ **Legal document registration court (Wasayeeq Court):** is an authorized court that issues official documents such title deeds, marriage certificates, and power of attorneys.
- ❖ **Legal malpractice:** Professional misconduct for which an advocate can be held civilly liable if a client or other injured party sues the advocate.
- ❖ **Legal profession:** an occupation based on expertise in the law and in its application.
- ❖ **Lesion:** excessive price.
- ❖ **License to practice:** according to Article 5 of the Advocates' Law, "a printed document with legal validity, the form and content of which is to be determined by the Association."
- ❖ **Litigation:** a controversy before a court, also known as a "lawsuit."
- ❖ **Loya Jirga:** a grand government assembly. In 2003, a Loya Jirga was assembled to draft the new Constitution of the Islamic Republic of Afghanistan.
- ❖ **Madrassa:** is a school or education institution that provides Islamic education.
- ❖ **Malpractice insurance:** A type of insurance purchased by professionals such as lawyers that provides a guarantee of compensation in the event that the professional is sued for malpractice.
- ❖ **Modernism:** in the context of Islam, modernism is a school of thought almost exclusively relying on the text of the *Qur'an* as an idealized source of normative behavior. Modernism is also sometimes referred to as transcendentalism.
- ❖ **Morals:** a set of values shared by a group of people.
- ❖ **Negligence:** failure to take the degree of care that a reasonable person acting in similar circumstances would take.
- ❖ **Norms:** standards adopted by a community reflecting shared values.

- ❖ **Obligation:** Those things a person is required to do or required not to do in private law.’
- ❖ **Officer of the Court:** a term referring to any person who has a duty to promote justice and effective operation of the judicial system such as judges, defense lawyers, clerks, and other personnel.
- ❖ **Omission:** The failure to do something that one has a legal obligation to do.
- ❖ **Perjury:** the act of lying while acting as a witness.
- ❖ **Practical legal skills:** are the expertise and abilities that help a defense lawyer defend his or her clients.
- ❖ **Private law:** the law that defines, regulates, and enforces relationships among individuals, associations, and corporations, and allows for compensation when one causes harm against another.
- ❖ **Promulgate:** to put into effect by official proclamation of some form.
- ❖ **Positional Conflicts:** when a single lawyer represents a client whose legal position could adversely affect another client in a factually unrelated matter.
- ❖ **Power of Attorney:** is a written document in which one person (the principal) appoints another person to act as an agent on his or her behalf.
- ❖ **Principal:** a person for whom another acts as an agent or representative.
- ❖ **Privacy:** The state or condition of being free from being observed or disturbed by others.
- ❖ **Pro Bono:** legal services rendered for free. The 2009 Advocates’ Law requires that advocates take at least three pro bono cases each year.
- ❖ **Profession:** an occupation or job requiring mastery of a complex set of knowledge and skills through formal education and/or practical training.
- ❖ **Professionalism:** the trait of performing a skill competently and expertly. Professionalism also refers to complying with rules and standards of conduct that exist within a profession.
- ❖ **Pro bono:** a Latin term meaning ‘for the public good’ and describing fee legal work done by an attorney for poor clients, or religious or charitable organizations. In Afghanistan, it is a requirement for defense attorneys to represent indigent persons for free in three criminal cases each year.

- ❖ **Public law:** the area of law focusing on the organization of government, relations between the state and its citizens, the responsibilities of the state, and relationships between states. It includes constitutional, administrative, criminal, and international law.
- ❖ **Quasi-executive:** similar in characteristic to executive powers.
- ❖ **Quasi-judicial:** similar in characteristic to judicial powers.
- ❖ **Promulgate:** to put into effect by official proclamation of some form.
- ❖ **Rehabilitation:** Using education or treatment to bring an offender into an improved state of mind and pattern of behavior so they can lead a useful and productive life rather than allowing the repetition of an offense.
- ❖ **Restoration of Honor:** is a process under the penal code of Afghanistan that allows a person who has lost some civil and political rights due to commission of a serious crime to regain those rights after meeting certain legal conditions and the passage of a period of time.
- ❖ **“Revolving Door” Phenomenon:** when lawyers go back and forth between private practice and government service.
- ❖ **Scope:** The extent or breadth of information covered.
- ❖ **Shura (Jirga):** an informal, customary village council that in many rural areas serves as a preferable alternative to the formal court system.
- ❖ **Simultaneous representation:** when the same lawyer represents multiple clients with diverging interests in the same matter.
- ❖ **Stage Program:** is an educational program that consists of courses on defense lawyering for those who want to become lawyers in Afghanistan.
- ❖ **Successive representation:** when the same lawyer represents a current client against a former client in a related legal matter.
- ❖ **Statute of Limitation:** A principle in law that sets out a time limit after which one cannot begin legal proceedings.
- ❖ **Termination:** is the action of ending a legal relationship such as a contract.
- ❖ **Traditionalism:** in the context of Islam, traditionalism is a school of thought focusing mostly on historical interpretations of the *Qur'an*. It is synonymous with orthodoxy.
- ❖ **Unethical:** an act that violates the ethics codes that govern lawyers.

- ❖ **Unlawful claim:** A claim brought for an improper purpose, such as vindictiveness, to cause delay, or to cause another party reputational harm.
- ❖ **Unlawful privileges:** benefits obtained unlawfully or corruptly. In an effort to eliminate corruption within the legal profession, the AIBA Code of Conduct prohibits lawyers from obtaining unlawful privileges.
- ❖ **Utilitarianism:** a theory of ethics that focuses only on the consequences of actions and holds that whatever action leads to the most good for the greatest number of people is the ethical choice.
- ❖ **Vicarious Conflict:** when a lawyer is representing a client in a legal matter and another member of the lawyer's firm or office has a recognized conflict of interest with that same client.
- ❖ **Virtue ethics:** a theory of ethics that argues people should strive to act in accordance with virtuous character traits and that exercising these traits leads to an ethical life.
- ❖ **Waiver:** The attorney-client privilege protects confidential communications from a client to her advocate unless the client waives the privilege by giving the attorney permission to disclose the information.
- ❖ **Whistle-Blower Provision:** a legal provision calling for one party to disclose the misconduct of another party. Article 5 of the AIBA Code of Conduct, which requires attorneys to report the misconduct of other attorneys, is a whistle-blower provision.
- ❖ **Zealous Advocate:** a lawyer who works diligently to achieve the best result possible for his client.