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New York State Bar Association
Committee on Professional Ethics

Opinion 1171 (08/26/2019)

Topic: Deceptive Conduct -- Assisting foreign clients to make investments that are subject to foreign currency controls

Digest: A lawyer may not engage in deceptive conduct to help clients in foreign countries circumvent currency controls of that country.

Rules: 1.2(d), 8.4(b), 8.4(c)

FACTS

1. The inquiring lawyer is admitted in New York and in no other extraterritorial or U.S. jurisdiction. The inquirer represents four companies in a multi-step transaction to invest funds now located in China to acquire an interest in an enterprise for a project in the U.S. We are informed that the amount of the funds at issue exceeds the strict limits imposed by China's currency control laws for transfer out of China, would not be permissible under the law of China, and could potentially subject the transferor to criminal liability in China.

2. There are four companies involved in the proposed transaction. Two of them – we will call them Company A and Company B – are each a U.S. corporation commonly owned or controlled by U.S. citizens or holders of Lawful Permanent Resident Cards, popularly known as green cards; Company B is located (or is doing business) in China. The other two companies – for convenience, Company C and Company D – are each a Chinese corporation commonly owned or controlled by citizens of China; Company D is located (or is doing business) in the U.S.

3. The proposed transaction would involve three steps. First, the U.S.-owned and U.S.–based Company A would transfer U.S. dollars to the inquirer's escrow account. Second, after giving notice of the receipt of those U.S. dollars, the inquirer would instruct the Chinese-owned and Chinese–based Company C to wire Chinese funds (*renminbi* or "RMB"), in an amount equivalent to U.S. dollars in the inquirer's escrow account into a Chinese bank account of the U.S.-owned but China-based Company B. Third, following that wire transfer, the U.S. dollars in the inquirer's escrow account would be released to the U.S. bank account of the Chinese-owned but

U.S.-based Company D. The inquirer represents to us that Company C has a *bona fide* investment motive for providing funds to Company D. The inquirer denies knowledge, however, on whether Company A has a bona fide investment motive for providing funds to Company B. This much is clear: By this arrangement, the U.S.-owned and U.S.–based Company A would be financing the Chinese-owned and Chinese–based Company C's investment in the Chinese-owned but U.S.-based Company D.

4. The inquirer proposes to charge a fee such as 1% or 2% of the amount held in escrow.

QUESTIONS

5. May a lawyer help a client in a foreign country invest in a United States company, despite currency controls imposed by the foreign country, using the lawyer's escrow account in a way that avoids direct payment from the investing client to the United States company?

6. If so, may the lawyer charge a fee calculated as a percentage of the amount in escrow?

OPINION

7. Rule 8.4(c) of the New York Rules of Professional Conduct (the "Rules") provides: "A lawyer or law firm shall not … engage in conduct involving dishonesty, fraud, deceit or misrepresentation …."

8. The terms "dishonesty," "deceit," and "misrepresentation" are not defined in the Rules, but in Rule 1.0(i) there is a definition of "fraud":

> ''Fraud'' or ''fraudulent'' denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

Application of Rule 8.4(c)

9. We begin by reviewing some facts relevant to whether the proposed conduct would involve dishonesty, fraud, deceit or misrepresentation.

10. The proposed money transfers, taken together, would have a net effect equivalent to (a) a transfer of dollars from Company A to Company B, and (b) a transfer of dollars from Company C to Company D, even though such a transfer, if made directly, would be prohibited by the Chinese laws in question. There are connections among the parties: Companies A and B are commonly owned, as are Companies C and D, and all four are represented by the same attorney. Company

C, located in China and subject to Chinese currency controls, has a genuine motive to invest in the United States project of Company D. Such an investment, even though prohibited in direct form by those controls, would in effect be achieved indirectly through the proposed combination of transfers. In addition to the economic analysis that supports that characterization, the inquiry clearly acknowledges that the proposed transfers are motivated by the desire of Company C to invest in Company D's project in the United States. Although there would also effectively be a corresponding transfer from Company A to Company B, nothing in the facts as presented suggests any genuine motive for investment between those two companies. Notably, the amount of the proposed "investment" by Company A in Company B would be exactly equal to the investment by Company C, and therefore not dictated by any investment considerations of Company A.

11. These facts lead to the conclusion that the proposed conduct would have the purpose and effect of allowing Companies A and B, and their purported investments, to be used to circumvent applicable currency controls. The inquirer's proposed use of an attorney escrow account would be an important part of this scheme. The goal of this scheme would be to disguise the true nature of the money transfers and deceive government authorities and counter-parties In our view, the inquiry proposes sham conduct that would involve dishonesty, fraud, deceit or misrepresentation.

Possible application of other Rules

12. Because we conclude that Rule 8.4(c) answers the primary question, we need not resolve whether two other Rules that have to do with "illegal" conduct also apply. One of those Rules provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

Rule 1.2(d); *see* Rule 1.0(i) (definition of "fraudulent").

13. The other is Rule 8.4(b), which provides: "A lawyer or law firm shall not … engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."

14. These Rules are ambiguous in failing to explain whether the Rules apply only to conduct that is illegal under the laws of the United States or its political subdivisions, or extend their reach to conduct illegal under the law of a foreign country. The Rules do not explicitly distinguish between domestic and foreign law, nor do the relevant Comments. Arguments may be made in favor of either outcome. Nevertheless, we have been unable to locate a single ethics authority –

case law, treatises, ethics opinions, and the like – in which a suggestion arises in which a lawyer may be held accountable for conduct in violation of the law solely of a foreign country without any attendant violation of the laws of the United States and its states and territories. A commentator who discusses the point argues that the Model Rules should be changed to clarify the point. Mike Donaldson, "*Lawyers and the Panama Papers: How Ethical Rules Contribute to the Problem and Might Provide a Solution*," 22 Law & Bus. Rev. of the Americas 363, 372 (2016); *id*. at 372 n.49 (citing letter from John Leubsdorf and William Simon to Global Witness, "*Professional Responsibility Assessment of Lawyer Interview Transcripts*" (2015)). Because the current inquiry does not require an answer to this question, we leave its consideration to a future day.

15. Having concluded that the proposed conduct is impermissible, we have no occasion to consider the secondary question: whether ethics provisions including Rule 1.5(a) would permit a fee for those services to be calculated as a percentage of the amount in escrow.

CONCLUSION

A lawyer may not engage in deceptive conduct to assist a client in a foreign country to carry out a scheme to circumvent currency controls of that country by making sham investments.

(06-19)