AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Global Migration & Legal Ethics, Part II: Unauthorized Practice of Law and Foreign Corrupt Practices Act Issues*

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Unauthorized practice of law ("UPL") and Foreign Corrupt Practices Act ("FCPA") violations are two of the most common problems U.S. attorneys encounter in Global Migration practice. New attorneys and seasoned practitioners new to Global Migration alike must be mindful of the UPL and FCPA challenges they will face. Fortunately, this is an area where diligent preparation and planning can significantly reduce the challenges.

U.S. attorneys often initially become involved in managing global immigration matters by chance. A U.S. immigration client may approach their U.S. attorney for assistance with global matters because the client already knows and trusts the attorney and is concerned about finding counsel in a foreign jurisdiction(s). For many clients, particularly those who have ongoing global immigration needs in multiple jurisdictions, having a U.S. attorney oversee their global immigration matters can add significant value. U.S. attorney involvement may not be as beneficial for clients who only have a few matters in one foreign jurisdiction; there a referral to local counsel may be sufficient.[1] However, even smaller clients often value having a trusted advisor available to them in their time zone. Depending on the countries and cultures involved, the U.S. attorney may also be able to bridge cultural differences in client service methods that frustrate U.S. clients who are not familiar with the cultures of the global jurisdictions they are entering. Having a central point of contact to track case progress and monitor expiries can also be quite valuable. However, one of the most important value adds a U.S. attorney can provide is to ensure that the client is being served by competent and compliant counsel in the foreign jurisdiction. Thus, it is essential that U.S. attorneys coordinating global matters be aware of UPL and FCPA challenges and how to avoid or overcome them.

Unauthorized Practice of Law in a Global Context

When coordinating outbound immigration matters, U.S. attorneys often face issues regarding the unauthorized practice of law. These issues can be bi-directional; UPL rules apply both to them and to the local advisors[2] they engage to assist their clients with non-U.S. immigration matters.

*Please note that this article is intended to be a general discussion of the issues US attorneys face with regard to UPL and FCPA in Global Migration practice. It is not intended to provide legal advice. Should a US attorney encounter suspected UPL or a FCPA violation he should consult with a FCPA or consumer protection expert regarding the specific matter at hand. This article continues the discussion of ethical considerations in Global Migration begun in *Global Migration & Legal Ethics: Confidentiality Considerations in Working with Foreign Counsel*, AILA Infonet Doc. No. 13092040, September 20, 2013, available at http://www.aila.org/content/default.aspx?docid=45876.

1 Note that even if simply providing a referral to a local advisor a US attorney still needs to be mindful of the issues of UPL and FCPA compliance, as discussed in fn 12.

2 Foreign counsel, foreign licensed immigration agents, or foreign consultants, shall be collectively referred to as "foreign advisors."

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Application of UPL Rules to U.S. Attorneys

U.S. UPL Rules

Under the American Bar Association Model Rules of Professional Conduct ("Model Rules"), U.S. attorneys are prohibited from "practic[ing] law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction."[3] In the outbound context, this means that a U.S. attorney must refrain from practicing immigration law in a country in which he is not licensed. Given the variation in the regulation of immigration services around the world, this issue is a bit more nuanced than it may seem at first glance. Foreign jurisdictions can generally be broken into three types. First, some foreign jurisdictions, such as Brazil, take the position that the provision of immigration services is the practice of law and must be carried out by an attorney licensed in that jurisdiction. Second, some jurisdictions allow for non-attorneys to provide immigration services if they meet certain licensing standards. For instance, Australia[4], Canada[5] and the UK[6] all permit non-attorneys to provide immigration services if they are properly licensed. Third, other jurisdictions, such as Russia[7], do not consider provision of immigration services to be the practice of law and do not impose any licensing standards or requirements. Therefore, a U.S. attorney admitted and licensed only in the U.S. would violate Rule 5.5 by providing immigration services in the first two types of jurisdictions but not in the third. However, a U.S. attorney trying to provide immigration services in a jurisdiction such as Russia could run into trouble with the ethical rules regarding provision of competent counsel,[8] unless she was on the ground and learned the local immigration and citizenship rules and practice. Even in permissive jurisdictions it is advisable to collaborate with a qualified local advisor.

Foreign UPL Rules

In addition to running afoul of Rules 1.1 and 5.5, a U.S. attorney engaging in unauthorized practice could also be subject to penalties under the law of the foreign jurisdiction. Again, there is significant variation across jurisdictions on unauthorized practice rules and penalties. Some jurisdictions, such as Canada[9] and New Zealand[10], have very specific prohibitions on the provision of immigration services by unlicensed persons. In other jurisdictions there are no specific prohibitions related to provision of immigration services, but rather general bar rules that prohibit the unauthorized practice of law in any substantive area, including immigration.

Practical Guidance

What does this mean from a practical perspective? What can U.S. immigration attorneys do when advising a client on an outbound immigration matter? As discussed above, the answer differs based on the foreign jurisdiction at issue, as well as the U.S. state bar rules applicable to the particular U.S. attorney. Because of the variation, it is advisable to take a conservative approach rather than trying to push the limits of what might be permissible in a particular jurisdiction. Some best practices include the following:

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3 Model Rules of Prof'l Conduct R. 5.5, § a.

4 In Australia "registered migration agents" may represent applicants in filings with the Department of Immigration and Border Protection (DIBP). Migration agents must be registered with the Office of the Migration Agents Registration Authority (MARA). *See* http://www.immi.gov.au/visas/migration-agents/_pdf/agent-fact-sheet.pdf.

5 In Canada "authorized representatives" may represent applicants before Citizenship and Immigration Canada. Authorized representatives include: 1) lawyers and paralegals who are members in good standing of a Canadian provincial or territorial law society, 2) notaries who are members in good standing of the Chambre des notaires du Québec and 3) immigration consultants who are members in good standing of the Immigration Consultants of Canada Regulatory Council. *See* Citizenship and Immigration Canada, http://www.cic.gc.ca/english/information/representative/rep-who.asp.

6 In the UK regulated legal advisers or representatives may assist applicants in immigration matters with UK Visas and Immigration (formerly the UK Border Agency). The Office of the Immigration Services Commissioner regulates advisers at three levels: Level 1 – Advice and Assistance, Level 2 – Casework, Level 3 – Advocacy and Representation. *See* https://oisc.homeoffice.gov.uk/how_to_find_a_regulated_immigration_adviser/

7 AILA Global Migration Section/Rome District Chapter Quarterly Call: Ethical Considerations in Working with Foreign Counsel, December 2013, available at: http://agora.aila.org/product/detail/1814.

8 Model Rules of Prof'l Conduct R. 1.1.

9 The Act to Amend the Immigration and Refugee Protection Act, enacted on June 30, 2011, makes it an offense for anyone other than an authorized representative to represent applicants in immigration matters for a fee. Penalties for violations of the act include fines up to $100,000 and imprisonment for up to two years. *See* Backgrounder – Bill C-35 – Highlights, available at http://www.cic.gc.ca/english/department/media/backgrounders/2011/2011-06-28a.asp.

10 The Immigration Advisors Licensing Act 2007 requires all persons providing immigration advice or representation to be properly licensed by the Immigration Advisors Authority unless exempt. Lawyers and community law centre providers, among others, are exempt from the licensing requirement. Under the Act, unlicensed persons (who are not exempt) providing immigration advice may be subject to a fine of up to $100,000 or imprisonment for up to 7 years. Immigration Advisors Licensing Act 2007, Public Act 2007 No 15 (May 4, 2007), *available at* http://www.legislation.govt.nz/act/public/2007/0015/latest/DLM406945.html.

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- The U.S. attorney should disclose to clients that he will be collaborating with a qualified local advisor in the jurisdiction. This may be included in the engagement letter and then again in the initial communication with the client about the substance of the case. Including this in the engagement letter can also enable the attorney to obtain express consent from the client to disclose the client's confidential information to the local advisor.
- The U.S. attorney should not hold him or herself out as an expert on the law of the non-U.S. jurisdiction. He should qualify statements he makes about the case to make it clear that the advice given is coming from the local advisor.
- The local advisor should be involved in communications the U.S. attorney has with the client. This ensures that the client is aware that the legal advice is coming from the qualified local advisor, not the U.S. attorney. It also ensures that the local advisor is aware of all of the information that is exchanged and is able to truly serve as the expert to identify any issues with the case.

Application of UPL Rules to Foreign Advisors

Identifying that one should associate with a local advisor in the foreign jurisdiction is only the first step. A U.S. attorney is also prohibited from "assist[ing] another" in "practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction."[11] In addition, a U.S. attorney may be liable for negligently referring a client to an unqualified foreign advisor, or for subsequent errors made by the foreign advisor.[12] A U.S. attorney owes a duty of care to his clients in referring them to other counsel, and this duty very likely extends to referrals to or collaboration with a foreign advisor.[13] Thus, it is very important that a U.S. attorney confirms the foreign advisor holds the proper credentials to provide immigration services in the jurisdiction at issue, and that he makes reasonable efforts to investigate whether the foreign advisor has the necessary knowledge and experience to provide the particular immigration services the client needs. This investigation should include requesting a copy of the foreign advisor's license or other document that evidences authorization to provide immigration services in the jurisdiction. However, as noted above, jurisdictions vary widely regarding what credentials (if any) are required. A U.S. attorney should be mindful of this and attempt to verify what credentials are required in the jurisdiction at issue. It is also advisable for the U.S. attorney to conduct an internet search of the foreign advisor and his firm or company, review online profiles of the foreign advisor, and question the foreign advisor about his knowledge and experience.[14] It may also be prudent to ask the foreign advisor for references.[15] Speaking with the local bar or licensing agency may be reveal whether individuals need to be licensed to advise on immigration and to confirm the foreign advisor's bar membership or licensing, if it is required.

In countries where the provision of immigration services is not considered the practice of law it may be impossible to find an attorney who practices immigration law. Indeed, some of the most experienced and capable immigration service providers in such jurisdictions may be non-attorneys (or even a category of "licensed" immigration agents). In such situations it is both permissible and unavoidable for a U.S. attorney to collaborate with a non-attorney. However, working with a non-attorney as a local advisor may also heighten the U.S. attorney's duty of care. For example, the U.S. attorney should take special care to ensure that such a local advisor understands the ethical and other legal obligations that the attorney must abide by, including rules regarding attorney-client privilege and confidentiality of client information as well as the Foreign Corrupt Practices Act (please see below). It is a best practice to memorialize the local advisor's understanding and agreement to voluntarily abide by these rules by entering into a written contract at the outset of the engagement.

11 M.R. 5.5(a).

12 Model Rules of Prof'l Conduct R. 1.5 cmt. 7 ("A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter"); *see also* Richmond, Douglas R., "Professional Responsibilities of Co-Counsel: Joint Ventures or Scorpions in a Bottle?" *Kentucky Law Journal* v. 98, pp. 462-516 at pp. 483-4 (2009-10) (citing Model Rule 1.5 cmt. 7 and discussing case law regarding liability for negligent referrals).

13 *Id.*

14 *Id.* at pp. 484-5.

15 *Id.* at pp. 485-6.

Foreign Corrupt Practices Act Considerations in a Global Context

The Foreign Corrupt Practices Act of 1977 (FCPA) (15 U.S.C. § 78dd-1) 15 U.S.C. § 78dd-1, 15 U.S.C. §§ 78m (b)(2)(A) and (B) of 1977 is the federal law addressing bribery of foreign officials and requirements for accounting transparency. In general terms it criminalizes offering or providing, directly (or through intermediaries), anything of value to a foreign government official with improper intent to influence the granting or continuation of business or to gain unfair advantage. Therefore, FCPA is something U.S. attorneys must address especially when dealing directly, or via intermediaries, with foreign administrative/government officials. This is particularly true in developing countries, where there may be no domestic laws prohibiting bribery, coupled with social norms supporting such payments and there may exist a cash economy. In particular, U.S. immigration counsel must be especially vigilant on the requirements of FCPA when managing their intermediary foreign advisors, because immigration law, like customs law, is fertile ground for interaction with administrative officials. FCPA case law shows that immigration, customs and low level licensing is a significant source of risk for violations in many countries.[16]

Preparation for U.S. Attorneys

US attorneys should familiarize themselves with the FCPA, and may consider starting with a thorough read of the Resource Guide on FCPA.[17] For an understanding of which countries may carry a particular corruption risk, consider reading Transparency International Corruption Perception Index.

Next, given the heightened risks of partnering/associating with foreign counsel or particularly, a non-lawyer foreign advisor in outbound immigration casework, the U.S. attorney must develop specific and rigorous guidelines in evaluating and approving the foreign advisors used. Thorough due diligence to select the advisors[18] before the first case is initiated is crucial and continued oversight is a must. Consider Model Rules, R 1.5, R 5.2 and 5.3, particularly with regard to a U.S. attorney's responsibility for a non-lawyer with whom they associate.

Putting Foreign Advisors on Notice re FCPA

Contracts with Foreign Advisors

A common practice in the Global Migration field is for U.S. attorneys to include in their engagement letter or Master Services Agreement with foreign advisor, a clause requesting they attest to the fact that they comply with the requirements of FCPA. These types of agreements or clauses may simply cite the FCPA (and often the United Kingdom's Anti-Bribery Act[19]), with no further explanation or details. This cursory FCPA clause may be considered inadequate for two reasons: the U.S. attorney needs to take certain action in the event of a violation or audit, and such a clause should provide reasonable access to information on the FCPA.

With regard to the first issue, this FCPA agreement should not just mention the importance of FCPA compliance and require the foreign advisor to represent that they understand and will comply with FCPA, but should also have a clearly worded audit clause that requires foreign counsel to provide documents and assist in the event of any investigation. Also having the ability to terminate the contract if foreign advisor is in violation of the FCPA makes good sense.

With regard to the second issue with such cursory FCPA clauses, the thought is that by signing, the US attorney has met its obligation regarding due diligence and compliance. However, a simple signing by foreign advisor of such an agreement may be insufficient to form a basis for reasonably believing that the foreign advisor understands and is adhering to the FCPA. Given U.S. attorneys must reasonably assume that most foreign advisors are not versed sufficiently in U.S. law, signing of such an agreement with a cursory clause appears inadequate. The U.S. attorney may not have the resources to train foreign

16 *Securities and Exchange Commission v. Parker Drilling Company*, Civil Action No. 1:13CV461 (E.D. Va., April 16, 2013). Also see: *Securities and Exchange Commission v. NATCO Group Inc.*, Civil Action No. 4:10-CV-98 (S.D. Tex.). Also, regarding Noble Co. *see* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171487432. Also regarding Panalpina Inc. *see* http://www.sec.gov/news/press/2010/2010-214.htm.

17 U.S. Department of Justice, "Resource Guide on the FCPA," available at http://www.justice.gov/criminal/fraud/fcpa/guidance/

18 *Id.* at p. 60.

19 Bribery Act 2010 (c.23)

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immigration advisors; however they can consider minimally providing reference to appropriate FCPA links. For example:

- http://www.justice.gov/criminal/fraud/fcpa/statutes/regulations.html for links to FCPA translated into 45 languages, and
- http://www.justice.gov/criminal/fraud/fcpa/guidance/ the Resource Guide on FCPA ("the Guide") published by the Department of Justice, which is a relatively easily understood handbook for such a significant law.

Another possibility is to provide a separate Ethics Agreement, Anti-Bribery Policy or Code of Conduct that the advisor confirms they have read and understood and will follow. Certainly U.S. attorneys should specify that if the foreign advisor uses any sub-contractors (anyone who may interact with government officials, for instance) in the execution of their work, that those sub-contractors adhere in the same manner (further in sub-contractors and intermediaries below).

Providing the above information is a good start, but U.S. attorneys should be aware that foreign advisors often do not have an understanding of two issues in particular: FCPA application to any "intermediary" they may use in the immigration process, AND the concept of "facilitation payments."

Problems with Intermediaries

In FCPA parlance, an intermediary is a third party or agent, used to interact with government officials on behalf of the firm/company/person. Clearly, most companies/U.S. law firms, when engaging in global immigration work engage a local law firm or visa service that may also engage third parties/sub-contractors of their own to interact with the government agencies that make immigration decisions. Use of third parties does not eliminate liability with regard to FCPA. The fact that a bribe is paid by a third party does not eliminate the potential for criminal or civil FCPA liability[20]. Therefore, it is incredibly important for the U.S. attorney to not only do their due diligence on the firm or visa agency itself, but also to require that they assert that any intermediary they may use also complies with the FCPA. The vast majority of all FCPA prosecution involves activities by third parties/intermediaries. Make sure before you engage their services that your foreign advisor explains clearly who will be involved in your clients' immigration process and promises documentation of all charges with accurate receipts.

Facilitation Payments

Facilitation payments, sometimes called "grease-the-wheel" payments, are permitted in a restricted sense as an exception under the FCPA. Facilitation payments involve a small offer of value to a government official in order to speed up the processing of a routine, generally non-discretionary government action. As described in the Guide:

> The FCPA's bribery prohibition contains a narrow exception for "facilitating or expediting payments" made in furtherance of routine governmental action. The facilitating payments exception applies only when a payment is made to further "routine governmental action" that involves non-discretionary acts. Examples of "routine governmental action" include processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water.[21]

Though as immigration attorneys we do not like to consider our work as "routine government action [s]", such expedite payments can be permitted as an exception under the FCPA. Note that such a payment could never meet the exception if it were to change a decision or cause the official to take action in a manner they could not otherwise do under the law.

However, there is very good reason to not allow facilitation payments under any circumstance. First, such a payment may violate local corruption laws (note that facilitation payments are not allowed under UK's Anti-Bribery regime). Also, to meet the exception, there are strict recording requirements under the FCPA's books and records provision.[22]

20 U.S. Department of Justice, "Resource Guide on the FCPA," p. 22, available at http://www.justice.gov/criminal/fraud/fcpa/guidance/.

21 *Id.* at p. 25.

22 *Id.* at p. 26.

Given the complexity of utilizing the facilitation payment exception under the FCPA, it is no wonder that foreign advisors often would not have sufficient knowledge to utilize this exception. It is these authors' experience that foreign advisers (even foreign legal counsel) may believe they understand bribery generally but do not understand the FCPA's facilitation payment concept. In fact, this author has encountered many anecdotal situations where foreign counsel has communicated that their understanding of bribery is solely an offer of value to induce a government official to do something they do not have the authority to do or to change a government decision. Therefore if the foreign advisor believes it is not bribery to provide gifts or non-invoiced payments to government officials to obtain expedites, special appointments, accept applications, "not cause problems" with applications, or similar favoritism, they do not sufficiently understand FCPA. This is a risk to a U.S. attorney's client and practice of Global Migration.

Compliance: A Partnership Effort with Foreign Advisor

Avoiding the potholes of petty corruption and facilitation payments is often highly inconvenient. Doing processing the clean way can often be slower and require more administrative hoop-jumping. When an issue arises, it is prudent to encourage the foreign advisor to speak directly and clearly to you at first instance, about these problems and jointly to come up with a way to explain these issues to clients. U.S. attorneys should not communicate in an aggressive or judgmental manner, conveying U.S. law as the only "right way" to do things. In many cultures, this will be insulting and may even be a disincentive to open communication on this issue in the future. Reiterate the aspects of FCPA that are involved. Be as supportive and accommodating as possible regarding the inconvenience to doing things the right way. Don't give in to pressure from clients to get employees working in country "yesterday." Work together to explain to clients why taking the slower road will benefit them in the end. FCPA compliance is a partnership effort.

Conclusion

Ethical challenges for U.S. attorneys abound in the practice of global migration. Avoiding UPL and FCPA violations is not easy. It takes significant time and effort for U.S. attorneys to ask the right questions and find the right foreign advisors to both ensure UPL and FCPA compliance and meet their clients' legal needs by obtaining the necessary visas and work permits. However, when U.S. attorneys are able to successfully navigate this ethical minefield they are truly doing their clients a service by ensuring they receive competent, ethical representation in immigration matters around the globe. In turn, U.S. attorneys are doing themselves a service by avoiding ethical and other legal sanctions, and also developing a reputation for excellence that will win them new clients from the ever-growing pool of companies that realize non-compliance is not a viable option in today's climate of enforcement.

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