

ADVOCATE AND CORRUPTION ERADICATION

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Abstract

The role of advocate is of significant importance in the corruption eradication, especially in the side of litigation process. During litigation process, there is ethical dilemma experienced by such advocate in accomplishing advocacy on behalf of client. In such situation, the courage of an advocate in holding up the Advocate Ethical Code is very demanding.

The meaning of corruption, in more sense, includes the abuse of power or position to enrich him/her self or others, the bribery and money laundering. An advocate is also possible for both a means of corruption device and a person radiating corruption. These following paragraphs are to explain how an advocate enables to eradicate corruption in a three-activity way as he or she is responsible for in their daily activities: legal consultant, litigation and money laundering.

Non-Litigation Process

An advocate, in general, performs as a legal consultant. This activity is pertaining to bureaucracy that handles the pass of permission to run a business. In doing so, to smooth the process, one is to pay unexpected cost to make it easy. A paper, some days ago, reported that there was a person who had a wish to run a 4-acre plantation of Jati Emas in Bojonegoro had to pay Rp. 200 millions as capital. Yet, the permission cost Rp. 50 Millions. Having heard it, he refused to run the business.¹ Apart from taking too much time and money, this phenomenon is common. When one wants everything go smoothly, he pays more.

It is not rare that big enterprises have to spend some more money, in other words, commit bribery. Due to these commitments, US Congress passed FCTA in year of 1977. This law permits not American companies to get tender and run business by committing bribery.²

Here it is, for example, an interesting case of an American company that does business in Indonesia. SEC v. KPMG Siddarta & Harsono explained how American Security Exchange Commission – SEC (Badan Pengawas Modal) sued Accountant Office for Indonesia on the matter of tax paying violence. The bureau of tax Indonesia warned the branch of Baker Hughes, PT Eastman Christiansen (PTEC) to pay tax for USS 3.2 millions. PTEC appointed KPMG Siddharta & Harsono (KPMH–SSH) as representative. KPMH–SSH agreed with PTEC that the tax bureau officer had made a mistake, and on the contrary, PTEC was to get tax return KPMH–SSH met with the officer from Dirjen Pajak in which the officer asked for USS 200.000 as the reward from reducing tax.

¹ “Perizinan Usaha dan Investasi,” Kompas, 16 Mei 2008.

² Oren Gleich and Ryan Woodward, “Foreign Corrupt Practices Act”, *American Criminal Law Review*, Spring, 2005, page 546.

KPMH–SSH contacted Tax Manager for Baker-Hughes Asia Pacific not to comply with the bribery, but against it by law.

The officer, however, denied it though he had reduced it to S 75.000. Sonny Harsono, senior partner at accountant office made a new plan, if Baker Hughes had wished, he had been able paid the tax officer and had put the money through to the cost of accountant office. The accountant office gave two options to PTEC to pay USS 3.2 millions ASAP and it would take two years to handle it, or commit bribery. Baker Hughes Manager delivered the situation in details to Baker Hughes vice-president in Washington DC due to two-day limit given to them to settle the USS 3.2 millions. FCPA consultant informed the tax manager for PTEC that such payment would break FCPA agreement, and the KPMG-SSH was to make agreement that they would never do such.

The consultant delivered such situation to General Counsel for Baker Hughes and Hughes' treasury. General Counsel told them not to deal with any bribery. Yet, they did the bribery and paid USS 200.000. General Counsel knew it ad later did necessary correction. The Counsel stopped the next payment, informed SEC and US Court Justice, and even let the information audited by others, corrected it, stopped KPMG-SSH, accepted the retirement of any officers involved and surely paid the obligation to pay the exact tax USS 2.1 millions to Indonesia Government.

SEC and US Court Justice, in 2001, for the very first and at the same time, sued KPMG-SSH with the charge of unlawful to FCPA. This case shows how FCPA is valid also to exterritorial subject. This also show us how a consultant is able prevent bribery that includes in the corruption act³.

Another interesting case is regarding to the American branch in Indonesia, PT Triton Indonesia which attempted to commit bribery in order to reduced tax they had to pay. Meaning this was between SEC v. **Triton Energy Corp**. It means that SEC had sued **Triton Energy Corp** that also had any responsibility to bribery conducted by those two officers in Indonesia.⁴

The Role Advocate in Eradicating Corruption at Litigation Process

An advocate, in doing litigation, is aware of having dilemma ethics might appear as he represents his clients. It is possible for somebody who gives something, in law court, to a judge might enable him to win the case. It is also very possible and common, in Indonesia, that criminal law can be won when one gives something to police, law court. Furthermore, he or she can be released from any accusation. This news is much often heard in paper. A strong and determined advocate will as much as he can avoid such embarrassing act. It is of importance to see the role of an advocate to eradicate corruption. And more important will it be when an advocate represents his foreign clients.

“The net result of these developments is that the international legal practitioners not only are going to the forefront of the developing anti-bribery mechanisms, but

³ Daniel Patrick Ashe, “The lightening Anti-Bribery Lasso of USA: The Recent Extraterritorial Application of the U.S. Foreign Practice Act”, Fordham Law Review, May, 2005, page. 2921-2931.

⁴ Alexandros Zervos, “Amending The Foreign Corrupt Practice Act: Repealing The Exption for “Routine Government” Payment”, *Penn Satet International Law Review, Summer; 2006, page 261-261.*

*also be more often challenged by them. So long as clients tread the fine line that separates legality from bribery, lawyer will be have to reply on the ethical principles contained in the professional rules of conduct ... in the end, as the case in other legal area, there is no substitute for professionalism and ethical judgment”.*⁵

Thus, it is a must for an advocate to uphold Advocate Ethical Code.

The Role of Advocate in Abolishing Money Laundering

The latest *RUU Anti Pencucian Uang* replaced Money Laundering Law No 25 Year 2003 on Criminal Act of Money Laundering has been proposed to People’s Consultative Assembly (DPR). On this proposal, one of the important matter is that it includes the obligations of lawyer, accountant and notary to report any suspected transaction to PPATK.

This explanation will attempt to discuss the controversy regarding the obligation of a lawyer to report his client identity and transaction in USA and Europe.

In may 2002, FAAT issued “Gatekeeper Initiative” proposing a legal professional should be in cooperation with legal institution to monitor the international money market. This obliges any lawyer to submit “suspected transaction report”.

American Bar Association, in response, agreed on the resolution against regulation or law which compels a lawyer to give any information concerning his client’s confidential data to government as the result of being lawful to international policy against money laundering. On the contrary, the resolution agrees on “*reasonable and balanced private*” to detect and prevent money laundering and terrorism. The recommendation from ABA says⁶:

“that any changes in policy or regulations targeted at money laundering be consistent with the following people: that lawyers play a critical and independent role in preserving lawful compliance of persons involve in commerce and finance, that regulation professional responsibility of lawyers is the responsibility of the judiciary and the organized bar, and that lawyer clients confidentiality is critical to “ensure the indolence of the bar, to protect the lawyer-client relationship, and to support the proper functioning of legal system.”

*European Union did “Directive 1991” amendment, extended the obligation to report any suspected transaction out of banking to lawyer and accountant. In England, the objective of The Criminal Justice Act 1988, section 93 c concludes not only persons working in bank but also lawyer and accountant.*⁷

⁵ Juscelino F. Colares, “The Evolving Domestic & International Law against Foreign Corruption: Some New&old Dilemmas Facing the International Lawtyers”, 5 *Washington University Global Studies Law Review*, 2006, page 30.

⁶Juscelino F. Colares, “The Evolving Domestic & International Law against Foreign Corruption: Some New&old Dilemmas Facing the International Lawtyers”, 5 *Washington University Global Studies Law Review*, 2006, page 30.

⁷ Andreas Rneda, “International Money Laundering Enforcemet&The USA Patriot Act of 2001”, 10 *Michigan State University-DCL Journal of International Law*, Summer, 2001, page 157. Andrew de Lotbinere Mc Dougall, “International Arbitration and Money Laundering” 20 *American University International Law Review*, 2005, page 1033.

Aside from the existence of law listed lawyers to report suspected transaction, in the effort to involve lawyer to abolish money laundering, it is also necessary to add the same thing in the Advocate Ethical Codes.⁸ Bill C 22, in Canada, requires not only money institution but also lawyers and accountant to report any suspected transaction.⁹

FATF claims that some lawyers' activities are able to be used by money launderers to cover them selves.

"For example money launders can take advantage of lawyer's ability to create corporate vehicles, establish trust arrangement, and provide financial advice in complex transaction. Money-launderer can also use lawyers' client account for layering and concealing funds, exploiting the secrecy offered by the legal privilege, and obtaining a veneer of respectability by engaging the service of lawyer".¹⁰

In USA, based on the Internal Revenue Code (IRC) lawyers are obliged to IRS reporting the clients' names who pay his lawyers in cash above USS 10.000.- yet, rule 1.6 (a) from American Bar Association Models Rules of Professional conducts not allows to reveal "information relating to (the) representation of

Some courts, in accordance to consideration of revealing his clients' identity, apply "general rule..... privilege". An example, United States v. Ritchie, 15F.3d 974 (6th ... 1994) Court says: "no reason to grant law firms a potentials ... on money laundering solely because their service are personal and confidential".

Another example, Alexiorv. United States, 39F.3d 973 (9th ... 1994). Court says that it is not a secrecy to reveal client's identity who pays his layer USS 100 in forgery. The court argues that there is an exception upon general rules by stating: "*if client's identification was a last link trying the client to a crime and found "the client's identity would not suffice in this case; knowledge and intent would still have to prove."*" In other cases, United States v. Garner&Newman, 873F. Supp 729 (D Mass 1995), Massachusetts District Court proclaims that there is an exception from general agreement, by saying, "... *where there was concrete evidence that disclosure client's identity, despite his paying more than USS 10,000. in cash, was privilege nevertheless*". According to general agreement, a lawyer unlimitedly delivers such information mentioned. This creates potential erosion for lawyers to represent his clients effectively and appropriately. And what next is that the citizen will pay the result from the fear of the clients due to the identity disclosure committed by the lawyers.

The American Lawyers feel anxious, apart from the identity disclosure, that they will also take any responsibility in the possibility of being part of a money-laundering act.

It is true that lawyer profession is prosperous field for money laundering, because, "*lawyers are especially attractive to money launders because their professional conduct rules force them to keep clients secrets*".

⁸ Katrina, R. Abendano, "The Rule of Lawyers in the Fight Against Money Laundering is a reporting Requirement appropriate", 27 *Journal of Legislation*, 2001 page. 144.

⁹ Sevin Moran, "Global Banking-Canada /Latin America/Africa "20 *Annual Review Banking Law*, 2001, page 84-85.

The strategy to abolish money laundering asks lawyers and accountants to take in part in the efforts, considered that both professions play a role as a Gatekeeper in money transaction either domestic or international.

It brings about, thus, expecting by emerging as a “Gatekeeper,” negative result for lawyer professions. At first, the right of client to get his secrecy seriously becomes compromised. Secondly, government is able to sanction criminal act to lawyers.¹¹ At least, there are four functions related to clients: 1) *advisor clients*; 2) *screening cases and legal arguments*; 3) *avoiding personal participation in improper behavior*, and 4) *disclosing confidences, when permitted by rule, to serve interests that trump the client’s*.¹²

“European Union Directive” consists of two elements: (1) identification (2) openness. *Firstly*, guidance of identifications causes lawyer to do “*due diligence investigation*” to his clients. This guidance is known as “*know-you client*”, requires layer to know who would attain benefit from this legal service, not simply what a lawyer’s sees, or anyone coming to him.

To do so, apply these chances: (1) *when entering into a business relationship with a client*; (2) *when opening a client account*; (3) *when offering safe custody facilities*; or (4) *when any transaction involves currency 15.000 or more, whether in single sum or separate installments*.

Secondly, a report has to be made when a suspected transaction occurs. The guidance mentioned surely causes controversy related to the concept “independent legal professional” and attorney-client-privilege” that are confidential.

Conclusion

The special relationship between a lawyer and a client tends to be more important than the privacy of the client. The relationship must uphold “public administration of justice.” Thus, a lawyer had better check the identity of his client, know where he or she comes, recognize her or his motives when they require service from lawyers.

It is a must for a lawyer to report when he or she suspects the money laundering act takes place. This is uneasy, furthermore, for a lawyer who is determined to keep the client’s talks or any discovered facts that, in the end, make the client troubled.

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¹¹ Sally Baghdasarin, “Gatekeepers: How the Broad Application of Anti-Money Laundering Status and Strategies May Open an Attorney’s Gates to Prosecution”, 32 *Southwestern University Law Review*, 2003 page 726-731.

¹² Fred Zacharias, “Lawyers As Gatekeepers”, 41 *San Diego Law Review*, August-Sept 2004, page 1390.

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