

Understanding The Advice-Of-Counsel Defense

Law360, New York (June 22, 2011) -- The recent indictment and trial of a pharmaceutical company associate counsel has prompted renewed attention to the utilization of the advice-of-counsel defense in civil and criminal matters. In *United States v. Stevens*[1] the associate counsel was indicted for allegedly withholding documents from the U.S. Food and Drug Administration during its inquiry into whether the company was promoting “off-label”[2] uses of one of its drugs. The indictment alleged that the counsel obstructed an investigation, falsified documents, concealed documents and made false statements.[3]

Counsel steadfastly claimed not only that she had done nothing wrong, but that some of her actions were based in part upon the advice of the company’s outside counsel.[4] In addition to asserting the advice-of-counsel defense at trial which resulted in the dismissal of all charges, the defense wisely asserted pretrial that the indictment was improperly obtained because prosecutors misinstructed the grand jury on the effect of relying on the advice of counsel.[5]

After an in-camera review of the grand jury transcript, the court agreed and dismissed the indictments without prejudice, concluding that the government had misinstructed the grand jury on the advice-of-counsel defense.[6] Although this case demonstrates the nightmare created by overly aggressive theories of prosecution, it also serves as a reminder of the benefit of consulting counsel, and, where proper, asserting an advice-of-counsel defense.

In an era marked by aggressive legal theories of criminal, civil and administrative prosecution in thorny, well-regulated industries, the advice-of-counsel defense may emerge as a robust defense for executives or in-house counsel charged with violating various federal laws, such as the False Claims Act[7] or the Anti-Kickback Statute[8]. The defense’s application to the FCA alone is important in light of the U.S. Department of Justice’s announcement that in a two-year period it recovered \$5.5 billion in FCA civil judgments and settlements.[9]

The vast federal regulatory scheme and the quick pace in the change of laws make compliance with legal standards difficult. Too often, in-house counsel have to balance three competing interests: counsel must work to prevent the creation of an adverse relationship between the legal department and management through the culture of being “Mr. No”; counsel must determine who actually performs the task associated with the advice (for example, counsel must determine what to produce and actually produce the information); and counsel must limit their advice to legal matters and not encroach upon business

decisions.

In this environment, it is very important that in-house counsel provide advice to their clients more often than in the past. In the event that something goes wrong, what are the ramifications? Can the entity that sought the advice point the government to the advice when the government is conducting an investigation? In addition, the defense is not limited to criminal statutes, but also applies to a number of civil statutes.

Background of the Advice-of-Counsel Defense

The advice-of-counsel defense allows a defendant to show that there was no wrongful intent underlying his unlawful actions. The defense demonstrates that the defendant lacked the mens rea needed to commit the offense,[10] or, in the civil context, that the defendant lacked the specific state of mind required (or conversely acted in “good faith”).

Accordingly, the defense is not always an affirmative defense, but rather negates an element of the offense itself.[11] A corporate employee may assert the defense to any criminal charges or civil suit brought against them, even if there is no direct attorney-client relationship between themselves and the corporation’s counsel.[12]

Accepted in U.S. courts for well over a century,[13] the Courts of Appeal generally outline the defense as some variation of the following: “[A] defendant must show that he: (i) fully disclosed all material facts to his attorney before seeking advice; and (ii) actually relied on his counsel’s advice in the good faith belief that his conduct was legal.”[14] While not every court has adopted the exact standard, they are generally consistent.[15] Still undecided, however, is the issue of whether the defendant invoking the defense must have initially sought the advice in good faith.[16]

Waiver of Privilege

Raising the advice-of-counsel defense is not without pitfalls. The defense generally waives the attorney-client privilege protecting communications between a client and his counsel because the client is putting the contents of those communications at issue by asserting the defense. For executives, the issue of waiver is made difficult because the lawyers they often rely upon represent the corporation, not its executives.

Thus, it is not clear if they can be permitted to raise the defense in each instance if it could cause the corporation to waive the attorney-client privilege. This creates a conundrum because corporate directors and employees frequently rely on the advice of their corporation’s legal counsel in matters that could expose them to personal liability. Courts have not taken a consistent approach to whether and to what extent an individual asserting an advice-of-counsel defense may introduce privileged communications against the wishes of the corporate privilege holder.

In *United States v. W.R. Grace*, the district court framed the question this way: “whether and under what circumstances the attorney-client privilege must give way to a criminal defendant's Sixth

Amendment right to present a defense ...”[17] There, the court adopted a balancing test rather than a blanket policy regarding the admission of privileged documents.[18] An important issue in that case was that it was a criminal trial where the Sixth Amendment protected “a defendant’s right to present evidence in his defense ...”[19]

The Sixth Circuit took a different approach in *Ross v. City of Memphis*. [20] In that case, both the city and its former police director were sued for civil rights violations.[21] The former police director alleged that he received advice from the city’s counsel to help prove that he had qualified immunity; however, the city invoked the attorney-client privilege to keep the communications from being disclosed.[22]

The Sixth Circuit rejected a balancing approach and held that “a municipal official’s assertion of the advice of counsel defense does not require the City to relinquish the privilege it holds.”[23] *W.R. Grace* and *Ross* represent two differing approaches taken by federal courts. Neither has been fully embraced.

Application under the False Claims Act and Health Care Fraud Laws

The advice-of-counsel defense has wide application for health care companies under both the FCA and other laws. The defense’s application in the health care context was publicized in *United States v. Anderson*. [24] There, the government charged that hospital executives and doctors had violated the Anti-Kickback Statute.[25] One of the defendants asserted an advice-of-counsel defense, arguing that “his actions ... were entirely directed and controlled by legal counsel.”[26] Both the district and appellate court agreed that the defense could negate the specific intent requirement of the anti-kickback statute.[27]

Similarly, in the civil FCA context, the advice-of-counsel defense was successfully used by a health care executive in *U.S. ex rel. Bidani v. Lewis*. In *Bidani*, the court granted summary judgment to a defendant in a qui tam FCA case based upon the advice-of-counsel defense.[28] The defense’s application to the health care field was also demonstrated in *U.S. ex rel. Pogue v. Diabetes Treatment Centers of America*, in which the court held that the defense applied to claims under the Anti-Kickback Statute and the FCA.[29]

Unlike the court in *Bidani*, the court rejected the advice-of-counsel defense on summary judgment.[30] While the defense can be used in the health care context,[31] it may also prove to be a viable defense in a host of other areas of the law and should be closely examined to determine if it is applicable. For instance, it can be used as a defense in actions alleging willful patent infringement,[32] violations of securities laws,[33] or even as evidence that an importer used reasonable care in importing products under the Customs Modernization Act.[34]

Best Practices for Corporate Executives and In-House Counsels

In order to make the defense available, counsel should think about some issues such as proper documentation, preservation of the advice of counsel, the potential for attorney-client waiver and ascertaining who they can rely on the advice within the company. Some tips include the following.

A. Reliance by Individuals on Advice of Corporate Counsel

Clarify the Representation

While an individual may assert the advice-of-counsel defense based upon the advice of a corporation's counsel, an individual should constantly be aware that the corporate counsel usually only represents the corporation, not its employees.

Consider Retaining Independent Counsel

If an individual's obligations are different from the corporation's obligations, then an executive or in-house counsel should consider retaining their own counsel for advice regarding the matter in question.

Discuss Corporate Waiver of the Privilege

An individual should not be afraid to ask relevant corporate officers as to whether they would agree, in advance, to waive the privilege if the need to assert an advice-of-counsel defense arises.

B. Seek Legal Advice!

Seek Advice Early and Often

The advice-of-counsel defense only applies when the advice was sought before action was taken as it asserts that the defendant relied on the advice. One cannot have relied on advice if the decision to take a course of action was made before consulting counsel.[35]

Resolve Gray Areas

The moment you have identified a gray area is the moment you need to seek legal advice. Any delay in seeking advice could be spun by prosecutors as evidence that you were consciously avoiding getting accurate advice that your conduct was unlawful.

Do Not Seek Business Advice

Attorneys are now often consulted about business decisions, not for their legal perspective, but for their business acumen. While business decisions may raise legal issues, if the questions are presented as business questions, then it will be difficult to argue that the advice-of-counsel defense applies if that transaction is called into question.

Hypothetical Versus Genuine Business Issues

Always seek to present genuine business issues to counsel. Questions about hypothetical business activities make it tougher for attorneys to provide legal advice because there are more unknowns.

C. Provide Full Disclosure to Counsel and Keep Proper Documentation

Full Disclosure of Facts Means Full Determination of Facts

In order to provide outside counsel with the information needed to give advice, an executive or in-house counsel must first determine all the relevant facts. This means they must determine what information needs to be collected and then diligently set about collecting this information. Remember, seeking the advice of counsel does not immunize a defendant from a charge of willful blindness.[36]

Continued Disclosure and Past Versus Future Conduct

It is important for executives and in-house counsel to provide additional disclosures when either new information is discovered or the relevance of previously undisclosed information is realized.[37]

Document Requests for Advice and Internal Requests for Information

It is important for executives and in-house counsel to clearly document their requests for legal advice from attorneys and the subsequent responses on matters that could give rise to liability. The advice-of-counsel defense can turn on whether a defendant did his due diligence in collecting information for submission to counsel. Accordingly, internal requests for information should be documented as well.

Mark Privileged Documents

Clearly mark any and all requests for information and subsequent legal advice as documents subject to the attorney-client privilege. Laying the groundwork for a potential advice-of-counsel defense should not open up yourself or your company to the risks that come with the accidental disclosure of privileged information.

Conclusion

The dismissal of the indictment in *United States v. Stevens*, and the subsequent judgment of acquittal after trial, has highlighted the need for corporate executives and in-house counsel to seek legal advice not just during government investigations. Whether the advice-of-counsel defense is appropriate for any individual defendant can only be determined on a case-by-case basis, but through good and detailed recordkeeping, along with appropriate business practices, executives and in-house counsels can make sure that the defense can be available if needed.

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[1] United States v. Stevens, ___ F.Supp.2d ___, 2011 WL 1033707 (D. Md. Mar. 23, 2011).

Subsequently, the government re-indicted the defendant and the case proceeded to trial. After the close of the government's evidence, the defendant moved for acquittal under Federal Rule of Criminal Procedure 29. The court granted the motion and the defendant was acquitted. United States v. Stevens, Judgment, No. 10-cr-00694-RWT (D. Md. May 13, 2011). The court explained its decision to grant the motion for acquittal orally, a transcript of which is available at <http://lawprofessors.typepad.com/files/110510stevens.pdf>.

[2] An off-label use of a prescription drug is when the drug is used in a manner not approved by the FDA. While there is no prohibition on doctors prescribing drugs for off-label uses, pharmaceutical companies may only disseminate information about their drug's off-label uses in limited ways, for instance, by disseminating peer-reviewed journal articles about a drug's off-label uses. A pharmaceutical company may not imply that the drug is approved for these off-label uses in a promotional context.

[3] United States v. Stevens, Indictment, No. 10-cr-00694-RWT (D. Md. Apr. 13, 2011).

[4] United States v. Stevens, ___ F.Supp.2d ___, 2011 WL 1033707, at *2 (D. Md. Mar. 23, 2011).

[5] *Id.* at *2.

[6] *Id.* at *7, 10–12.

[7] 31 U.S.C. §§ 3729 et seq.

[8] 42 U.S.C. 1320a-7b(b)(1)(A)

[9] U.S. Department of Justice, Department of Justice Recovers \$3 Billion in False Claims Cases in Fiscal Year 2010 (Nov. 22, 2010), available at <http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html>.

[10] While this article will limit its discussion of the advice of counsel for its use as a defense, it can also be used affirmatively. For instance, in *Robert W. Stark, Jr., Inc. v. New York Stock Exchange, Inc.*, 346 F.Supp. 217 (S.D.N.Y. 1972), the plaintiff alleged that he properly relied on the advice of counsel when seeking a preliminary injunction enjoining the New York Stock Exchange from expelling him.

[11] *United States v. Benson*, 941 F. 2d 598, 613 (7th Cir. 1991).

[12] See *United States v. McClatchey*, 217 F.3d 823, 830-32 (10th Cir. 2000) (holding that acquittal would be appropriate if the defendant relied on the advice of corporate counsel in good faith); Douglas W. Hawes and Thomas J. Sherrard, *Advice of Counsel as a Defense in Corporate and Securities Cases*, 62 Va. L. Rev. 1, 28 (1976) (“[T]he same good faith and due care standards will be applied in scrutinizing reliance claims whether the attorney-client relationship is direct or indirect.”)

[13] See *State v. Patterson*, 71 P. 860 (Kan. 1903) (rejecting advice-of-counsel defense when the defendant sought the advice after committing the alleged act); *People v. Long*, 15 N.W. 105 (Mich. 1883) (rejecting advice-of-counsel defense when defendant failed to follow the advice of counsel).

[14] See *United States v. Rice*, 449 F. 3d 887, 897 (8th Cir. 2006); see also *United States v. Butler*, 211 F. 3d 826, 833 (4th Cir. 2000) (“The essential elements of the reliance-on-counsel defense are (a) full disclosure of all pertinent facts to an expert, and (b) good faith reliance on the expert's advice.”) (quotations omitted); *United States v. Lindo*, 18 F. 3d 353, 356 (6th Cir. 1994) (“The elements of a reliance on counsel defense are (1) full disclosure of all pertinent facts to counsel, and (2) good faith reliance on counsel's advice.”); *United States v. Kenney*, 911 F. 2d 315, 322 (9th Cir. 1990) (“In order to qualify for an advice of counsel instruction the appellant must show that there was full disclosure to the attorney of all material facts, and that he relied in good faith on the attorney's recommended course of conduct.”); *CE Carlson, Inc. v. SEC*, 859 F. 2d 1429, 1436 (10th Cir. 1988) (“The elements of such a defense require a showing of 1) a request for advice of counsel on the legality of a proposed action, 2) full disclosure of the relevant facts to counsel, 3) receipt of advice from counsel that the action to be taken will be legal, and 4) reliance in good faith on counsel's advice.”); *United States v. Eisenstein*, 731 F. 2d 1540, 1543 (11th Cir. 1984) (“In order to take advantage of this defense, the defendant must show that he relied in good faith after first making a full disclosure of all facts that are relevant to the advice for which he consulted the attorney.”); *United States v. West*, 392 F. 3d 450, 447 (D.C. Cir. 2004) (“A defendant may avail himself of an advice of counsel defense only where he makes a complete disclosure to counsel, seeks advice as to the legality of the contemplated action, is advised that the action is legal, and relies on that advice in good faith.”)

[15] See *United States v. Christopher*, 142 F. 3d 46, 55 (1st Cir. 1998) (discussing requirements for advice-of-counsel defense); *United States v. Evangelista*, 122 F. 3d 112, 116 – 118 (2d Cir. 1997) (same); *United States v. Trait*, 871 F. 2d 368, 382 – 383 (3d Cir. 1989) (same); *United States v. Carr*, 740 F. 2d 339, 347 (5th Cir. 1984) (same); *Liss v. United States*, 915 F. 2d 287, 291 (7th Cir. 1990) (In order to establish an advice of counsel defense, a defendant must establish that: (1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report.)

[16] Compare *Liss*, 915 F. 2d at 291 and *United States v. Beech-Nut Nutrition Corp.*, 871 F. 2d 1181, 1194 (2d Cir. 1989) with *United States v. DeFries*, 129 F. 3d 1293, 1308 n.7 (D.C. Cir. 1997) (“[s]o long as the defendant relies on his counsel’s advice in good faith, it is irrelevant whether or not he initially sought the advice in good faith.”).

[17] *W.R. Grace*, 439 F.Supp.2d at 1136

[18] *Id.* at 1142.

[19] *Id.* at 1137

[20] 423 F.3d 596.

[21] *Id.* at 598.

[22] *Id.*

[23] *Id.* at 603.

[24] 85 F.Supp.2d 1047 (D. Kan. 1999) rev'd by *United States v. McClatchey*, 217 F.3d 823 (10th Cir. 2000).

[25] *Id.* at 1052-1060.

[26] *United States v. McClatchey*, 217 F. 3d 823, 830 (10th Cir 2000)

[27] *Id.* at 829-830; 836.

[28] *U.S. ex rel. Bidani v. Lewis*, 2001 WL 32868, at *6-10 (N.D. Ill. Jan. 12, 2001) vacated in part 2001 WL 747524 (N.D. Ill. June 29, 2001).

[29] 565 F.Supp.2d 153, 167 (D.D.C. 2008) (“Courts do, however, recognize a good-faith defense to claims pursued under the AKS and FCA.”).

[30] *Id.* at 169.

[31] 42 U.S.C. §1320a-7b(b)(1) – (2); 31 U.S.C. § 3729(a)(1)(A).

[32] See *In re EchoStar Communications Corp.*, 448 F. 3d 1294, 1299 (Fed. Cir. 2006)

[33] See *United States v. Bilzerian*, 926 F. 2d 1285 (2d Cir. 1991) (defendant unsuccessfully attempted to assert good faith reliance on the advice of counsel for defense in securities case).

[34] U.S. Customs and Border Protection, *What Every Member of the Trade Community Should Know About: Reasonable Care*, p. 11 (Feb. 2004) (“Have you consulted with a Customs ‘expert’ (e.g., lawyer, . . .) regarding the correct country of origin/proper marking of your merchandise?”)

[35] See *United States v. King*, 560 F. 2d 122, 132 (2nd Cir. 1977) (advice-of-counsel instruction is improper when defendant “specifically testified on cross-examination that he did not recall relying on counsel before [committing the illegal acts]”)

[36] See *United States v. Beech-Nut Nutrition Corp.*, 871 F. 2d 1181, 1194 (2d Cir. 1989) (permitting instructions on both the advice-of-counsel defense and willful blindness to go to the jury); *United States v. Duncan*, 850 F. 2d 1104, 1118 (6th Cir. 1988) (holding that it is appropriate to “combining the reliance

instruction with an instruction on the adverse effect ‘willful blindness’ must have on a good faith defense to criminal intent”).

[37] See *United States v. Johnson*, 139 F. 3d 1359, 1366 (11th Cir. 1998) (approving of district court’s instruction that “good faith reliance upon the advice of counsel requires not only full and complete disclosure of the facts then known but also of material facts or information later acquired ...”)

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