

HCCA COMPLIANCE INSTITUTE
**Advice of Counsel and Good Faith
Reliance: Best Practices in a Risky
Environment (Session 306)**

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Overview

1. Basics of Advice of Counsel Reliance and Defense
2. Why Compliance Officers Should Understand Advice of Counsel
3. Issues Related to Advice of Counsel Defense
4. A Case Study of the Advice of Counsel Defense Used in Tuomey and the Impact on Enforcement Decisions

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What is the Advice of Counsel Defense?

- Advice of counsel is a legal defense to allegations of intentional illegal conduct
- Basically, it says a person or entity did not intentionally violate the law because they sought advice from counsel prior to acting and acted on that advice
- Advice of counsel only is a defense where the intent of the party is an element of the offense
 - Proof of violation requires proof of a level of intent
 - Not Stark violations: strict liability (overpayment)
 - Not miscoding: strict liability (simple overpayment)
 - But False Claims Act requires "knowing" conduct (can be reckless disregard")
 - AntiKickback Act requires "knowing and willful" violation

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WHY IT MATTERS-INDIVIDUAL RISKS FOR COMPLIANCE OFFICERS

- (DOJ) "Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals."
- " (DOJ) Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay."

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Why Advice of Counsel Matters To Compliance Officers

Compliance Officer Interactions with Counsel

- Routine Day to Day Interactions
- Answering Legal Questions/Interpreting the Law
- Development of Compliance Policies
- Assistance with Complex Matters

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ADVICE OF COUNSEL-COMPLIANCE OFFICERS' RISKS

- Second hand receipt of underlying facts(passed through others)
- Second hand receipt of advice (we ran this past the lawyers)
- Uncertain facts
- Uncertain opinion-not in writing
- Individual employee could not disclose the privileged information necessary to raise an advice-of-counsel defense because the corporation owns the privilege. US v. Wells Fargo Bank, NA, 132 F. Supp. 3d 558 (SDNY 2015)
- What documents will exist after the fact to show your good faith

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Why Advice of Counsel Matters To Compliance Officers

Handling of Post Advice Communications

- Verbal Communications
- Written Communications
- Policies
- Board Communications

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Why Advice of Counsel Matters To Compliance Officers

- Increasing cases against compliance officers (SEC and FINRA)
- Susan L. Martin "Compliance Officers: More Jobs, More Responsibility, More Liability" 29 Notre Dame Journal of Law, Ethics, & Public Policy (2015)
- Deborah A. DeMott, *The Crucial but (Potentially) Precarious Position of the Chief Compliance Officer*, 8 Brook. J. Corp. Fin. & Com. L. (2013).

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When it works . . .

- “After an extensive investigation,. . . This office has determined that the parties involved cannot be appropriately prosecuted, given their reliance on the advice of counsel. . . This conclusion is not an endorsement of the conduct at issue; indeed, the transactions appear contrary to the intent and spirit of the laws. . . ”
- March 16, 2017 NY District Attorney letter declining prosecution of New York Mayor DeBlasio.

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Elements of Advice of Counsel Defense

1. Counsel is aware of all relevant facts(complete disclosure by client)
2. Counsel is consulted as to legality of conduct before the action taken
3. Counsel's advice is clear (that conduct was legal)
4. Counsel's advice is relied upon in good faith and followed
Markowski v. SEC, 34 F.3d 99, 105 (2nd Cir.1994)
5. IMPORTANT QUESTION: Can the defendant rely upon advice given to another party to transaction? (common interest doctrine-sharing communications that facilitate compliance)
6. IMPORTANT QUESTION: Can an individual defendant rely upon advice given to the entity that employs them?

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Advice of Counsel: Pluses and Minuses

- Benefits
 - If successful, it may be a complete defense
 - The ultimate issue of whether a defendant relied in good faith on **advice of counsel** and therefore did not act willfully is a question of fact to be resolved by the jury. "Whether the defendant fully disclosed the relevant facts, failed to disclose all relevant facts, or concealed information from his advisor, and relied in good faith on his advisor are matters for the jury—and not the court—to determine, under proper instruction." *United States v. Kofwitz*, 614 F.3d 1241, 1272 (11th Cir.), *opinion withdrawn and reissued in relevant part*, 627 F.3d 1383 (11th Cir.2010).
 - No bad intent, no violation
 - But may still be overpayment
- Downsides
 - It rarely works
 - Party must waive attorney privilege for all related communications with any attorney
 - Can make things much worse depending on communications
 - What will the attorney say?

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Why Advice of Counsel Rarely Works at Trial

- Conflicting advice from counsel
 - Opinion shopping
- Advice given after the fact
- Counsel not given all relevant information
- Advice from counsel is equivocal
- Advice not strictly followed

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Risk of Advice of Counsel Defense may be effective pre-indictment tactic

- Subject of investigation not required to commit to use of defense (prevents discovery of communications)
- Reluctance of DOJ attorneys to subpoena, depose attorneys-US Attorney's Manual **9-13.410 - Guidelines for Issuing Subpoenas to Attorneys for Information Relating to the Representation of Clients**
 - requires prior authorization for the subpoena, by the AAG of the Criminal Division, even in civil cases.
 - DOJ must show that "All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful."

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Advice of Counsel Waives Attorney Client Privilege

- Attorney client privilege
 - o A/C privilege protects communications between counsel and the client entity with respect to legal advice, including investigations.
 - o Privilege extends to communications with in house counsel as well as outside counsel so long as the communications address legal matters
- Assertion of the advice of counsel defense by the holder of the privilege waives the attorney client privilege for all legal communications on the subject matter

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WAIVER OF PRIVILEGE BY PUTTING ISSUE IN CASE- Columbus

- “Columbus Regional intends to offer evidence at trial that it believed its conduct was lawful. Columbus Regional does not assert an "advice of counsel" defense, and it does not intend to rely on communication with its attorneys in support of its defense.”
- CMS 855 Claim form represents compliance with Anti-Kickback and Stark-Columbus put in affirmative defense of belief its conduct was lawful in answer.
- when a defendant affirmatively asserts a good faith belief that its conduct was lawful, it injects the issue of its knowledge of the law into the case and thereby waives the attorney-client privilege. *Barker v. COLUMBUS REGIONAL HEALTHCARE SYSTEM*(MD Georgia August 29,2014) citing *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994).

WAIVER OF PRIVILEGE BY SUBJECT MATTER DISCLOSURE

- The voluntary disclosure by a client of a privileged communication waives the privilege as to other such communications relating to the same subject matter made prior to and after the occurrence of the waiver. *In Re Application of Chevron Corporation* 650 F. 3d 276 (3d Cir. 2011)(dictum) (“presence of strangers” in meeting means no privilege attaches, therefore no waiver)

WAIVER OF PRIVILEGE BY SELECTIVE WAIVER

- Health care-In Re Columbia/HCA Billing Practices Litigation 293 F. 3d 289 (6th Cir. 2002) waiver to one is waiver to all-focus on the communication purpose of the privilege

HOLDER'S BURDEN IN ASSERTING ATTORNEY CLIENT PRIVILEGE

- "To determine if a particular **communication** is confidential and protected by the attorney-client privilege, the holder must prove the communication was (1) intended to remain confidential and (2) under the circumstances was reasonably expected and understood to be confidential." Bogle v. McClure, 332 F.3d 1347, 1358 (11th Cir. 2003).
- See generally In U.S. ex rel. Baklid-Kunz v. Halifax Hospital Medical Center, Case No: 6:09-cv-1002, 2012 U.S. Dist. LEXIS 158944 (M.D. Fla. Nov. 6, 2012) for detailed discussion of necessary showings

The Kellogg Test (DC Circuit)

- Was obtaining or providing legal advice **a primary** purpose of the communication, meaning one of the significant purposes of the communication? In re Kellogg Brown & Root, Inc., 756 F. 3d 754(DC Cir. June 27, 2014)
- Compare: "**the predominant purpose** of the communication is to render or solicit legal advice." In re County of Erie, 473 F.3d 413, 420 (2d Cir. 2007)
- Some Third Circuit cases use phrase "**the** primary purpose"

WAIVER OF PRIVILEGE BY INTERNAL DISCLOSURE

- Law firm retains public relations firm to act as consultant on communications relating to its representation. PR firm participates in meetings with client and attorneys.
- Disclosure of client communications to PR firm, or attendance by PR firm at attorney client meetings "waives the privilege" Calvin Klein Trademark Trust v. Wachner 198 F.R.D. 53(SDNY 2000) (the possibility that the communications to the PR firm may have been helpful in formulating legal strategy and assisting counsel assessing probable public reaction "is neither here nor there.")

NOT ALL COMMUNICATIONS ARE PRIVILEGED

- 1) Is this a communication by a client to an attorney for "the purpose of obtaining or providing legal assistance to the client." (attorney-client) In re Grand Jury Subpoena, 223 F.3d 213, 219 (3d Cir.2000)
- 2) Is this a document or tangible thing prepared by or for an attorney in **anticipation of litigation** or for trial? (work product)
- 3) Has the protection already been waived by disclosure? (in depositions, proffers, by a public report, or to the other side in a transaction)
- 4) Can a client make a selective waiver of the protection in order to assert or present an advice of counsel defense, or allow others to do so?
- 5) Did the client "intend to commit a crime or fraud" at the time the attorney was consulted? and did the client use the attorney-client communication or work product in furtherance of the fraud?
- 6) Who has the authority to waive the privilege to assert the defense?

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WAIVER OF PRIVILEGE BY DISCLOSURE?

- GM issues extensive Valukas Report concerning its investigation into the ignition switch defect and internal follow up
- Communications by employees protected: "the fact that certain information in [otherwise protected] documents might ultimately be disclosed does not . . . create the factual inference that the communications were not intended to be confidential at the time they were made."
- Report disclosure does not open up other work product: "A voluntary disclosure in a federal proceeding or to a federal office or agency . . . generally results in a waiver only of the communication or information disclosed." Fed. R. Evid. 502, Committee Notes
- IN RE GENERAL MOTORS LLC IGNITION SWITCH LITIGATION(SD New York January 15, 2015)

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MANDATORY REPORTING OF CONDITIONS AFFECTING RIGHT TO PAYMENT

- required to be disclosed to a government entity or private party Model Rule of Professional Conduct 1.6
- CMS Form 855 and 855a certification
- ACA 6402 report refund explain overpayment within 60 days
- Section 111 reporting of primary insurance by primary insurer
- CONDITIONS OF PARTICIPATION-855
- STARK VIOLATIONS
- HOSPITAL READMISSION

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ADVICE OF COUNSEL ISSUES FOR PRIVILEGE AND DISCLOSURE

- You will (probably) want to preserve the privilege until the organization decides that advice of counsel disclosure is in its best interest
- But-you may decide to create documents outside of the privileged context so that they can be used to support an advice of counsel argument without waiving the privilege generally
- EXAMPLE: Stark analysis of transactions

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Not Reliance on Advice of Counsel, but Evidence of Good Faith?

- -believed materials reviewed and approved by lawyers and other professionals
- Defense to "knowingly and willfully" in Anti-Kickback statute?
- "pure heart/empty head" good faith
- "Scienter ... is a subjective inquiry. It turns on the defendant's actual state of mind." Thus, "although we may consider the objective unreasonableness of the defendant's conduct to raise an inference of scienter, the ultimate question is whether the defendant knew his or her statements were false, or was consciously reckless as to their truth or falsity."
- SEC v. Platforms Wireless Intern. Corp., 617 F. 3d 1072, 1093 (9th Cir. 2010)

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Other Lessons Learned

- Assume there is no Advice of Counsel Defense
- Evaluate Attorney Advice Carefully
- Think Independently

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