HERE BE DRAGONS – REGULATORY LAW AND THE ADVICE-OF-COUNSEL DEFENSE

Federal regulations are an enormous morass of complex, confusing, and often contradictory rules. The 2009 Code of Federal Regulations was 163,333 pages in 226 individual books. The 2010 Federal Register, which contains new regulations proposed rules, and presidential papers, contained an additional 81,305 pages. Intended as a roadmap, providing guideposts and requirements for dealing with the Government, it has become so incomprehensible to the layman that it could just as easily be a 16th century copper globe engraved "HC SVNT DRACONES" (Latin, *hic sunt dracones*, or "here be dragons"). From the Hunt-Lenox Globe, or Lenox Globe, ca. 1503-1507, the second-oldest known terrestrial globe, after the Erdapfel of 1492, presently housed by the Rare Book Division of the New York Public Library.

It is little wonder that health care providers, bankers, defense contractors, builders, even farmers and ranchers, turn to attorneys to help understand what they are allowed to do and, even more important, what actions are prohibited. A regulatory attorney helps guide a client through the regulatory jungle, identifying the client's needs and goals and advising how they can be met (and sometimes if they can be met) within the confines of the regulations. This actually confers two different benefits on the client. The first, the obvious benefit, is concrete advice on what the regulations permit and prohibit. The second, less obvious, less often needed, but absolutely critical when the need arises, is confidence that the client did the very best it could to comply with all applicable laws, rules, and regulations. If the government ever aggressively challenges the client's actions, particularly if it challenges the actions in criminal court or in a False Claims Act (31 U.S.C. 3729 *et seq.)*case, this forms the basis for what is known as the "advice-of-counsel defense." Advice to the client is always at the forefront of the client's and counsel's minds, while the advice-of-counsel defense is rarely, if ever part of the engagement or ongoing conversations. It does, however, form a crucial backstop of protection for the client. Therefore, any attorney providing regulatory advice should have a working understanding of the defense, how it is used, how advice should be provided to protect the defense, and how it can be unintentionally ruined or even waived, perhaps even before the need for the defense is recognized.

THE ADVICE OF COUNSEL DEFENSE

All criminal prosecutions include demonstration of *mens rea*, a guilty mind, or criminal intent. Without a demonstration of criminal intent there can be no finding of guilt. In some civil matters, e.g. False Claims Act. cases, require a showing that the alleged improper act was done knowingly. In asserting the advice-of-counsel defense a defendant is not saying it did not perform the act. Rather, it asserts that it acted in good faith, and therefore without *mens rea* (criminal) or knowledge (civil), due to reasonable reliance on advice from counsel. *In re Seagate Techonology, LLC*, 497 F.3d 1360, 1369 (C.A. Fed. 2007)). The two elements of an advice-of-counsel defense are (1) full disclosure of all pertinent facts and (2) good faith reliance on advice of counsel. Further, to invoke the advice-of-counsel defense, the party must waive the attorney-client privilege.

FULL DISCLOSURE

The first place an advice-of-counsel can, and often does, fail is the first element, full disclosure. The client must provide counsel all relevant information about the entire subject matter upon which counsel will provide advice, not just the minimum of information necessary to answer a single question. In a fraud case in bankruptcy court, the debtor told his counsel that the state court had authorized a sale to go forward, but failed to tell him that the court was not aware that the sale was to the debtor's brother for far less than fair market value. (*In re Retz*, 606 F.3d 1189 (9th Cir. 2010)). In a criminal case arising out of bankruptcy court, the debtor transferred assets to her parents but maintained control over them. She failed to tell her attorney that the transfers were to relatives and that she continued to use them. Her advice-of-counsel defense failed for lack of full disclosure.(*U.S. v. Antoinette-Bates*, 359 Fed.Appx. 845 (9th Cir. 2009)).

It is important to note that the full disclosure element of the advice-of-counsel defense is a factual issue, not a legal issue. It is up to a judge or jury, as the finder of fact, to determine whether a defendant fully disclosed all relevant information.(*U.S. v. Noe*, 145 Fed.Appx 15, 17 (4th Cir. 2005)).As with any issue that goes to a jury, full disclosure will be judged based upon witness credibility, motive, and the overall tenor of a case. Where the advice-of-counsel was for an act that allowed the defendant to profit from the government, that factor can weigh against a finding of full disclosure, even if, from the defendant's and counsel's point of view, every relevant piece of information was provided.

GOOD FAITH RELIANCE

Good faith reliance upon advice of counsel, the second element, can also trip up an advice-of-counsel defense. Failures due to lack of good faith reliance generally fall under one of a few broad categories.

The first category of good faith reliance failure is nefarious intent. If the party seeking advice knows he intends to do something improper, counsel's advice cannot vitiate the existing *mens rea* or knowledge.(*In re Adeli*, 384 Fed.Appx 599 (9th Cir. 2010)). Just like full disclosure, good faith reliance is a factual issue for a jury to determine. (*Mee Industries v. Dow Chemical Co.*, 608 f.3d 1202 (11th Cir. 2010)). This is an important consideration when giving regulatory advice. When clients approach regulatory attorneys they often already have their plan in mind and are asking whether it meets the applicable rules. In litigation, this would be presented as a pre-existing plan in search of a blessing, rather than advice. While everybody within an industry might fully understand such plans are within the normal course of business, a jury, particularly with the government on the other side of litigation, could easily find otherwise.

The second category of good faith reliance failure is contradictory advice. Clients often seek advice from multiple counsel. Sometimes, they get advice from multiple counsel even if they did not seek it out, such as commentary from an attorney board member or assistant in-house counsel. Where a defendant moved forward with advice that profited it, in the face of advice that perhaps it should not do so, a fact-finder can determine that reliance upon the former was not in good faith. Additionally, such contradictory advice cannot be concealed. Please see "Waiver of Attorney-Client Privilege," below.

The third category of good faith reliance failure is opinion shopping. The fourth, fifth, or even sixth attorney to be asked the same question may finally offer the opinion the client wishes to hear; however, any reliance upon that opinion as a defense is likely to be looked upon askance. The client and final counsel may be able to persuade a jury that reliance was in good faith, but any generation of advice after the first brings with it reduced credibility and increased risk.

Another failure of good faith reliance comes from captive counsel. Where the advice comes from within a company or, even worse, from an attorney who also stands to profit from the company's actions, the advice-of-counsel defense is instantly weaked in the eyes of a judge or jury. This matter goes beyond mere conflict of interest, for an in-house counsel has no such conflict where she is assisting her client or profiting beside it. Rather, it simply raises a credibility issue in the eyes of the fact finder, which must determine whether the advice might have gone a different way had counsel and client not had the same interest in the result.

WAIVER OF ATTORNEY-CLIENT PRIVILEGE

To raise the advice-of-counsel defense, a defendant must waive the attorney-client privilege. The extent of that waiver is often a subject of intense litigation and usually arises during discovery, when the defendant raises the attorney-client privilege as a basis to object to production. Trial counsel, when different from the advising counsel, are generally exempt from the waiver. *In re Seagate*, *supra*. In criminal cases this arises as part of a Sixth Amendment right to counsel issue. In civil and criminal cases it also goes to the issue at hand – the defendant's intent at the time of the alleged wrongdoing – which inevitably preceeds retention of defense counsel in a criminal or civil prosecution. In the rare instance where defense counsel is hired at the time of the advice the client would have other problems addressing the "good faith reliance" element of the advice-of-counsel defense. The advice-of-counsel defense also makes the advising attorney a potential witness, raising conflict issues that may lead to disqualification as trial counsel, either by the same attorney or another member of the attorney's law firm.In some states, e.g. Illinois, an individal attorney may be barred from participating in a case while his firm can continue as trial counsel. In others, e.g. Ohio, individual conflict requires the entire law firm be excluded from participation in a matter.

At a minimum, the attorney-client privilege must be waived for "[A]ny document or opinion that embodies or discusses a communication to or from [the alleged infringer] concerning [the matter] ... includ[ing] not only letters, memorandum, conversation, or the like between attorney and client, but also ... any documents referencing a communication between attorney and client." In some cases courts, concerned that the defendant is the party both raising the privilege and deciding what documents fall under the waiver, have required that all communication of any kind with the counsel, particularly counsel retained for the particular purpose, be produced.(*Western States Co. v. O'Hara*, 357 Ill.App.3d 509, 520–21, 293 Ill.Dec. 532, 828 N.E.2d 842 (Ill.App.Ct.2005)).

Attorneys providing regulatory advice should, at all times, keep in mind that any communications with a client could later be produced to support an advice-of-counsel defense. That means counsel must be absolutely scrupulous in providing open, honest, and straightforward communication. With every communication such counsel must ask, not just "is this the very best advice I can provide," but also, "have I

offered it in a manner I am willing to state in a court of law?" At all times, too, counsel must remember that, while the initial audience is the client seeking regulatory advice, a client familiar with the industry and the regulatory morass in which it operates, the final audience may be two teachers, a retired postman, a banker, a homemaker, and college professor, a jury.

CONCLUSION

Regulatory advice should always be provided with the potential it may arise later as part of an advice-of-counsel defense. It must be sought and acted upon in good faith and full disclosure. Invocation of the defense requires waiver of the attorney-client privilege. For these reasons, communications between clients and counsel must be forthright, professional, and provided with the ultimate potential fact-finding audience in mind.

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