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WHITE-COLLAR CRIME

When an Executive's Defense May Waive Company Privilege

By Robert J. Anello and Richard F. Albert
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When a corporate officer seeks to defend criminal charges based on his or her reliance on the corporation's counsel, complex legal issues tend to arise for the company and the courts. A decision late last year from the First Circuit Court of Appeals in *United States v. SpineFrontier, Inc.*, 160 F.4th 212 (1st Cir. 2025), a prosecution of officers of a medical device company charged with violating the Anti-Kickback Statute (AKS) based on an alleged sham consultancy program for surgeons, addresses two thorny issues in this area. First, when does a particular executive's invocation of a defense based on the role of corporate counsel waive the corporation's privilege? Second, can the executive's restriction of the defense to the mere involvement of counsel, without revealing particular advice provided by counsel, avoid effecting a waiver?

In addressing these questions, the First Circuit drew on Second Circuit precedent, in particular *In re Grand Jury Proceedings,* 219 F.3d 175 (2d Cir. 2000), a decision addressing whether certain statements by a corporate CEO in the course of grand jury testimony waived corporate privilege. By overturning a district court ruling finding waiver over the corporation's objection,

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SpineFrontier, like In re Grand Jury Proceedings, illustrates that courts are reluctant to imply broad waivers of corporate privilege based on the conduct of an officer. In addition, *SpineFrontier's* analysis provides useful support for the premise that in some circumstances, a defendant may invoke a disciplined involvement of counsel defense without waiving privilege. Nevertheless, the takeaway for counsel is to proceed with caution. This area is fraught, highly fact specific and difficult to predict.

Background—Advice of Counsel versus Involvement of Counsel

As the Second Circuit has explained, a traditional "advice of counsel defense" relies on evidence that, if believed, can raise a reasonable doubt in the minds of the jurors about whether the government has proved that the defendant

had the unlawful intent necessary to commit the offense. *United States v. Scully*, 877 F.3d 464, 476 (2d Cir. 2017); see R. Anello & R. Albert, "My Lawyer Said It Was OK: 'Scully' and Defending Based on Reliance on Counsel," N.Y.L.J. (April 3, 2018).

In considering such defense, a jury is instructed to assess whether the defendant "honestly and in good faith sought the advice of counsel," "fully and honestly laid all the facts before his counsel," and "in good faith and honestly followed counsel's advice." *Scully*, 877 F.3d at 476. A defendant's assertion of an advice of counsel defense is typically considered to place the nature of the lawyer's advice squarely in issue and thereby cause a waiver of the attorney-client privilege, to ensure fairness by preventing a defendant from using only the helpful portions of the advice and hiding the unhelpful portions.

A defendant invoking an "involvement of counsel" defense, by contrast, seeks to negate a claim of bad-faith or illegal intent by adducing evidence of a lawyer's participation in a series of transactions or other conduct, without claiming reliance on any particular advice the lawyer provided to the defendant. A leading case arose in the context of an SEC enforcement proceeding, *Howard v. S.E.C,* 376 F.3d 1136 (D.C. Cir. 2004), where the SEC claimed that Howard acted fraudulently in carrying out a stock offering by counting as bona fide certain prior stock sales made to entities with which his companies had some association. Howard's in-house and outside counsel played a central role in steps leading to the prior sales, and they also prepared the offering documents for the challenged stock offering.

The D.C Circuit expressly rejected the argument that a defendant could claim reliance on counsel only when he could make out each element of a traditional "advice of counsel" defense. Ruling that Howard did not act with wrongful intent, the court explained that because Howard was aware of the involvement of in-house and outside counsel in preparing, reviewing and approving of the offering documents, and because outside counsel had considered and approved at least one of the challenged stock sales, Howard could not have acted with wrongful intent. *Howard*, 376 F.3d at 1146-47.

In recent years, some district courts in the Second Circuit have taken a skeptical approach to defense efforts to offer evidence of involvement of counsel, precluding such evidence under Fed. R. Evid. 403 as more prejudicial than probative. Those courts have reasoned that such evidence risks suggesting to the jury that, because lawyers were involved to some degree with certain conduct, the defendant was entitled to conclude that the lawyers blessed other conduct. Such courts have also suggested that there is some inherent unfairness in a defendant being able to get the benefit of an advice of counsel defense, without proving its elements and without waiving the attorney-client privilege. See *S.E.C. v. Lek Securities Corp.*, 2019 WL 5703944, at *3-4 (S.D.N.Y. Nov. 5, 2019); *S.E.C. v. Tourre,* 950 F. Supp. 2d 666, 684 (S.D.N.Y. 2013).

Most prominent among these rulings is *U.S. v. Bankman-Fried*, 2024 WL 477043 (S.D.N.Y. Feb. 7, 2024), the prosecution of the founder of cryptocurrency firm FTX, where based on a detailed analysis of testimony proffered by the defendant outside the presence of the jury, Judge Lewis Kaplan precluded the defense from offering evidence of involvement of counsel in three subject areas. That ruling is a prominent subject of Bankman-Fried's pending appeal, which was argued in November 2025. The Second Circuit's upcoming decision in that appeal may well provide further guidance on the appropriate approach to defense efforts to offer evidence of the involvement of counsel.

'SpineFrontier'

In *SpineFrontier*, a grand jury charged SpineFrontier, a company that designs, manufacturers, markets, and sells spinal medical devices, along with its principal shareholder,

CEO and sole director, Dr. Kinglsey Chin, and its CFO, Aditya Humad in August 2021 with alleged violations of the Anti-Kickback Statute based on an alleged sham consulting program designed to induce surgeons into ordering and using the company's devices in surgeries subsidized by federal healthcare benefit programs. Prior to trial, the defendants noticed the possibility of invoking an "involvement of counsel" defense based on SpineFrontier's engagement of an outside law firm, to negate the necessary willfulness element of the statute. The law firm had drafted opinion letters about the program's legality for SpineFrontier that Chin and Humad distributed to third-party surgeon-consultants.

Significantly, the opinion letters expressly relied on certain key assumptions and qualifications, including that the compensation paid surgeons would be for bona fide services at fair market value, and that such compensation would not be determined based on volume or value of business. The indictment alleged that, in fact, the defendants calculated compensation payments based on the volume of surgeries performed using SpineFrontier devices and the amount of revenue generated for the company.

The government moved for a ruling that the letters impliedly waived any claim of corporate privilege over all related communications with the law firm. Before the district court resolved the motion, the government dismissed all charges against SpineFrontier, leaving Chin and Humad as defendants. Thereafter, the district court ruled that Chin and Humad together had the authority to effect an implied waiver of the corporation's privilege, and that their pursuit of the defense at trial would waive privilege as to all of defendants' communications with the law firm. Humad then informed the court that he intended to invoke the defense, while Chin stated he would not. The district court issued a March 7, 2025 order that Humad's planned defense waives the privilege. Thereafter Chin pleaded guilty, leaving Humad as the only remaining defendant.

SpineFrontier, now a third party, filed an interlocutory appeal of the district court's March 7 order. In resolving the appeal, the First Circuit followed the Second Circuit's analytical framework established in *In re Grand Jury*, where the Second Circuit addressed what factors a court should consider in determining whether a senior executive may, over the corporation's objection, waive the corporation's privileges through his testimony in the grand jury. The Second Circuit found that although the witness was the corporation's chairman, founder and CEO, and he testified that advice received from counsel validated company actions that were the subject of the investigation, such testimony did not necessarily waive the corporation's privilege. The court remanded the case for the district court to further analyze the circumstances of the testimony.

Change in Circumstances

For the first step in the analysis, the First Circuit looked to whether the executive and company were "alter-egos" or otherwise shared a tight alignment of interests. The First Circuit noted that "alter-ego" status depends on multiple considerations, including an executive's control over the corporation and a corporation's public or private status. As to alignment of interests, the court pointed out that an executive's interest in avoiding conviction may "override his fidelity" to the now uncharged corporation, which has consistently sought to preserve its privilege, such that imputing a waiver to the company might not be fair.

The court noted that although implied waiver analysis is "highly fact dependent," the district court did not conduct a new analysis after Chin pleaded guilty but rather treated the Company's two officers as a unit and assessed their joint authority. Finding that whether Humad alone was SpineFrontier's alter ego was "far from clear," the First Circuit vacated the district court's order

and remanded the case for further analysis on a more developed record.

Is Waiver Required?

Continuing its analysis assuming Humad had the authority to waive the corporation's privilege, the First Circuit addressed whether Humad's proposed involvement of counsel defense – which does not intend to reveal any specific communications or to rely on any particular advice -- requires waiver. The First Circuit observed that under the doctrine of implied waiver, a traditional advice of counsel defense requires disclosure of the privileged communications to the opposing party lest the defendant selectively disclose only helpful fragments of the lawyer's advice, thereby subverting the truth-seeking process. In contrast, the First Circuit opined that "an involvement of counsel defense does not automatically trigger a waiver of the privilege," and whether Humad's planned defense raises the same fairness concerns as an advice of counsel defense triggering waiver will depend on "exactly what he seeks to argue at trial," which was not yet clear.

If Humad were to suggest that outside counsel were "watching" or "in the room" during the duration of the consulting program, thereby seeking to have the jury infer that corporate counsel approved of Humad's conduct in implementing the consulting program, waiver would be required to enable the government to probe the extent of counsel's knowledge of how the program was executed. If, however, Humad's argument was limited to asserting that he was less likely to have intentionally violated the Anti-Kickback Statute because he "knew that SpineFrontier had engaged a law firm to set up the consulting program and remain on retainer to address problems as they arose," such a defense would not inject the substance of attorney-client communications into the litigation, nor require the inference that counsel approved the way the program was implemented. The First Circuit remanded for the district court to analyze the precise theory Humad seeks to raise at trial.

The First Circuit further noted that other approaches beside waiver could address the potential prejudice to the government from Humad's defense, including the use of a limiting instruction to the jury. The First Circuit expressed skepticism that Humad's defense would raise "material prejudice" since the letters themselves, by including an assumption that compensation would not be determined by volume or value of business, could undermine his theory. The court emphasized that "a waiver is a significant penalty" and "less-onerous mechanisms" to address prejudice should be considered first.

Conclusion

The First Circuit's ruling in SpineFrontier confirms that courts are hesitant to imply a broad waiver of corporate attorney-client privilege over the corporation's objection based on the actions of an officer. By effectively countenancing a defendant's effort to offer evidence of involvement of counsel as evidence of good faith, the opinion provides a useful contrast to some recent district court opinions precluding defendants from offering such evidence.

Further, by providing guidance as to how a defendant can limit his use of such evidence so as to avoid effecting a waiver, the ruling provides a potentially useful road map. SpineFrontier and other case law in this area illustrate, however, that such road is hazardous, full of unpredictable twists and turns for counsel and client alike.

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