



Advice of Counsel

What Every Corporate Executive Needs to Know

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Welcome



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Housekeeping

- Add your questions to the Q+A Section. Questions will be addressed at the end.
- If you have any technical issues hearing or seeing the presentation, please contact Siobhan Conlon (sconlon@foleyhoag.com).

Today's Program

Advice of Counsel (“AOC”)

- Topical -- recently came up in the Sam Bankman Fried (FTX) trial
- Important issue for companies, but also for corporate executives
 - The interests of a company and an executive may not be aligned when it comes to asserting the AOC Defense

Presentation today will discuss:

1. Elements of the AOC Defense (civil and criminal)
2. Discussion of the AOC Defense as applied in the case law, including:
 - Who owns and can assert the privilege and who can waive it
3. Practical Considerations for Executives who Consult Company Counsel in the course of their job

Advice of Counsel: The Elements

CIVIL:

1. The party made a **complete disclosure** to counsel
2. The party **sought advice** from counsel as to the legality of his actions
3. The party **received advice that his conduct was legal**
4. The party **relied on such advice in good faith**

CRIMINAL

1. The **advice was sought and received before taking the allegedly criminal action**
2. The defendant **sought the advice of a professional in good faith**
3. **With the purpose of determining whether the conduct was lawful**
4. The **professional was apprised of all material facts which the defendant knew**
5. The defendant **acted strictly in accordance with the advice of the professional**

Advice of Counsel – In the Civil Context

- Purpose:
 - Ordinarily raised where a ***party is accused of acting willfully*** and asserts as an essential element of its defense that ***it relied upon the advice of counsel***
- How to Raise the Defense:
 - The defense can be raised as ***an affirmative defense*** or ***raised later to defeat an element of a claim***

There is no explicit rule that advice of counsel is an affirmative defense that must be pleaded in one's answer pursuant to FRCP 8(C)

Advice of Counsel – In the Criminal Context

■ Purpose

- It negates an element of criminal fraud, *i.e.*, unlawful intent.

>>> *It is not an affirmative defense* <<<

- It is evidence that, if believed, can raise a ***reasonable doubt*** in the minds of jurors about whether the government has proved the required element of the offense
- Good faith reliance on advice of counsel is not really a defense to an allegation but ***is the basis for a jury instruction*** on whether or not the defendant possessed the requisite specific intent

Advice of Counsel – In the Criminal Context

■ When It Must be Raised

- Generally, a Defendant does not need to reveal the advice of counsel defense, or whether it will rely on it, prior to trial

BUT....

- Courts have discretion to order pretrial notice of an advice of counsel defense

Advice of Counsel: the Informal Version

The “formal” advice of counsel defense (described previously) requires satisfying the listed elements in order to make out the claim.

Some Courts, however, have held that a party who does not make out the formal defense may still use the involvement of counsel to evince good faith:

- “For example, a defendant might testify that he negligently, but not intentionally, failed to provide a complete set of facts to the lawyer, or that he received accurate advice but innocently misinterpreted it. That would not qualify for an advice-of-counsel defense in the formal sense; nonetheless, such evidence would surely be admissible on the issue of defendant's state of mind.” ***United States v. Gorski***, 36 F. Supp. 3d 256 (D. Mass. 2014)
- ***SEC v. Present***, 2017 U.S. Dist. LEXIS 120351 (D. Mass. Jul. 31, 2017) (evidence that defendant engaged top counsel to ensure compliance with legal requirements was admissible to the extent it is relevant to whether defendant acted in good faith and/or with due care)
- ***Howard v. SEC***, 376 F.3d 1136, 1147 (D.C. 2004) (reliance on counsel can be evidence of good faith, a relevant consideration in evaluating defendant’s scienter)

Advice of Counsel: the Informal Version

Others, on the other hand, have found that a party may not discuss the general presence of counsel or counsel's advice where the elements of the defense are not satisfied because it might mislead the jury into believing intent is negated and is thus prejudicial

- ***SEC v. Mapp***, 2017 U.S. Dist. LEXIS 22012 (E.D. Tex. Dec. 4, 2014) (without evidence regarding what information Mapp provided counsel when seeking advice, what advice Mapp received, and whether his conduct was consistent with that advice, general reference to the existence of counsel was prejudicial)
- ***United States v. Liberty***, 2020 U.S. Dist. LEXIS 202243 (D. Me. Oct. 30, 2020) (refusing to allow defendant to “thread the needle” by making an involvement of counsel argument without disclosing any confidential communications and thereby avoiding an implied waiver)
- ***Schultze v. 2K Cleveland LLC***, 2018 U.S. Dist. LEXIS 148363 (S.D. Fla. Aug. 29, 2018) (the intention to present evidence that one sought legal counsel in support of a good faith defense, but resistance to disclose what specific advice was given because of attorney-client privilege, raises the issue of “inferential hearsay” and should be precluded on motion in limine)

AOC and the Sam Bankman Fried (FTX) Case

August 18

[about six weeks prior to the first day of trial]

The government moved for an order:

- Requiring the defendant to provide immediate notice . . . of (i) the nature and specifics of his advice of counsel defense, including . . . who provided such advice and a proffer of facts in support of such a defense, and (ii) all documents” related to the defense
- Or – if those specifics are not provided -- precluding SBF from asserting a purported advice-of-counsel defense at trial

Defense was ordered -- prior to the government's August motion -- to “provide notice to the Government . . . of his intention to present an advice of counsel or a defense based on mental condition or defect.”



Defense's notice -- “Please take notice of our intent to rely on a defense of advice of counsel at trial.”



Not surprisingly, the government argued that the notice was insufficient.

AOC and the Sam Bankman Fried (FTX) Case *(cont'd)*

- Defense responded that it intended “to elicit evidence that Mr. Bankman-Fried was aware that . . . lawyers as well as in-house counsel for FTX . . . were involved in reviewing and approving decisions related to [certain] matters . . . which gave him assurance that he was acting in good faith.”

Matters SBF claimed involved lawyers included, among others:

- Use of encrypted messaging apps and auto-deletion policies
- Loans given to the founders and other executives of FTX and Alameda
- FTX customer agreements, including the FTX Terms of Service
- Intercompany agreements between FTX and Alameda, including the Payment Agent Agreement.

AOC and the Sam Bankman Fried (FTX) Case *(cont'd)*

- SBF argued that his “reliance on counsel is relevant to the question of intent and is not limited to situations where the defense can establish that the defendant formally sought out the advice of counsel, received legal advice, and followed the advice given.”
 - *Essentially, the informal version*
- Cited **Howard v. SEC**, 376 F.3d 1136, 1147 (D.C. Cir. 2004) (“[R]eliance on the advice of counsel need not be a formal defense; it is simply evidence of good faith, a relevant consideration in evaluating a defendant’s scienter.”)
- Also quoted Sand’s Modern Federal Jury Instructions, Instr. 44-5 (“It may also be appropriate to instruct the jury that consulting counsel could be considered as evidence of good faith.”)

AOC and the Sam Bankman Fried (FTX) Case

August 30

- Parties had a conference in front of Judge Kaplan
- Court ordered SBF provide an additional advice of counsel disclosure by **September 15**
- He also directed the parties to confer and submit a joint letter outlining the scope of the disclosure the defendant would make on that date.

- The lawyers whose advice SBF was referencing were FTX's lawyers – both in-house and outside counsel – not his personal lawyers
- FTX was in bankruptcy and under the direction of a Chief Restructuring Officer
- SBF was no longer in a position to waive the AC privilege
- Not in FTX's interest to waive

AOC and the Sam Bankman Fried (FTX) Case

September 1

- The USAO submits a letter to the Court on behalf of both parties concerning the defendant's AOC disclosure
- Parties agree that “for any defense based on advice of counsel, reliance on counsel, presence of counsel, or involvement of counsel,” SBF would disclose additional information and supporting materials by ***September 15***

What do SBF's counsel have to disclose?

- A description of the contours of the defense, including the attorney's involved and general subject matter
- If formal AOC defense, will disclose the information provided to the attorneys, the advice conveyed, and other individuals present
- Whether SBF is asserting a formal AOC defense or the informal good faith defense
- Counts of Indictment to which the defense applies
- Who owns the privilege

AOC and the Sam Bankman Fried (FTX) Case *(cont'd)*

October 1

Judge Kaplan's In Limine Decision

- [the day before the beginning of the trial]
- Judge Kaplan issues a memorandum opinion in response to the government's in limine motion to preclude the defense from arguing or adducing evidence regarding the involvement of lawyers in certain events at FTX and his hedge fund, Alameda, absent a "formal 'advice of counsel defense.'"
- In his opinion, Judge Kaplan ***recognizes that SBF is not asserting a formal AOC defense***
- Rather, that ***SBF is arguing the "informal" AOC defense – good faith and lack of intent***

AOC and the Sam Bankman Fried (FTX) Case *(cont'd)*

- “[T]he risk of confusion and unfair prejudice to the government were defendant to focus on the presence or involvement of lawyers at or for FTX and Alameda – without any degree of specificity about what they were present for or involved in, what their tasks were, what exactly they knew, and what the defendant knew about what the lawyers knew and were doing – is palpable.”
- “Cutting the other way may be circumstances in which lawyer presence, involvement, or advice known to the defendant at the time of his alleged misconduct might have a real bearing on whether he acted with or without fraudulent intent.
- “So whether and to what extent the defendant should be permitted to argue or adduce evidence regarding the presence or involvement of lawyers will depend on the circumstances.” .
- Holding: ***SBF is precluding from referring to the presence of or involvement by lawyers in his opening statement, or offering any evidence, argument or testimony without prior notice to the Court and government.***

AOC and the Sam Bankman Fried (FTX) Case *(cont'd)*

October 26

- Testimony of SBF
 - Outside the presence of the jury
 - Subject to cross-examination
 - Testifies to presence and involvement of lawyers in a number of areas
- SBF's lawyers argue that sufficient basis for them to elicit testimony; government can cross-examine, gov't can argue weight/significance of evidence
- Gov't argues the involvement of lawyers was collateral, and not relevant to issues at trial; under 403 balancing test (probative value vs. prejudice), it should not come in

AOC and the Sam Bankman Fried (FTX) Case *(cont'd)*

- Court reserves decision until the next day
- Judge Kaplan splits the baby
- Rules that ***SBF may testify about lawyer's involvement in FTX's data retention policies*** (testimony at trial that they used messaging apps that deleted the messages)
- But ***bars the defendant's testimony regarding the involvement in the drafting of "plain vanilla legal documents,"*** concluding it would be "confusing and highly prejudicial by falsely implying the lawyers, with full knowledge of the facts, blessed what the defendant's alleged to have done."

Asserting an AOC Defense Typically Waives Attorney-Client Privilege

Because a Defendant asserting an AOC defense affirmatively puts the advice he or she received from counsel at issue, that results in a subject matter waiver of the attorney-client privilege.



That makes discoverable not only the advice a Defendant received from the attorney, but all privileged documents on that same subject.



Attorney-client privilege can be waived by asserting the AOC defense either formally or informally.

Executives Consulting Company Counsel May Not Have Authority to Waive the Attorney-Client Privilege



- Communications between employees and company counsel are protected by the attorney-client privilege; however, the company, not the employee owns the privilege.
- Some executives may have the authority to waive privilege on behalf of the company, while others do not.
- What happens if an executive is sued based on conduct about which he or she sought and relied upon the advice of company counsel?

United States v. Wells Fargo Bank

- In ***United States v. Wells Fargo Bank, N.A.***, 132 F. Supp. 3d 558 (S.D.N.Y. 2015), the US brought civil claims under the False Claims Act (“FCA”) and the Financial Institutions Reform, Recovery, and Enforcement Act (“FIRREA”) against Wells Fargo and Lofrano, a Bank employee
- Lofrano sought to assert the AOC defense, while Wells Fargo did not
- Government sought to reopen discovery claiming waiver of attorney client privilege by Lofrano’s invocation of AOC defense or alternatively to bar Lofrano from asserting an AOC defense
- Wells Fargo moves for a protective order precluding Lofrano from disclosing attorney-client protected communications

United States v. Wells Fargo Bank

- This case presented an issue of first impression within the Second Circuit:

whether, and under what circumstances, an employee may pursue an advice-of-counsel defense where doing so requires disclosure of privileged communications and his employer owns the privilege and refuses to waive it

United States v. Wells Fargo Bank

Holding: Defendant's right to assert an advice-of counsel defense was not sufficient to overcome the Bank's privilege.

- It is well established that the right to present a defense – even in criminal cases, where the right is at its strongest – is not “absolute”
- Court rejected Defendant's argument that:
 - The Bank's privilege must give way as a matter of fundamental fairness and due process
 - That the court should balance the probative and exculpatory value of the evidence against the need for the Bank to keep the evidence confidential

United States v. Wells Fargo Bank

- Court held that the argument is foreclosed by Supreme Court precedent (***Swidler & Berlin v. United States***, 524 U.S. 399 (1998)), which rejected the use of a balancing test in defining the contours of the privilege
 - Noted possible exception for criminal cases
- Stated the result was “[a]rguably harsh . . . as it may deprive Lofrano of his best defense to liability for tens of millions of dollars.”

SEC v. Present

Follow on Case to *Wells Fargo Bank*

- Defendant Present was CEO of F-Squared investments until he resigned in 2014
- Present was both F-Squared's CEO and the executive responsible for statements regarding its products
- Throughout this period, Present, in his capacity as CEO of F-Squared, consulted regularly with outside counsel
- F-Squared admitted liability for making materially false statements and paid a \$35 million fine
- On the same day, the SEC sued Present alleging false statements and violations of the Advisers Act

- Present serves a subpoena on F-Squared seeking “all documents concerning, or including, **legal advice regarding**” “**Public facing statements F-Squared would make regarding its products from 2008 to 2013**” among other topics
- F-Squared files a motion to quash and for a protective order prohibiting discovery or disclosure of its privileged documents and communications
 - ✦ Documents are clearly relevant to Present's asserted defense and covered under the AC privilege
 - ✦ Present concedes that it is F-Squared -- and not he -- who holds the privilege and that he is no longer in a position to waive that privilege
- Present asserts that fairness compels disclosure of the privileged information. He essentially asks the Court to balance his interest against F-Squared's and find the communications outside the privilege

SEC v. Present

(cont'd)

- Both as the CEO and a sophisticated businessman, he necessarily understood that F-Squared, rather than he, personally held the keys to the attorney/client privilege
- At that time, as the CEO of F-Squared, Present was in the position either to waive the privilege or to obtain in his personal capacity the right to be able to waive the privilege in the future
- ***He chose not to do so***
- Court quashed the subpoena based on the undisputed unwaived privilege and the Supreme Court's rejection of balancing considerations

- The Court recognizes the “tension arising from rules that encourage corporate executives to seek legal advice about their actions on behalf of the corporation, and protect those communications from disclosure, but . . . [then] prevent the corporate official from defending himself personally (possibly) based on the very advice that he received when the corporation and the official differ on whether to waive the privilege.”
- Present served as CEO of F-Squared when the SEC case began
- The SEC investigation encompassed the misrepresentations that he is charged with making and thus placed Present on notice of his potential personal exposure

Practical Considerations for Executives

- ***Consider waiving privilege***, at least with regard to the issues for which you obtained legal advice, when you are in a position to do so
- ***Negotiate a future right to relevant documents/ability to waive privilege*** from the company as part of your separation agreement before you leave
 - Both of these factors were mentioned by Judge Sorokin in *SEC v. Present*
 - He stated that ***Defendant's failure to pursue these mitigated the fairness considerations***
- ***Retain your own attorney*** and get your own legal advice when confronted with thorny legal issues



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Thank you! Questions?

- CLE forms will be distributed as soon as possible
- The recorded presentation and copy of the slides will follow in approximately one week
- Please contact Siobhan Conlon (sconlon@foleyhoag.com) with any questions