

White-Collar Crime

Expert Analysis

My Lawyer Said It Was OK: ‘Scully’ and Defending Based on Reliance on Counsel

Good faith reliance on counsel can be a critical line of defense for the accused in white-collar prosecutions where transactions are often complex, regulatory schemes uncertain, and the question of intent is frequently the crux of the case. Although typically referred to as the “advice of counsel defense,” that formulation is something of a misnomer that may suggest an unduly constricted view of the doctrine. Reliance on counsel is properly understood as part of a broader category of evidence of good faith that may negate the government’s claim of unlawful intent, rather than as a formal defense requiring a defendant to demonstrate specific factual elements.

Defendants seeking to assert reliance on counsel often face skepticism and procedural hurdles raised



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by prosecutors and courts. The case law includes some notable examples where trial courts, at the urging of the government, took an overly narrow view of a defendant’s right to present this line of defense. The district court’s ruling in *United States v. Scully* is a recent illustration, and the Second Circuit’s reversal, 877 F.3d 464 (2d Cir. 2017), which underscored the fundamental principle that asserting reliance on counsel does not shift the burden to the defense, offers useful guidance.

For counsel defending cases involving complex transactions in which lawyers may have played an ongoing role, a particularly valuable tool may be a broader variant of the doctrine exemplified by *Howard v. SEC*, 376 F.3d 1136 (D.C. Cir. 2004), sometimes

referred to as the “involvement of counsel” defense. This article discusses *Scully* and other recurrent issues important to defense lawyers asserting reliance on counsel.

‘**United States v. Scully**’. The primary issue on appeal in *Scully* was whether the trial court improperly

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excluded evidence relating to the advice-of-counsel defense asserted by the defendant, William Scully. *Scully* also challenged on appeal the trial court’s jury instructions on that defense. *Scully* had been found guilty of mail and wire fraud and conspiracy in connection with the importation and distribution of misbranded and unapproved pharmaceuticals.

Scully founded Pharmalogical to serve as a wholesale distributor of pharmaceutical products to retail

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customers. In 2009, Pharmaceutical began importing foreign versions of FDA-approved products available from European distributors at reduced prices. Scully and his partner retained an attorney, Richard Gertler, to research the legality of reselling the imported products in the United States. Gertler issued two positive opinion letters in 2009.

In March 2012, agents of the FDA executed search warrants at Pharmaceutical offices. Thereafter, Gertler and two other attorneys—Peter Tomao representing Scully individually and another lawyer representing Scully's partner—met with prosecutors. In April 2014, Scully and his partner were indicted on charges of willfully importing foreign versions of pharmaceuticals not approved by the FDA and reselling them in the United States under materially false and fraudulent pretenses. Scully's partner entered into a cooperation agreement with the government and pled guilty.

Scully proceeded to trial, asserting that he lacked the requisite criminal intent because of his good faith reliance on advice from Gertler and Tomao regarding the legality of his conduct. Scully called Gertler to testify, but his testimony was undermined by the government's evidence that Scully provided Gertler with false or incomplete information.

Scully did not call Tomao to testify, but sought to introduce evidence of Tomao's legal advice through Scully's own testimony that Tomao had given his oral approval to the transactions. The government objected, and the district court did not permit the evidence, at first ruling that it was hearsay, and then when the defense demonstrated that it was not because

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it went to Scully's state of mind, ruling that the evidence's probative value was outweighed by its risk of unfair prejudice. In so ruling, the court pointed out that Tomao was "readily available" to testify at trial because he generally was "in court every day."

The court's instructions to the jury on the advice-of-counsel defense stated that the defendant had the "burden of producing evidence" to show that he: (1) sought the advice of counsel honestly and in good faith prior to committing any of the crimes; (2) fully and honestly placed all the facts before his counsel; and (3) followed his counsel's advice in good faith and honestly believing it to be correct and intending that his actions were lawful. The court explained to the jury that if it found these elements established, the defendant would be

acquitted of the crime even if the jury found that the government had proven guilt.

On appeal, Sully challenged the district court's exclusion of evidence regarding Tomao's legal advice and the instructions to the jury. The Second Circuit panel ruled that Scully's proposed testimony was not hearsay, and that it was inappropriate for the trial court to require that the testimony be offered through Tomao. Tomao's absence, among a host of other lines of attack, could be raised by the government to challenge the weight and credibility of Scully's testimony, but such matters did not render the evidence inadmissible. The government was also free to call Tomao as a rebuttal witness. Nevertheless, Scully was competent to testify about his state of mind, and determining the persuasiveness of that testimony was "the province of the jury alone." Because evidence regarding the advice of a second, well-qualified attorney was "extremely important" to Scully's defense, barring the evidence was not harmless and Scully was entitled to a new trial.

Further, although the Second Circuit found that at trial Scully had waived any objection to the jury instruction regarding advice-of-counsel, the court offered guidance to the district court for use on retrial. The court explained that "[i]n a fraud case ... the advice-of-counsel defense is not

an affirmative defense that defeats liability even if the jury accepts the government's allegations as true." Rather, evidence of advice of counsel can raise reasonable doubt as to whether the government proved the requisite element of unlawful intent. Thus, once facts exist in the record providing a sufficient foundation, a trial court must give an advice of counsel instruction that advises the jury clearly that the burden to prove unlawful intent beyond a reasonable doubt at all times remains with the government.

The appellate court explained that the district court's instruction that Scully had "the burden of producing evidence to support the defense" and had to satisfy the elements of the defense may have been confusing to the jury and impermissibly shifted the burden of proof. The court provided examples of preferred instructions, recommending a charge that expressly informed the jury that the burden at all times remains with the government and the defendant need not establish his good faith.

The Foundation for an Advice of Counsel Instruction: 'U.S. v. DeFries'. Although not at issue in *Scully*, the question whether a sufficient foundation exists for an advice of counsel jury instruction is often disputed. *United States v. DeFries*, 129 F.3d 1293 (D.C. Cir. 1997), provides useful insight on

some recurring government lines of attack. Clayton DeFries and Clyde Dodson, elected union leaders, were charged with embezzlement and other crimes arising from steps they took to pay themselves a large severance when their union merged with another, and their alleged failure to make timely disclosures. Their defense was largely based on reliance on outside counsel's approval of the severance package. The D.C. Circuit reversed the conviction and found that the district court improperly refused to give an advice of counsel instruction to the jury.

The appellate court explained that such instruction is required if any foundation exists in the evidence, even if "weak, insufficient, inconsistent or of doubtful credibility." The court rejected the government's effort to support the failure to give the charge by citing a "laundry list" of material facts not disclosed to counsel: "No client ever tells his or her lawyer every single fact that a good lawyer probes before giving advice. Indeed, clients do not typically even know which facts a lawyer might think relevant." So long as the client knows the lawyer is aware of the primary pertinent facts, "the predicate for an advice-of-counsel defense is laid."

The D.C. Circuit also rejected the government's argument that

DeFries and Dodson did not rely on the advice in good faith because they manifested an intent to implement the severance plan before receiving the lawyer's advice and did not adhere to the lawyer's suggestions on limiting the size of the payments. Observing that the government "unfairly ascribe[d] nefarious motives to common attorney-client interaction," the court noted that clients often come to lawyers with plans and ask the lawyers to implement them in a legal manner, and that lawyers also often warn clients against behavior that although not illegal, may lead to controversy. Because counsel ultimately advised that the final severance plan was legal, DeFries' and Dodson's failure to heed counsel's other suggestions did not undermine their good faith reliance.

'Involvement of Counsel': 'Howard v. SEC'. An important variant of a defense based on reliance on counsel is sometimes referred to as the "involvement of counsel" defense, which can arise in cases involving complex transactions where lawyers may have played an ongoing role in drafting the operative documents. In those instances, the key question often is whether evidence of counsel's involvement in the transactions is sufficient to demonstrate that a client did not engage in the transactions with

wrongful intent. *Howard v. S.E.C.* is a leading case. In reversing a finding of civil fraud liability, the D.C. Circuit rejected the SEC's narrow construction of the defense to apply only when a defendant could make a specific showing that he made full disclosure to counsel, sought counsel's advice, received it, and relied upon it. "[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 [intent]."

The defendant, Nicholas Howard, was a senior vice-president of broker-dealer JCI. He led JCI to form a company, New Europe Hotels, to capitalize on a perceived market opportunity to build hotels in eastern Europe after the fall of the Berlin Wall. JCI prepared an offering, which required refunds to investors if a certain number of shares of New Europe had not been purchased by a stated date. Howard headed the marketing effort, and it turned out that there were difficulties selling enough shares. The SEC later challenged as not bona-fide three categories of sales of New Europe shares in which a JCI affiliate played some facilitating role, including a sale to a developer paid for with a loan for which New Europe provided the collateral. Howard voted to approve the loan only after being advised by experienced in-house counsel that outside counsel, Rogers & Wells,

had been consulted and approved. Rogers & Wells prepared the offering documents for the challenged stock offering, as well as for a second offering several months later. Howard was aware of the facts underlying the non-bona fide sales, but he did not believe them to be an issue because he understood that in-house counsel had cleared the transaction with Rogers & Wells.

The D.C. Circuit ruled that Howard did not act with wrongful intent, writing that "[i]n this case, rather than red flags, Howard encountered green ones, as outside and inside counsel approved transactions and counted sales that, the SEC later determined, should not have been counted under a rule whose language was silent on the subject." The court noted that determining which share sales counted was a complex area of law with no clear rule on point, and that a layman "has no real choice but to rely on counsel." The court emphatically rejected the SEC's argument that Howard could not rely on Rogers & Wells' involvement because his in-house counsel, rather than he, dealt directly with Rogers & Wells. Under the SEC's theory, if a firm's president directly provided perfect information to competent outside counsel and was advised that a transaction was legal, and then he directed his staff to execute it, only he would have an advice of counsel

defense, but those working under him would not. "That is illogical and makes no sense whatsoever." Because Howard was aware of the involvement of in-house and outside counsel in preparing, reviewing and approving 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.

Conclusion. Good faith reliance on counsel can be a powerful weapon in defense counsel's arsenal; but to bring it to bear, counsel may need to overcome procedural challenges borne of skepticism and an unduly narrow view of the doctrine. As illustrated here, lawyers are well advised to study the nuances of the case law when asserting a defense based on reliance on counsel.