

PUBLICATION

Court Acquits Former GlaxoSmithKline Attorney

May 17, 2011

On May 10, United States District Judge Roger Titus granted the Rule 29 Motion for Judgment of Acquittal of former GlaxoSmithKline (GSK) in-house counsel Lauren Stevens, emphasizing that "a lawyer should never fear prosecution because of advice that he or she has given to a client who consults him or her, and a client should never fear that its confidences will be divulged unless its purpose in consulting the lawyer was for the purpose of committing a crime or fraud" As Judge Titus noted, Rule 29 motions are often made but rarely granted. For background information, see Baker Donelson's March 23 and April 18 alerts on this case.

Ms. Stevens was charged with obstruction of a proceeding, falsification and concealment of documents and making false statements in GSK's response to the investigation of the marketing and promotion of Wellbutrin SR. The United States alleged that, during an FDA investigation, Ms. Stevens withheld and concealed slides used by GSK speakers promoting off-label use of Wellbutrin. Ms. Stevens sought the advice of an outside law firm in preparing GSK's response to the FDA and was counseled about producing the slides.

The government's case against Ms. Stevens was based primarily on documents reflecting confidential attorney-client communications both internally and with outside counsel for GSK. Early in the investigation a Magistrate Judge in Massachusetts invoked the crime-fraud exception and ruled that the communications with counsel were not privileged. Conversely, Judge Titus found "[w]ith the 20/20 vision of hindsight" that the ruling from the Massachusetts Court was "an unfortunate one" and that the government should never have had access to the confidential communications. The court noted that during the 10-day trial, "the prosecutors were permitted to forage through confidential files to support an argument for criminality of the conduct of the defendant." However, Judge Titus noted that those confidential documents "also show that this was a client (attorney) that was not engaged to assist a client to perpetrate a crime or fraud. Instead the privileged documents in this case show a studied, thoughtful analysis of an extremely broad request from the Food and Drug Administration and an enormous effort to assemble information and respond on behalf of the client."

While Ms. Stevens' responses "may not have been perfect" they were provided to the FDA "in the course of her bona fide legal representation of a client and in good faith reliance of both external and internal lawyers for GlaxoSmithKline." Even though some of the statements by Ms. Stevens were not true, the court held that "it is clear that they were made in good faith which would negate the requisite element required for all six of the crimes charged in this case." The court concluded that "only with a jaundiced eye and with an inference of guilt that's inconsistent with the presumption of innocence could a reasonable jury ever convict this defendant."

Judge Titus also noted that "while lawyers should not get a free pass, the Court should be vigilant to permit the practice of law to be carried on, to be engaged in, and to allow lawyers to do their jobs of zealously representing the interests of their client. Anything that interferes with that is something that the court system should not countenance."

Corporate counsel and management should draw the following lessons from the prosecution of Lauren Stevens:

- Seeking and following advice of counsel provides significant support for arguments refuting the government's inference of unlawful intent;

- When seeking the advice of counsel, full disclosure of all relevant facts is critical to the legal validity of the advice of counsel defense;
- Written communication including emails, letters and memoranda seeking and following advice of counsel is important; and
- Choosing not to follow the advice of counsel, unless supported by alternate legal interpretations that support the corporate decision making, may become evidence of a knowing violation if the court does not allow the assertion of the attorney-client privilege.

For further interpretation of this ruling, please contact your Baker Donelson attorney.