

PUBLICATION

Advice of Counsel Shield Upheld -- For Now

March 29, 2011

On March 23, 2011, the United States District Court for the District of Maryland dismissed without prejudice the prosecution of Lauren Stevens, former GlaxoSmithKline Vice President and Associate General Counsel. 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 court found that the prosecutors misstated the law regarding good faith reliance on advice of counsel negating specific intent when it presented the case to the grand jury that indicted Ms. Stevens. Conviction of these crimes could have resulted in potential jail terms in excess of 20 years per charge.

The United States alleged that Ms. Stevens withheld and concealed slides used by GSK speakers promoting off-label use of Wellbutrin during the FDA investigation. Ms. Stevens was assisted and obtained counsel from an outside law firm in preparing GSK's response to the FDA, and was counseled on the necessity of producing the questioned promotional slides.

In dismissing the prosecution, the court explained that for crimes which require specific intent like falsification and concealment of documents during a criminal investigation, proof of good faith reliance on the advice of counsel demonstrates a lack of intent to violate the law and commit a crime.

Carefully explaining that advice of counsel was not an affirmative defense, but instead evidence to refute intent, the court interestingly left open the possibility of re-prosecution with evidence questioning whether Ms. Stevens truly relied in good faith on the advice of counsel, or whether the advice was obtained following the full disclosure of necessary facts. It is also important to note that the dismissal was based on the prosecutors' failure to properly state the law regarding advice of counsel when questioned by the grand jury member. It is unclear whether an accurate statement of the law would deter a future grand jury from supporting a new indictment of Ms. Stevens.

Management and in-house counsel should consider the following key lessons from the dismissal of the prosecution of Lauren Stevens:

- Seeking and following advice of counsel provides significant support of intent to comply with the law and refutes the inference of unlawful intent.
- Written evidence (such as memorandums, letters or emails) of seeking and applying advice of counsel is important.
- Disclosing the entire story and all relevant facts to counsel is critical to the legal validity of the advice of counsel defense.
- Ignoring advice of counsel, unless supported by alternate legal interpretations supporting corporate decision making, may become evidence of a knowing violation.

For more information, click [here](#) to view a copy of the memorandum opinion. For interpretation of this ruling, please contact your Baker Donelson attorney or any of the attorneys in the Government Investigations, Drug, Device & Life Sciences or Health Law practices Groups.