



Criminal Charges Against GSK In-House Counsel Dismissed in Maryland

By Lela Hollabaugh and Tripp Haston

Earlier this month, a federal district court in Maryland dismissed all counts of the government's case against Lauren Stevens, an in-house attorney for GlaxoSmithKline ("GSK"). The decision brings an end to a closely-watched trial that threatened to erode the attorney-client privilege between corporations and their in-house counsel.

Background

In 2002, the FDA informed GSK that it was investigating certain off-label marketing practices through which GSK and physicians allegedly provided information on Wellbutrin as a weight-loss drug, notwithstanding the fact that Wellbutrin had not been approved by the FDA for that use. Indictment at ¶ 3, *United States v. Lauren Stevens*, No. 8:10-cr-00694-RWT (D. Md. Nov. 8, 2010) [hereinafter *Stevens* First Indictment]. It was alleged that Lauren Stevens, a vice president and associate general counsel at GSK, (1) signed and submitted letters from the company in response to the FDA investigation that falsely denied that GSK had promoted the drug for off-label use and (2) failed to produce certain documents to the FDA. *Stevens* First Indictment at ¶ 25.

On November 8, 2010, Ms. Stevens was indicted on six counts of obstructing justice and making false statements to the FDA. *Stevens* First Indictment at 11-18. The initial indictment was dismissed without prejudice in March of this year on the grounds that prosecutors provided erroneous and prejudicial legal advice to grand jurors regarding the availability of the "advice of counsel" defense to Ms. Stevens. Memorandum Opinion at 18-19, *United States v. Lauren Stevens*, No. 8:10-cr-00694-RWT (D. Md. Mar. 23, 2011) [hereinafter *Stevens* Memorandum Opinion]. Nonetheless, last month Ms. Stevens was re-indicted on essentially the same charges. Indictment at 13-20, *United States v. Lauren Stevens*, No. 8:10-cr-00694-RWT (D. Md. Apr. 13, 2011) [hereinafter *Stevens* Second Indictment].

Judge Rodger Titus (D. Md.) tried the case earlier this month. During the case, the government introduced a significant amount of documentary evidence related to GSK's alleged off-label marketing, including communications between GSK and counsel related to the FDA inquiry. The government had access to those documents because a magistrate judge in the District of Massachusetts had earlier ordered Stevens and GSK to produce a large volume of documents that otherwise would have been covered by the attorney-client privilege. The Massachusetts court ordered the documents to be produced under the crime-fraud exception to the attorney-client privilege because, in that court's opinion, there was evidence that GSK intended to perpetrate a crime or fraud and the communications at issue were made in furtherance of that crime or fraud.

At the close of the government's case, Ms. Stevens moved for a Judgment of Acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

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The Court's Decision

In granting Ms. Stevens' motion, the court addressed both the merits of the case against Ms. Stevens as well as the earlier determination by the court in Massachusetts that the attorney-client privilege did not apply to communications between GSK and counsel related to the FDA inquiry.

With respect to the privilege determination, the court noted that the communications never should have been disclosed to the government, and in hindsight, were squarely within the attorney-client privilege. The court concluded that "[w]ith the 20/20 vision of hindsight, and that's always the place to be in terms of wisdom, the Massachusetts Order was an unfortunate one, because I now have benefitted from a trial in which these documents that were ordered produced were paraded in front of me and the prosecutors were permitted to forage through confidential files to support an argument for criminality of the conduct of the defendant." *United States v. Lauren Stevens*, No. 8:10-cr-00694-RWT, at 5 (D. Md. May 10, 2011) [hereinafter *Stevens Dismissal*]. Rather than demonstrating that GSK intended to perpetrate a crime or fraud, the court found that "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." *Id.*

With respect to Stevens' alleged misstatements, the court noted that although there were misstatements made by Stevens and GSK, the statements were made in good-faith reliance on both external and internal counsel. As such, the law specifically provides a safe harbor for Stevens' advocacy. 18 U.S.C. § 1515(c) ("This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding."). As a result, the court dismissed the obstruction counts. *Stevens Dismissal* at 6.

With respect to the counts relating to the question of advice of counsel—including the allegedly false statements to the FDA—the court concluded that "the evidence in this case can only support one conclusion, and that is that the defendant sought and obtained the advice and counsel of numerous lawyers. She made full disclosure to them. Every decision that she made and every letter she wrote was done by a consensus. Now, even if some of these statements were not literally true, 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." *Stevens Dismissal* at 6-7.

Although the court noted its duty to punish lawyers who assist clients in the commission of crimes, the court cautioned 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 a fraud." *Id.* at 9-10.

The court concluded:

There is an enormous potential for abuse in allowing prosecution of an attorney for the giving of legal advice. I conclude that the defendant in this case should never have been prosecuted and she should be permitted to resume her career.

The institutional problem that causes me a great concern is 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 job of zealously representing the interests of their client. Anything that interferes with that is something that the court system should not countenance.

Id. at 10.

Conclusion

Only time will tell whether this decision will deter prosecutors from pursuing charges against in-house attorneys. This decision is a robust defense of the need for vigorous legal representation and highlights the pitfalls of improvident orders that require the production of otherwise privileged documents. Nonetheless, current trends suggest continued government pressure on corporations, including pharmaceutical companies. In the light of this context, there are important takeaways from this decision.

First, because the court's opinion makes clear the significant consequences of the production of privileged documents, this decision could have strong persuasive value as pharmaceutical companies defend the privilege in future litigation. Companies should continue to defend vigorously the privilege and outside counsel should cite this decision in any privilege disputes. But in-house counsel should think proactively about privilege concerns before litigation commences and the company and its outside counsel should take every precaution to establish and maintain an attorney-client privilege over all communications that seek or give legal advice.

To that end, companies should consider several best practices for preserving the privilege:

- Make clear in all written communications (including emails) that the purpose of the communication is to facilitate the rendering of legal advice
- List only the attorney(s) in the "To:" field of all written communications and limit the "CC:" recipients only to individuals who necessarily need the advice in the performance of their job
- Conspicuously place the words "Attorney-Client Privilege" in the subject or body of the written communication.

Second, the court concluded that even inaccurate

statements were made in good faith because: (1) Stevens and GSK involved inside and outside counsel in formulating their response to the FDA inquiry; (2) they made full disclosure to both inside and outside counsel; (3) and they made decisions by consensus. To that end, companies should always engage outside counsel when responding to any governmental investigation and work closely with outside counsel to respond to government inquiries. In-house lawyers should also take special care to document their efforts to advise the company of all potential courses of action and their ramifications.

If you have any questions about this Alert, please contact Lela Hollabaugh at 615.252.2348 or Tripp Haston at 205.521.8303.

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