1st Circuit limits privilege waiver in kickback case

Nuances of involvement-of-counsel defense explored

Kris Olson (https://masslawye[redacted](mailto:?subject=1st Circuit limits privilege waiver in kickback case&body=An executive's planned use of an "involvement-of-counsel" defense to a federal criminal charge under the Anti-Kickback Statute did not necessarily implicitly waive a corporation's attorney-client privilege, the 1st U.S. Circuit... You can read the content in details following link https%3A%2F%2Fmasslawyersweekly.com%2F2025%2F12%2F08%2Fanti-kickback-involvement-of-counsel-privilege-ruling%2F)

2025 // **8 Minute Read**

nti-kickback-involvement-es/2025/12/Michael-B.-%20in%20kickback%20case)

▶ Listen to this article

In brief

- 1st Circuit finds involvement-of-counsel defense does not always waive corporate privilege
- Case concerns Anti-Kickback Statute (https://masslawyersweekly.com/tag/anti-kickback-statute/?taxo-tag-body) charges involving SpineFrontier
- Court urges caution in applying implied attorney-client privilege waivers (https://masslawyersweekly.com/tag/privilege-waivers/?taxo-tag-body)
- Decision impacts future white-collar and healthcare fraud prosecutions

An executive's planned use of an "involvement-of-counsel" defense to a federal criminal charge under the Anti-Kickback Statute did not necessarily implicitly waive a corporation's attorney-client privilege (https://masslawyersweekly.com/tag/attorney-client-privilege/?taxo-tag-body), the 1st U.S. Circuit Court of Appeals (https://masslawyersweekly.com/tag/1st-u-s-circuit-court-of-appeals/?taxo-tag-body) has decided.

The case has been remanded to U.S. District Court Judge Indira Talwani to reevaluate the issue in light of a substantial shift in the facts and procedural posture of the case.

Writing for the 1st Circuit panel, Judge Julie G. Rikelman noted that the nonparty corporation's interlocutory appeal raised "two key issues": whether the defendant had the authority to waive the corporation's privilege with respect to its communications with counsel and, if so, whether the defendant's involvement-of-counsel defense "in fact works a waiver."

On the first issue, the court found that the record was insufficiently developed to determine whether the defendant's identity and interests were sufficiently aligned with the corporation's — whether he was its "alter ego" — to decide whether the defendant had the authority to waive the corporation's privilege.

On the second issue, however, the court held that, even if the defendant could waive the corporation's privilege, not every involvement-of-counsel defense has the effect of serving as a waiver. That determination is consistent with a resistance among federal appellate courts to find implied waivers unless "principles of logic and fairness" demand it, Rikelman said.

If the defendant were to argue only that he would be less likely to break the law intentionally based on the corporation's decision to retain counsel, a waiver finding would not be warranted because the defendant would not have revealed any privileged communication, Rikelman explained.

However, if he suggested that the law firm approved the activities that prompted his criminal charges, then a waiver could be justified, she continued.

With the scope of the planned defense "elusive," on remand Talwani should similarly resist any finding of implied waiver and instead consider addressing any risk of unfair prejudice to the government through a limiting instruction and rulings under Federal Rules of Evidence 401 and 403, the 1st Circuit panel suggested.

The 28-page decision is ***United States v. SpineFrontier, Inc.***, Lawyers Weekly No. 01-249-25 **(https://masslawyersweekly.com/2025/12/01/criminal-advice-of-counsel-waiver-of-privilege/)**.

Balancing act

The 1st Circuit was correct to restrict the circumstances in which courts are going to find implied waiver, said Boston white-collar defense attorney Michael B. Homer.

"That's such a sledgehammer to a case and really should be reserved for specific sets of facts and circumstances that I don't think were applicable here," he said.

> ***Involvement of counsel is not automatically the same thing as advice of counsel.***
>
> ***— Michael B. Homer, Boston***

A defendant should be able to tell the jury that lawyers were in the room at relevant time periods without automatically handing the government every privileged email, Homer added.

"Involvement of counsel is not automatically the same thing as advice of counsel," he said.

The court's position serves a public policy goal, according to Boston criminal defense attorney Tracy A. Miner.

"You want to protect corporations' attorney-client privilege because you want them to get legal advice on programs that may implicate any law, but in particular the Anti-Kickback Statute, [which] is kind of complex," she said. "You don't want corporations to be deterred from that by saying, 'If one of our executives gets indicted, it's a waiver.'"

The decision also reflects the fact that courts view an implied waiver of the attorney-client privilege as a last resort, Boston attorney Elizabeth C. Pignatelli said.

"[The 1st Circuit's] basic answer is, 'We have other options that we use in other contexts with other categories of potentially prejudicial evidence all the time,'" she said.

Insurer agrees to policy limit in collision...
Truck driver hits bicyclist; injuries...
Student driver taking road test collides wit...

See All Verdicts & Settlements ›

Editor's Picks (https://masslawyersweekly.picks/)

SJC vacates tribunal's dismissal of med-mal claim
The SJC ruled that a medical malpractice tribunal

Opinion Digests (https://masslawyersweekly.

Insurance – Rental car benefits – Class...
Retirement – Accidental disability...
Civil practice – Mootness...
Criminal – Effectiveness of counsel – Plea...
Arbitration – Interim order...
Real property – Settlement agreement...
Criminal – Firearm – Licensing database...
Habeas corpus – Gang affiliation – Joint...
Employment – Discrimination – Disability...
Attorneys – Withdrawal – Corporate client...
Licenses and permits – Family child care...
Taxation – Condominium...

See All Digests ›

You want to protect corporations' attorney-client privilege because you want them to get legal advice on programs that may implicate any law, but in particular the Anti-Kickback Statute, [which] is kind of complex.

— Tracy A. Miner, Boston

Boston criminal defense attorney Martin G. Weinberg said he has defended executives using a state-of-mind defense like the one the defendant in *SpineFrontier* is planning to use, which indeed is distinct from a reliance-on-counsel defense.

"It's the government's burden to prove a subjective criminal intent, ... and the only way to detoxify that element, to negate that element, to defend it based on mens rea, is to prove good faith," Weinberg said.

Indeed, good faith is often the defense of choice in white-collar cases, where the government has such broad subpoena powers that it has collected the documents that might prove misrepresentations or that the guarantees given to investors were not made with complete fidelity to accuracy, Weinberg added.

"Mens rea is often the defense of last resort and the defense of first resort to executives charged with fraud," he said.

The ruling extends to criminal cases far beyond one statute, but it is particularly helpful in anti-kickback cases, where willfulness is everything, Homer noted.

"The fact that a company hired specialized health care counsel, obtained opinion letters, and even shared them with providers is powerful context on state of mind," he said. "I think the 1st Circuit is saying here that this context can be significant and appropriate for a jury to hear without automatically giving the government a license to rummage through all privileged communications."

That reinforces the importance of engaging specialized counsel to make determinations about the legality of something like the consulting arrangement at issue in *SpineFrontier*, he added.

"That can be hugely important evidence in the event things ultimately go south," Homer said.

Pignatelli and **Weinberg** said they could see the case coming back to the 1st Circuit, especially if the defense wades into what Pignatelli called "more classic advice-of-counsel territory."

The 1st Circuit provided some preliminary guidance on how Talwani might navigate that issue.

"But I think the guidance itself probably raises as many questions as it answers," Pignatelli said.

Courts have rarely had the opportunity to frontally address the intersection of a defendant's Sixth Amendment right to present a fulsome defense and an individual or corporation's attorney-client privilege, Weinberg noted.

"Whether this case leads there, it's certainly walking down the road toward addressing that fundamental tension in the law between one party's privilege and another party's Sixth Amendment right," Weinberg said.

The appellant's attorney, Robert L. Peabody of Boston, had not responded to a request for comment as of Lawyers Weekly's deadline.

Two-man team

Dr. Kingsley Chin founded SpineFrontier, Inc., which designs, manufactures, markets and sells spinal medical devices. He is also its principal shareholder, president, chief executive officer and sole director.

Defendant Aditya Humad serves as SpineFrontier's CFO, vice president of business development, secretary and treasurer, but he is not a shareholder. The company has no other officers.

On Aug. 30, 2021, a grand jury charged SpineFrontier, Chin and Humad with violating numerous criminal statutes, including the Anti-Kickback Statute. The government alleged that the three defendants paid millions of dollars in bribes through a sham consulting program.

Instead of compensating the surgeons for providing technical feedback about SpineFrontier's products, the payments were intended to induce the surgeons into ordering and using SpineFrontier's devices in surgeries subsidized by federal health care benefit programs, the government alleges.

Humad allegedly calculated each such payment based on both the volume of the surgeries that the surgeon performed using SpineFrontier's devices and the amount of revenue the surgeries generated for the company, which, if true, would run counter to the advice given by the law firm SpineFrontier engaged as it was developing the consulting program, Strong & Hanni.

In its opinion letters, Strong & Hanni stressed that any payments should be for "bona fide services" and should not be determined "in a manner that takes into account the volume or value of any referrals or business."

In a June 2024 order, Talwani indicated that she would allow the three defendants to highlight the involvement of "other persons" in the consulting agreements, without reference to their professions. But if any of the three defendants planned to introduce evidence of their attorneys' involvement to argue that they lacked the necessary willfulness to violate the Anti-Kickback Statute, Talwani said she was inclined to find a waiver of the privilege that applies to their communications.

Until she knew more about whether any of the defendants would rely on an involvement-of-counsel defense at trial, Talwani instituted "procedural guardrails," allowing the government to serve subpoenas on Strong & Hanni for its communications with SpineFrontier on the topics covered by the opinion letters and then keeping the responsive, privileged documents under seal.

Chin and Humad asked Talwani to reconsider her June 2024 waiver ruling, and by the time Talwani issued her February order resolving that motion, the government had dismissed all charges against SpineFrontier.

In that order, Talwani expressed her concern that, without a waiver permitting the government to probe Chin and Humad's communications with outside counsel, the jury could be misled to think the law firm had sanctioned the consulting program as it was implemented. As Chin and Humad were SpineFrontier's only two officers, they together had the authority to effect an implied waiver of the corporation's privilege, Talwani concluded.

United States v. SpineFrontier, Inc. (https://masslawyersweekly.com/2025/12/01/criminal-advice-of-counsel-waiver-of-privilege/)

THE ISSUE: Did a criminal defendant's planned use of an involvement-of-counsel defense in an Anti-Kickback Statute case constitute an implied waiver of a corporation's attorney-client privilege?

DECISION: No (1st U.S. Circuit Court of Appeals)

LAWYERS: Robert L. Peabody of Husch Blackwell, Boston (appellant)

Karen L. Eisenstadt and Leah B. Foley, of the U.S. Attorney's Office, Boston (appellee)

On March 3, Chin and Humad filed separate but simultaneous notices indicating that Humad planned to rely on the involvement-of-counsel defense at their joint trial, but Chin did not. At the government's urging, Talwani severed Chin and Humad's trials to prevent Chin from reaping second-hand benefits from Humad's planned involvement-of-counsel defense.

On March 5, Talwani informed the parties that, based on Humad's notice, she would allow inquiry into the communications between him and SpineFrontier's counsel and provide the government the documents that it was keeping under seal. Two days later, Talwani issued another order, concluding that there was no basis to bar Humad from raising the involvement-of-counsel defense. She stayed the order to allow SpineFrontier to pursue immediate interlocutory review, which it did.

Chin subsequently reached a plea deal. He admitted to a charge of making false statements in exchange for having the other charges against him dismissed. That left Humad as the only remaining defendant in a criminal case set for trial in June.

Other tools available

Not all executives are "alter-egos" of their employers, Rikelman observed, adding that such a determination would depend on many factors, including whether the executive holds decision-making authority over the corporation, and whether the corporation is public or private.

SpineFrontier argued that Chin, not Humad, is its only possible alter-ego, while the government tried to treat Chin and Humad as a unit, even though Chin was no longer a co-defendant in Humad's criminal case.

The court rejected the latter argument.

"The relevant inquiry, however, is not whether Chin and Humad together are SpineFrontier; it is whether Humad on his own is SpineFrontier," Rikelman wrote.

She added: "Neither of the parties before us suggests a clear path forward if the district court determines that Humad lacks the authority to waive SpineFrontier's privilege."

The 1st Circuit was not ready to adopt the government's argument that the corporation's privilege must take a back seat to Humad's Sixth Amendment right to present a defense. But it said that it agreed with the sentiment expressed in the 1998 U.S. Supreme Court decision in ***Swidler & Berlin v. United States*** **(https://supreme.justia.com/cases/federal/us/524/399/)** that "exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege."

The court devoted several paragraphs to evaluating the nature of Humad's involvement-of-counsel defense before concluding that "whether Humad's defense justifies a waiver will depend on what exactly he seeks to argue at trial, which, as of now, remains murky."

However, the panel said it agreed with the reasoning in the 1989 U.S. Circuit Court of Appeals for the D.C. Circuit case, ***United States v. White*** **(https://www.casemine.com/judgement/us/59148a4eadd7b049345103f0)**, cited by SpineFrontier, that if Humad's defense was limited to the argument that was less likely to have formed the intention to violate the Anti-Kickback Statute because he knew that SpineFrontier had engaged a law firm, that would not function as a waiver because there would be no disclosure of privileged information.

The panel concluded by noting its skepticism that Humad's planned involvement-of-counsel defense "raises a meaningful risk of prejudice to the government."

"As the government acknowledges, the force of Humad's planned defense, at least as currently proposed, may well be undermined by introducing into evidence Strong & Hanni's opinion letters themselves," Rikelman wrote.

The panel again noted the tools Talwani would have at her disposal to mitigate any prejudice to the government.

"We note only that a waiver is a significant penalty, and less-onerous mechanisms may be available to address any prejudice," Rikelman wrote.

Lawyers Weekly No. 01-249-25

Massachusetts Lawyers Weekly

- Criminal – Advice of counsel – Waiver of privilege **(https://masslawyersweekly.com/?p=547389)**

Tags: Privilege waivers (https://masslawyersweekly.com/tag/privilege-waivers/?taxo-tag), attorney-client privilege (https://masslawyersweekly.com/tag/attorney-client-privilege/?taxo-tag), Anti-Kickback Statute (https://masslawyersweekly.com/tag/anti-kickback-statute/?taxo-tag), Judge Julie Rikelman (https://masslawyersweekly.com/tag/judge-julie-rikelman/?taxo-tag), 1st U.S. Circuit Court of Appeals (https://masslawyersweekly.com/tag/1st-u-s-circuit-court-of-appeals/?taxo-tag), Criminal Law (https://masslawyersweekly.com/tag/criminal-law/?taxo-tag)

Related Articles

- **Criminal – Advice of counsel – Waiver of privilege (https://masslawyersweekly.com/2025/12/01/criminal-advice-of-counsel-waiver-of-privilege/?taxo-post)**
- **Search and seizure – Vehicle – Impoundment (https://masslawyersweekly.com/2025/08/06/search-and-seizure-vehicle-impoundment-5/?taxo-post)**
- **Prisons – Compassionate release – Sleep apnea (https://masslawyersweekly.com/2025/07/07/prisons-compassionate-release-sleep-apnea/?taxo-post)**
- **Exclusion of post-arrest statements upheld by 1st Circuit (https://masslawyersweekly.com/2025/09/19/1st-circuit-hearsay-ruling-sex-trafficking-case/?taxo-post)**
- **Criminal – Supervised release – Internet access (https://masslawyersweekly.com/2025/09/03/criminal-supervised-release-internet-access-2/?taxo-post)**

Related Content

Builder bound by secretive settlement kept from Land Court

The Appeals Court ruled a home builder liable for breaching a concealed settlement with abutters, affirming da[...]

December 9, 2025

(https://masslawyersweekly.com/2025/12/09/builder-concealed-settlement-breach-chapter-93a-ruling/)

Judge voids packaging patents over inequitable conduct

A federal judge invalidated Inline Plastics' entire patent family after finding inequitable conduct and inte[...]

December 5, 2025

(https://masslawyersweekly.com/2025/12/05/inequitable-conduct-inline-plastics-patent-invalidation/)

Former UMass Memorial nurse wins $75K in workplace defamation case

A Worcester jury awarded a former UMass Memorial nurse $75K after finding the hospital vicariously liable for [...]

Judge: hotel chain must face TVPRA suit over sex trafficking claims

A federal judge ruled that Hilton and a franchisee may face TVPRA liability for alleged sex trafficking at a B[...]