

4.11 Advice of Counsel

One element that the government must prove beyond a reasonable doubt is that the defendant had the unlawful intent to [*specify applicable unlawful act*]. Evidence that the defendant in good faith followed the advice of counsel would be inconsistent with such an unlawful intent. Unlawful intent has not been proved if the defendant, before acting, made full disclosure of all material facts to an attorney, received the attorney's advice as to the specific course of conduct that was followed, and reasonably followed the attorney's recommended course of conduct or advice in good faith.

Comment

A defendant who reasonably relies on the advice of counsel may “not be convicted of [a] crime which involves willful and unlawful intent[.]” *Williamson v. United States*, 207 U.S. 425, 453 (1908). Advice of counsel is not a separate and distinct defense but rather is a circumstance indicating good faith which the trier of fact is entitled to consider on the issue of intent. *Bisno v. United States*, 299 F.2d 711, 719 (9th Cir. 1961). A defendant is entitled to an instruction concerning the advice of counsel if it has some foundation in the evidence. *United States v. Ibarra-Alcaarez*, 830 F.2d 968, 973 (9th Cir. 1987). To assert advice of counsel, a defendant must have made a full disclosure of all material facts to his or her attorney, received advice as to the specific course of conduct that he or she followed, and relied on the advice in good faith. *United States v. Munoz*, 233 F.3d 1117, 1132 (9th Cir. 2000) (citing *id.*).

In appropriate cases, where the prerequisites are met, the jury may be instructed as to good-faith reliance on advice of an accountant or tax return preparer. *United States v. Bishop*, 291 F.3d 1100, 1106-07 (9th Cir. 2002); *United States v. Claiborne*, 765 F.2d 784, 798 (9th Cir. 1985), *abrogated on other grounds*, *Ross v. Oklahoma*, 487 U.S. 81 (1988). In such cases, the instruction should be modified accordingly.

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