ALM | LAW.COM

New York Law Journal

Steve Bannon's Questionable Reliance on 'Advice of Counsel'

By Joel Cohen and Douglas Nadjari
May 1, 2026

It looks, now, like Steve Bannon's conviction (and sentence) for Contempt of Congress will be dismissed on the motion of the now friendly-to-him Justice Department based on the Supreme Court's remand to the lower courts.

As you might remember, Bannon had outright refused to even show up before a then Democrat-led Congressional Committee, maintaining that to do so would violate his "executive privilege" obligation to President Donald Trump whom he briefly served in the White House during Trump's first term.

Bannon took that action rather than simply appear and under oath publicly articulate his (supposed) right to decline to testify. Put simply, by just appearing before the committee, Bannon (if he wanted to) could have avoided what some arguably saw as the figurative burning of his subpoena on the steps of Congress. Doing so—that is, just appearing before the Committee—might conceivably have even avoided the contempt finding.

Bannon was represented by Lawyer 1 (L1), a former deputy chief of the criminal division of the US Attorney's Office for the Southern District of New York, and then a partner at a prestigious New York firm. L1 must have seen it differently and, one must wonder what he was thinking when (and if) he actually advised Bannon not to appear.

To be sure, executive privilege had not been invoked by President Joe Biden, the then sitting president nor by Trump (who had no authority to do so as a *former* president). L1 most certainly knew that *Licavoli v. United States*, 94 F.2d 207 (D.C. Cir. 1961) controlled and it holds that the government need not prove bad faith to meet its burden in a Contempt of Congress case. To the contrary, Title 2 U.S.C. 192 (a misdemeanor) sets a low bar for conviction, requiring only proof of a deliberate and intentional failure to appear or produce documents, regardless of the reason.

Bannon never appeared and provided no documents and, instead, relied on executive privilege that had never been invoked. The government argued that the case was about nothing more than "... a guy who refused to show up." Bannon's jury was out for less than three hours, and he was easily convicted.

On appeal from his conviction, Bannon's new lawyer, L2, tried to thread a "very fine needle". L2 necessarily conceded that Bannon deliberately refused to comply, but that *Licavoli* should be overruled and replaced by a construction of the willfulness element requiring knowledge that his conduct was illegal. Under the standard advocated by L2, and assuming advice was sought and rendered in good faith, if the client is advised by the lawyer that his conduct is consistent with law (or, as in this case, what the law should be), reliance on counsel negates criminal intent. The D.C. Circuit rejected these arguments.

We'll never know exactly what did occur in the inner sanctum of the attorney-client portal and who—attorney

or client, or both—is at fault for Bannon having initially suffered his contempt conviction that now may be vitiated. Let's look at an attorney's duty when faced with such a situation by asking what the lawyer's responsibility is, both to himself and to the profession.

Bannon may have been looking for an excuse to dishonor the subpoena, and criminal lawyers are often confronted by clients who want to avoid testifying, conceal or withhold documents from production. The prospect of notoriety or a possible big fee in a case like Bannon's is tempting, but Rule 2.1 of the New York Rules of Professional Conduct still requires that lawyers exercise "independent professional judgment" and render candid advice. While such advice may consider moral and even political factors, it cannot exceed the bounds of or ignore prevailing law.

Here *Licavoli* controlled and choosing to just dishonor the subpoena seems to invite conviction for the client and trouble for the attorney. When the client is looking for an answer that "flies in the face" of prevailing law, as it did for Bannon and L1, the lawyer should ask himself if the client is truly looking for legal guidance or whether he wants to evade process and, in so doing find a respected and willing lawyer upon whom he may later "pin the tail of advice of counsel". If that's the case, perhaps it is an engagement that should be declined.

If not, he or she needs on the one hand to discuss the risks and consequences of simply dishonoring a congressional subpoena (which are significant) and, on the other, alternatives to complete compliance.

As opposed to simply not appearing, consideration should be given to obvious alternatives: (i) a motion to quash based upon both the subpoena's facial or procedural invalidity), (ii) providing a log of privileged materials and disclosing non-privileged materials and (iii) appearing and invoking executive privilege (on an admittedly painful question by question basis).

What, though, if the client says "look that's great, but the former president told us that to the extent the documents are privileged, I shouldn't produce them or testify. Why can't I take a hard line, give them nothing and provide no testimony?"

"Advice of counsel" is an affirmative defense and requires that the accused: (i) made a complete disclosure to counsel of the matter at issue, (2) sought advice as to the legality of his conduct, (3) received advice that his conduct was legal, and (4) relied on that advice in good faith. *U.S. v. Sam Bankman-Fried*, citing *Markowski v. S.E.C*, 34 F.3d 99 104,5 and *SEC v. Savoy Industries* 665 F2d. 1310 (D.C. Cir.).

Between attorney and client, this is where it gets ugly. When L1 advised Bannon, Licavoli was (and remains) good law. Can lawyers safely tell clients that they can essentially act in defiance of the law because the law should change? Perhaps. But it might be wise to consider parting ways before suggesting what some, potentially including the judges in question, will see as an illegal course of conduct, here dishonoring a Congressional subpoena. Endorsing or suggesting a course of action that is arguably criminal is at best, reckless. If the attorney does not withdraw then the next question may be whether his acts constitute malpractice or even worse, might suggest co-conspirator liability.

It may be that the wisest course of action may be for the lawyer himself to seek the opinion of ethics counsel when a potential conflict with his client may needlessly put himself behind the eight ball.

Joel Cohen, *a former state and federal prosecutor, practices white-collar criminal defense law at Ruskin, Moscou and Faltischek PC. He is the author of "Blindfolds Off: Judges on How They Decide" and teaches at Fordham and Cardozo Law Schools.*

Douglas Nadjari *is a partner at Ruskin Moscou Faltischek P.C. and a member of the firm's white-collar crime, health law, and crisis management departments. He is a former state prosecutor and is an instructor at the criminal law bootcamp at Tulane Law School.*