

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
v.) No. 04-20017-DV
)
RANDE LAZAR, M.D., d/b/a)
OTOLARYNGOLOGY)
CONSULTANTS OF MEMPHIS,)
 Defendant.)

ORDER DENYING GOVERNMENT'S SUPPLEMENTAL RESPONSE (Doc. No. 84)
TO ITS EARLIER MOTION TO REQUIRE DEFENDANT TO PROVIDE LIST OF
EXPERT WITNESSES AS ORDERED BY THE COURT AS PERTAINING TO
GOVERNMENT'S REQUEST THAT DEFENDANT GIVE NOTICE OF INTENT
TO USE ADVICE OF COUNSEL DEFENSE

Before the court is the August 27, 2004 supplemental response of the government, (Doc. No. 84.), to its earlier motion to require the defendant to provide a list of expert witnesses. The government's supplemental response requests that the defendant, Rande Lazar, be required to verify his intentions to rely on advice of counsel as a defense. The court will treat the government's supplemental response in this case as a motion for the defendant to give notice of intent to use advice of counsel. Lazar's response to the government's "motion" that defendant give notice of intent to use advice of counsel defense was filed on September 17, 2004. (Doc. No. 94.)

The advice of counsel "defense" has been used for over one

hundred years in a variety of contexts such as patent infringement cases, security law violation cases and insurer bad faith. (Gregory E. Maggs, Consumer Bankruptcy Fraud and the "Reliance on Advice of Counsel" Argument, 69 Am. Bankr. L.J. 1, *7). Case law has categorized advice of counsel not as a separate or affirmative defense, but as proof that serves to negate an element of an offense. (*Id.* at *8). There are three affirmative defenses for which notice is required under the Federal Rules of Criminal Procedure¹; however, there are no federal rules that require pretrial notice of an advice of counsel "defense."

Additionally, there has been one judicial opinion that addressed the issue of whether notice should be given by a party that intends to rely on the advice of counsel "defense." *United States v. Espy*, 1996 WL 560354 *1 (E.D. La. Oct. 2, 1996). Before the *Espy* court was a motion to compel notice of intent to rely on defense of advice of counsel. The court found that there was no case law to support the motion to compel. Of the four cases relied upon by the government in *Espy*, one set guidelines for asserting the defense² and the other three discussed the consequential waiver

¹ Rule 12.1 requires notice of an alibi defense; Rule 12.2 requires notice of an insanity defense; and Rule 12.3 requires notice of a public authority defense. FED. R. CRIM. P. 12.1 through 12.3 .

²*United States v. Carr*, 740 F.2d 339 (5th Cir. 1984).

of the attorney-client privilege.³

Because the government's motion for notice of advice of counsel defense is not supported by case law or federal rules, the government's supplemental response to its earlier motion is therefore denied.

IT IS SO ORDERED this 2nd day of November, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

³*United States v. Defazio*, 899 F.2d 626,631 (7th Cir. 1990); *United States v. White*, 887 F.2d 267,270 (D.C. Cir. 1989); *Panter v. Marshall Field & Co.*, 80 F.R.D. 718, 720 (N.D. Ill. 1978).