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Decisions Highlight Risk of Unintended Implied Waivers of Privilege

White-collar attorneys will continue to employ the attorney proffer to advance their clients' interests in responding to investigations, even while on occasion accepting the consequence of some limited waiver of privilege over the facts they strategically divulge.

By **David Siegal and Michael Scanlon** | January 26, 2018

In response to allegations of potentially criminal wrongdoing by a client of your firm, your investigation team has completed its review of the facts. You believe your conclusions position the client to receive cooperation credit from the government, so your plan is to make an "attorney proffer" of your findings to the US Attorney's Office. Such attorney-to-attorney discussions have for decades been a key tool in the kit of the white-collar defense lawyer. These presentations, typically made outside the presence of the client, serve multiple purposes, including demonstrating a desire to be cooperative and an ability to be of assistance, but also to gauge potential scope and depth of the authorities' interest in the subject matter.

If you wish, however, to maintain your client's privilege and work product protections over your investigation *results*, you should consider the implications of two recent federal court decisions finding attorneys' communications with the government impliedly waived their respective clients' privileges—Chief Judge Beryl A. Howell's opinion in *In re Grand Jury Investigation* and Magistrate Judge Jonathan Goodman's order in *S.E.C. v. Herrera*. These decisions have sent tremors of varying degrees through this foundational process, and highlight the risk that certain communications with government officials may result in unintended (and potentially sweeping) implied waivers of privilege. *In re Grand Jury Proceedings*, Misc. Action no. 17-2336 (BAH), 2017 WL 4898143 (Oct. 2, 2017) (Howell, C.J.); *SEC v. Herrera*, Case No. 17-20301-Civ. Lenard/Goodman, 2017 WL 6041750 (Dec. 5, 2017) (Goodman, M.J.). Judge Goodman in particular was cognizant of the broader implications of his finding of waiver, noting at the outset:

This Order concerns the legal consequences, if any, which arise when a major law firm conducting an internal corporate investigation into its client's financial and business activities produces what the parties here call "oral downloads" of witness interview notes and memoranda to the regulatory agency investigating its client.

Though distinct in their impact, each of these rulings presents important lessons and considerations for corporate white-collar practitioners in the modern era.

Background

The present-day law of implied waiver grew out of a series of governmental voluntary disclosure programs that fostered what critics have called a "culture of waiver." See Robert J. Anello & Richard F. Albert, "Government Makes Manafort's Lawyer a Key Witness Aginst Him—Ho-hum?," 258 N.Y.L.J. No. 107 (Dec. 5, 2017). Even under the Department of Justice's current guidelines for

prosecuting corporate crimes, while prosecutors may not request "non-factual or 'core' attorney-client communications or work product," companies must nevertheless disclose "the facts known … about the putative criminal misconduct under review" to obtain cooperation credit. Office of the U.S. Att'y, U.S. Att'y Manual §9-28.710 (New Aug. 2008). Satisfying the government's cooperation requirements may involve, as a practical matter, describing in substantial detail who said what and to whom, and which witnesses observed which facts. In attempting to meet these demands, defense lawyers can easily find themselves skirting the line of revealing privileged aspects of their work in an effort to obtain the benefits of cooperation. *In re Grand Jury Proceedings*, 219 F.3d 175, 190 (2d Cir. 2000).

The risks associated with privilege waivers are high. Most jurisdictions have rejected the "limited waiver" doctrine—i.e., the notion that a disclosure of privileged information made as part of an effort to cooperate with the government would not constitute waiver as to third parties. Thus, a voluntary waiver to the government is a waiver to all. *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993) (refusing to adopt the selective waiver theory, but declining to a per se rule against it); see also *In re Qwest Commc'ns Int'l*, 450 F.3d 1179, 1186-1201 (10th Cir. 2006) (rejecting theory and collecting cases); *Diversified Industries v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (en banc) (accepting theory). In addition, under Rule 502(a) of the Federal Rules of Evidence, an intentional waiver extends not just to materials actually disclosed to an "adversary"—e.g., the government—but also to *undisclosed* materials on the same subject matter if "they ought in fairness to be considered together." Fed. R. Evid. 502(a). (A finding of fairness typically requires a showing that the disclosing party either made offensive use of protected materials, such as invoking an advice-of-counsel defense, or caused "a selective and misleading presentation of evidence to the disadvantage of the adversary." Fed. R. Evid. 502, advisory committee note.) In making an attorney proffer with sufficient

detail to convince prosecuting attorneys of the client's willingness to be cooperative, practitioners run the risk of waiving privilege by including too much detail from their interview notes or memoranda.

'SEC v. Herrera'

The decision in *S.E.C. v. Herrera* arose out of an enforcement action against two former officers of General Cable, a global manufacturer of wire and cable products, who allegedly concealed the manipulation of accounting systems at the company's Brazilian operations. The company discovered the accounting errors before the SEC caught wind of them. It retained outside counsel, Morgan Lewis & Bockius, to conduct an internal investigation, which included interviewing dozens of the company's employees and officers. Later, SEC staff began their own inquiry, and in response to SEC requests, Morgan Lewis produced historical documents to and from the defendants and other persons interviewed, met with SEC staff and presented a PowerPoint setting forth its investigative steps and factual findings, and provided "oral downloads" of twelve witness interviews. The former officer defendants subpoenaed production of, among other things, Morgan Lewis's written notes and memoranda of the witness interviews that the firm had described (though never provided) to the SEC, as well as those additional interviews referenced in the PowerPoint.

Morgan Lewis resisted production of the notes and memoranda, arguing work product protection still applied because even those orally described in detail were never actually produced to the SEC. Magistrate Judge Goodman disagreed, concluding that the firm's oral disclosures were the "functional equivalent" of production of the documents themselves. Id. at *6 (emphasis omitted). (Magistrate Judge Goodman also noted the outcome likely would have been different had Morgan Lewis provided "only vague references" to the witness notes and memoranda or "detail-free conclusions or general

impressions" of its investigation. Id. at *5, citing *B.M.I. Interior Yacht Refinishing v. M/Y Claire*, No. 13-62676-CIV, 2015 WL 4316929 (S.D. Fla. July 15, 2015)). The court stopped short, however, of ruling that Morgan Lewis's presentations created a wider, subject matter waiver. The PowerPoint (which had already been made available to the defendants) was expressly prepared for the SEC and, therefore, was never itself protected under the work product doctrine, nor did it provide the substance of the additional interviews. Thus, according to the court, fairness considerations required production of the written interview notes and memoranda of the 12 recounted interviews, but not the other interviews incidentally referenced the PowerPoint.

'In re Grand Jury Investigation'

The *In re Grand Jury Investigation* decision arose not from an attorney's proffer, but from a lawyer's letters to the government that became a subject of the Special Counsel's Office (SCO) investigation into potential collusion between U.S. citizens and foreign government actors to influence the 2016 presidential election. The SCO uncovered evidence that Paul Manafort, his lobbying company, and its employee submitted false statements in two letters submitted in November 2016 and February 2017, respectively, to the Foreign Agent Registration Act Registration (FARA) Unit in violation of 18 U.S.C. §1001(a) and 22 U.S.C. §618(a). In the November 2016 submission, the attorney wrote that her clients "did not have an agreement to provide services" to a particular foreign entity, and "were not counterparties to any service agreements" between two government relations companies. In the February 2017 letter, written as a "more fulsome explanation" of her clients' work, the attorney wrote that one employee "recall[ed] interacting" with consultants of the foreign entity, but neither employee "recall[ed] meeting with or conducting outreach" on its behalf to U.S. officials or media outlets, and did not "recall" facilitating such communications, but rather, recalled that "such communications would have been facilitated by" the foreign entity.

The grand jury subpoenaed the attorney to testify to the communications underpinning the factual representations in her letters. The attorney refused based on her clients' invocation of the attorney-client and work product privileges. Over multiple filings and three hearings, the SCO clarified that it wanted testimony on the following eight issues:

> (1) Who were the sources of the specific factual representations in the letters?
>
> (2) Who were the sources of the email retention policy referenced in and attached to one of those letters?
>
> (3) Did the targets or anyone else at the targeted company approve the letters before the attorney sent them?
>
> (4) What, if anything, did the sources identified in response to the above three questions say to the attorney about statements in the letters?
>
> (5) When and how did the attorney receive communications from the targets, including whether by telephone or email?
>
> (6) Did anyone ask the attorney questions or suggest corrections to the letters?
>
> (7) Did the attorney memorialize her conversations with the targets?
>
> (8) Did the attorney act with care in submitting the letters, and whether it was her practice to review submissions with her clients before sending?

The SCO sought to overcome privilege based on the crime-fraud exception and implied waiver. Chief Judge Howell ruled in favor of the government on both grounds, compelling the attorney's testimony.

The court found the letters had impliedly waived the privilege because they "made specific factual representations" that were "unlikely to have originated from sources other than the Targets, and, in large part, were explicitly attributed to one or both Targets' recollections." Id. at *11. In addition, without citing to Rule 502(a), the court found that the attorney's waiver extended to all her other communications on the same subject matter (id., quoting *In re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994)), then held that the attorney-client privilege would not prevent her from responding to any of the eight questions. The work product doctrine provided only slightly more protection. After finding that the SCO could take discovery of fact, but not opinion, work product, the court determined that only question number 7 would improperly elicit the attorney's mental impressions or legal theories. She was ordered to answer the other questions.

Takeaways

White-collar attorneys will continue to employ the attorney proffer to advance their clients' interests in responding to investigations, even while on occasion accepting the consequence of some limited waiver of privilege over the facts they strategically divulge. The goal, however, is to minimize the extent to which additional privileged content is swept into that ambit. These decisions are recent examples of courts' willingness to order detailed production of otherwise privileged communications when attorneys have described their client communications to government agents. In practice, attorneys should, to the extent possible, describe factual information without providing witness attribution, and favor reference to preexisting documents rather than after-the-fact interview statements. Quotations from interview notes and memoranda should be kept to an absolute minimum. Practitioners should also seek to cabin the scope of any court-compelled waiver by pointing to the fairness analysis required under Rule 502(a), and Second Circuit precedent requiring district courts to "make particularized findings explaining the

connection" between the disclosed information and any additional materials that, in fairness, must be also considered. *In re Grand Jury Proceedings*, 219 F.3d 175, 192 (2d Cir. 2000).

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