Siegal and Scanlon in NYLJ: Decisions Highlight Risk of Waivers of Privilege

January 29, 2018 Michael Scanlon

PRACTICES Litigation

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. …

Excerpted from *New York Law Journal*. To read the full article, click here (Subscription required).