September 7, 2017

White Collar Roundup - September 2017

Limiting the Scope of Joint-Defense Agreements

In *United States v. Krug*, the U.S. Court of Appeals for the Second Circuit made it a bit easier to pierce the attorney-client privilege when multiple defendants have a joint-defense agreement (JDA). In the case, co-defendants Raymond Krug, Gregory Kwiatkowski and Joseph Wendel, officers of the Buffalo Police Department, were charged with offenses based on the alleged use of excessive force during the arrest of four individuals. The three co-defendants entered into a JDA in which their defense counsel "participated in meetings together, transmitted emails, and shared legal memoranda and research." While the parties were covered by the JDA, Krug and Kwiatkowski had discussions in a hallway in the courthouse when their attorneys were not present. As trial approached, Kwiatkowski began to cooperate with the government and shared in a proffer session the statements Krug made during the hallway conversation. The government sought to use these statements at trial, and Krug moved in limine to prevent it from doing so. Krug claimed those statements "constituted the mutual sharing of defense strategies, thoughts, and theories that would be privileged pursuant to that agreement." The district court agreed and granted the motion in limine. The government appealed. On appeal, the Second Circuit reversed. It reasoned that the "statements were not made to, in the presence of, or within the hearing of an attorney for any of the common-interest parties; nor did the excluded statements seek the advice of, or communicate the advice previously given by, an attorney for any of the common-interest parties; nor were the excluded statements made for the purpose of communicating with such an attorney." Therefore, it held, they were not covered by any privilege. The court expressed "no view as to whether all such circumstances would invoke the privilege," but it found "nothing in the circumstances here to support the application of the privilege."

Should We All Use Burner Phones When Traveling Overseas?

According to this article in the *ABA Journal*, attorneys who plan to travel out of the United States might consider using "burner phones" and other disposable devices to avoid compromising confidential client information. As we reported here, U.S. Customs and Border Protection (CBP) might require people — including citizens —entering the United States with electronic devices to unlock those devices to allow CBP officers to search them. The *ABA* notes that this raises concerns about the disclosure by lawyers of confidential client information in violation of the ABA Model Rules of Professional Conduct. The New York City Bar Association issued an ethics opinion in which it highlighted the issue and noted that lawyers are required to take "reasonable measures to prevent the disclosure of client data at the border." So, might burner phones be the answer? Perhaps. At the very least, lawyers should consider what's on the devices they take out of the country and, more important, what's on them when they bring them back.

Massive Disgorgement Order Affirmed

In *SEC v. Metter*, the Second Circuit affirmed a massive civil penalty and disgorgement order imposed on defendant Michael Metter by the U.S. District Court for the Southern District of New York. The SEC had sued Metter for engaging in an illegal pump-and-dump scheme. Metter entered into a consent order with respect to liability, but left open the size of the

disgorgement and civil penalties to be imposed. The court imposed $52 million in disgorgement. It also ordered $6 million in civil penalties based on a $5 million transfer from one business engaged in the fraud to another business of which Metter was the president. Metter appealed, claiming the district court abused its discretion with respect to the disgorgement amount and the civil penalty. He also argued that the disgorgement order violated the Excessive Fines Clause of the Eighth Amendment. The Second Circuit made quick work of the appeal, issuing a summary affirmance. It held that the district court's order of disgorgement and the civil penalty fit within the realm of reasonableness given the circumstances of the case. It also rejected Metter's Eighth Amendment argument, finding that none of the factors to consider under *United States v. Bajakajian*, 542 U.S. 321, 334 (1998), rendered the disgorgement order "grossly disproportional." Notably, in that discussion, the court cautioned "[i]n some cases, it may also be relevant whether the penalty effects a deprivation of an individual's livelihood" and cited *United States v. Viloski*, 814 F.3d 104, 111 (2d Cir. 2016). For a more thorough discussion of *Viloski*, click here.

Bridgegate Appeal Takes Aim at the Statutes of Conviction

Defendants Bill Baroni and Bridget Anne Kelly filed their appellate briefs with the Third Circuit. As noted here, both defendants claim that their convictions "were based on a right to intrastate travel that has not been recognized by the Supreme Court." They also contend that the wire fraud charges of conviction were "improperly based on actions that did not deprive the government of money or property, and contend the government wrongly applied a charge of misapplying federally funded property that was meant to target actual fraud." Kelly's attorney made the point that many critics of the prosecution made. In her brief, she noted, "Everyone hates traffic. The public anger over the alleged conduct in this case is therefore understandable." She went on to argue that "as the Supreme Court has repeatedly instructed, federal criminal statutes should not be read as imposing a 'good government' code on state and local officials." The government's brief will be filed in the coming months, and then the court will undoubtedly hear oral argument before deciding the case.

Search Warrant for Visitors to Website Upheld

D.C. Superior Court Chief Judge Robert Morin granted a request by the Department of Justice (DOJ) to obtain the records of a website named DisruptJ20.org that organized protests of the January 20 inauguration of President Donald J. Trump. As reported here, some of those protests turned violent. More than 200 protesters were charged with rioting, and the DOJ is seeking evidence against them by obtaining records from the website's host, DreamHost, to determine who might have visited the website. DreamHost moved to quash the DOJ's request, arguing that it was overbroad and would allow the DOJ to learn the IP addresses of the 1.3 million who visited the site. The DOJ winnowed its request, but DreamHost pressed its objection. It "highlighted the fact that the warrant still asks for content from all email accounts on the DisruptJ20.org domain," which it likened to "searching every apartment in a building with a single search warrant." The court allowed the search to proceed but ordered the DOJ "to specify in advance which people would have access to the data, describe how they would be filtering or searching through it and present the courts with a detailed list of what they seized and why." He also "barred" the DOJ from "sharing the data with anyone else, including other government agencies." DreamHost is considering an appeal.

Fifth Circuit Authorizes Pre-indictment Access to Search Warrant Affidavit

In *United States v. Sealed Search Warrants*, the Fifth Circuit suggested that Justin Smith, whose home, business and storage unit were searched pursuant to warrants in March and April 2016, might have a qualified right of pre-indictment access to the warrant materials, including the sealed probable-cause affidavits. Smith is the target of a criminal tax investigation by the IRS. As part of that investigation, IRS agents obtained and executed three search warrants at properties related to Smith — his business's commercial airplane hangar, his home and his storage unit. Smith relied on Federal Rule of Criminal Procedure 41 and filed a motion to unseal the probable-cause affidavits supporting the warrants. The magistrate

judge granted the motions in part and required the government to produce redacted versions of the affidavits. While considering whether to appeal, the government provided the redacted affidavits. The magistrate judge thought the redactions were too extensive and issued her own redacted versions, which remained sealed to allow the government to object, which it did. That court sustained the government's objections and reversed, ordering that the affidavits remain fully sealed during the pendency of the government's investigation. Smith appealed. The Fifth Circuit reasoned that there is a common-law right of access to judicial records, which is to be considered on a case-by-case basis. The court then held that this right extends to "situations involving an individual's request to access pre-indictment warrant materials such as the affidavits in this case." It directed that when considering such requests, "district courts should exercise their discretion by balancing the public's right to access judicial documents against interests favoring nondisclosure." It then remanded the case to the district court to consider Smith's request in light of that standard.

SCOTUS Filing and Website Upgrade

This is not specifically a white collar issue, but it's notable that the U.S. Supreme Court is going to begin using an electronic filing system on November 13, 2017. With electronic filing comes free and easy access to all of the filings with the Court. The *ABA Journal* reported about the specifics here. The change comes on the heels of a totally revamped website at the high court. You can check that out here.

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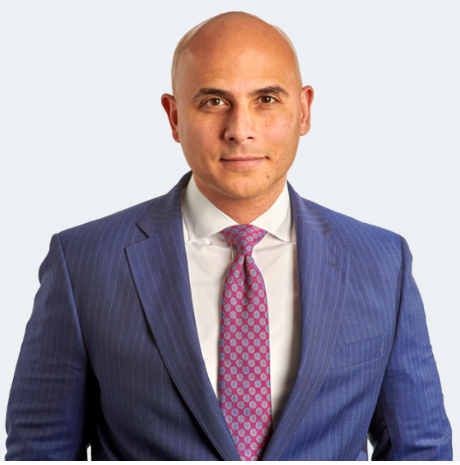

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