

Client Update

Oral Downloads of Interview Memoranda to Government Regulators Waive Work Product Protection

In a decision that makes clear the importance for counsel conducting internal investigations to think carefully about the consequences of providing oral summaries of witness interviews to government investigators, a federal Magistrate Judge recently held that a law firm waived work product protection for its interview memoranda when counsel provided oral downloads of those interviews to the U.S. Securities and Exchange Commission (“SEC”).¹ Noting that “very few decisions are consequence free events,” the Court held that there was “little to no substantive distinction” for purposes of work product waiver between providing the actual notes and memoranda and reading or orally summarizing the notes. The Court, however, rejected the notion that a waiver of work product protection extends to information the law firm shared with its client’s accounting firm, holding that the accounting firm and the company shared a “common interest.”

BACKGROUND

In 2012, General Cable Corporation (“GCC”) retained law firm Morgan Lewis & Bockius LLP (“Morgan Lewis”) to provide legal advice concerning accounting errors in its Brazilian subsidiary. Morgan Lewis commenced an internal investigation and informed the SEC of the investigation. The SEC then initiated its own investigation and requested internal documents from GCC. In cooperation with the SEC’s investigation, Morgan Lewis met with SEC staff and provided an oral briefing—described by the Court as an “oral download”—of 12 witness interviews.² GCC settled with the SEC in December 2016, and the SEC filed a contested civil action against three former GCC directors alleging that they had concealed the manipulation of the accounting system in GCC’s Brazilian operation.³ The defendants in the SEC’s case subpoenaed Morgan

¹ [Order on Defendants’ Motion to Compel Production from Non-Party Law Firm, SEC v. Herrera, et al., No. 17-20301 \(S.D. Fl. Dec. 5, 2017\)](#) (“Herrera Order”).

² The 12 downloads were apparently a subset of the “many” interviews conducted by the firm. *Id.* at 15.

³ *SEC Charges Former Executives of Wire and Cable Company with Financial Fraud*, Litigation Release, SEC (Jan. 25, 2017), <https://www.sec.gov/litigation/litreleases/2017/lr23726.htm>.

Lewis, seeking the witness interview memoranda and notes. Morgan Lewis declined to produce the documents, claiming that they were protected by the work product doctrine.

The issue before the Court was whether an oral briefing to the government constituted a waiver of information that would be protected under the work product doctrine. The Court focused its analysis on whether an oral briefing to the SEC staff “substantially increases the opportunity for potential adversaries to obtain the information.” The defendants cited a string of cases from various jurisdictions holding that oral disclosures to the SEC staff constituting a waiver of work product protection. In response, Morgan Lewis maintained that there was a meaningful distinction between the *actual* production of interview notes and providing the same or similar information orally. Further, Morgan Lewis emphasized that none of the decisions cited by the defendants specifically held that oral disclosures automatically equated to a waiver of work product protection.

The Court summarily rejected Morgan Lewis’ argument, explaining that the issue turned on whether the oral briefing to the SEC constituted a “sufficiently detailed” summary such that it effectively was the “functional equivalent” of the interview memoranda. The Court stated that Morgan Lewis’ work product argument would be stronger if it had provided only “vague references,” “detail-free conclusions” or “general impressions” to the SEC staff. While the Court did not make it clear what level of vagueness would be required to avoid a waiver, it noted that, in one decision cited by Morgan Lewis, the oral summary in question was “not very detailed,” and “no one could recall what portion of the report was disclosed.”

Although the Court concluded that the oral download waived work product protection for Morgan Lewis’ memoranda of the 12 witness interviews, it deferred a decision as to whether work product protection for notes taken *during* the meeting was likewise waived until after it reviewing a copy of Morgan Lewis’ notes to be filed under seal.

In a small, but critical, victory for Morgan Lewis, the Court made clear that the law firm’s disclosures to GCC’s accounting firm, Deloitte, did not constitute a waiver of work product protection even though Morgan Lewis turned over all the witness interview memoranda to Deloitte. The defendants had argued that because Deloitte “was on the SEC’s radar” and subsequently entered into a tolling agreement with the SEC, these actions were sufficient to elevate Deloitte to a potential adversary of GCC. The Court rejected the argument, noting that even if Deloitte were under investigation by the SEC, Deloitte and GCC “still had a common interest for *other* purposes,” and thus no adversarial or potentially adversarial relationship had been formed.

KEY TAKEAWAYS

The Court’s determination that work product protection is waived where summaries of witness interviews are provided orally to the government during an investigation continues a troubling

trend. Government investigators routinely ask for oral downloads in investigations, contending that the facts learned during witness interviews are not privileged and therefore would not be subject to a risk of waiver of any privilege or work production protection if shared with the government. The *Herrera* decision provides the clearest example of a rejection of that argument. In addition, the Court gave short shrift to Morgan Lewis' argument that the interview memoranda also contained lawyer impressions, inferences or commentary that may not constitute facts and that may not have been part of any oral download. As long as the SEC and Department of Justice ("DOJ") continue to make it clear that companies are credited for providing such downloads as part of their cooperation during an investigation, the *Herrera* ruling could create a significant dilemma for companies. [The DOJ has made this dilemma even more stark with its recently announced revised policy on Corporate Enforcement of the Foreign Corrupt Practices Act](#), which memorializes in the United States Attorneys' manual the incentives for cooperation with DOJ investigations. The new DOJ policy specifically provides for "disclosure on a timely basis of all facts" learned "during a company's independent investigation" as part of any cooperation.⁴

From a practical standpoint, counsel representing companies in internal investigations have always had to contend with the risk that providing information to government regulators could present waiver concerns. The *Herrera* ruling makes those risks even more acute and may prompt practitioners to resist government requests for downloads in some instances where the risk of subsequent litigation is high. The decision thus may reshape the way that the SEC and cooperating companies deal with witness interviews. Instead of providing detailed downloads, outside counsel may simply provide higher-level summaries to government investigators and then facilitate the SEC or DOJ to conduct its own interviews. Outside counsel may also need to consider other ways of providing the facts developed in the internal investigation by, for example, providing factual summaries based on multiple witness interviews as opposed to providing witness-specific interview summaries.

The *Herrera* court's broad ruling on waiver of work product coupled with established policies at DOJ and SEC which disfavor seeking waivers of privilege or work product protection, may put companies in a stronger position to object to requests by the SEC or DOJ for detailed witness-specific oral downloads. However, the government may also be more willing to work with companies to address waiver concerns as both the DOJ and SEC have explicitly stated that they will not require a waiver to obtain cooperation credit.

In many cases, the benefits and potential for cooperation credit will outweigh the risks of a potential work product waiver in a subsequent civil litigation. Nevertheless, counsel should take

⁴ See Debevoise & Plimpton, *DOJ Announces a Revised FCPA Corporate Enforcement Policy*, Client Update (Nov. 30, 2017).

heed of the *Herrera* decision,⁵ particularly taking care to ensure that interview notes and memoranda are drafted with care and precision, including preparing interview notes that focus exclusively on the facts learned and leaving any other observations that reflect attorney judgments or inferences to a separate document that would not be shared with the government. And any oral presentations made to the government should stick strictly to the facts and information set out in the underlying interview memoranda to minimize the risk of broader waiver claims.

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Please do not hesitate to contact us with any questions.

⁵ Morgan Lewis filed a Motion to Clarify or Reconsider the Order on December 13. The motion seeks to either reduce the scope of the documents Morgan Lewis must produce to only those portions of the interview memoranda read aloud to the SEC as well as notes from the meeting or, in the alternative, have the Court reconsider its Order altogether. Because the defendant's original motion concerns discovery, any appeal of the discovery Order will be filed with the U.S. Court of Appeals for the Eleventh Circuit. We will continue to monitor the developments of this case.

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