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CLIENT ALERT

Court Orders Disclosure of Attorney Work Product Based on Cooperation in a Government Investigation

Law Firm Ordered to Produce Interview Notes and Memoranda From an Internal Investigation

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A recent opinion out of the Southern District of Florida last Tuesday highlights the real risk of discovery of investigative work product. See *SEC v. Herrera*, Case No. 1:17-cv-20301-JAL (S.D. Fla. Dec. 5, 2017). In the opinion, Magistrate Judge Jonathan Goodman required law firm Morgan Lewis & Bockius to disclose interview notes and memoranda based on the firm's previous cooperation with the Securities and Exchange Commission ("SEC") in a government investigation. The opinion's sweeping conclusions underscore the significant risks for companies cooperating with any government investigation.

Attorney work-product protection has long served as an important bulwark in securing the integrity of the judicial process. The doctrine protects documents prepared by or at the direction of an attorney in anticipation of litigation, including documents containing an attorney's mental impressions, conclusions, and legal theories. Work-product protection can be waived, but only if disclosure to a third party "has substantially increased the opportunities for potential adversaries to obtain the information."[1]

[1] Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: Civil 2d § 2024, at 369 (2d ed. 1994).

Herrera involved an accounting fraud investigation launched in 2012. In October 2012, General Cable Corporation ("GCC") self-reported various fraud and FCPA issues to the SEC; Morgan Lewis represented GCC in the matter and conducted an extensive internal investigation. The alleged fraud related to inventory overstatements of $46.7 million, as well as alleged fraud in net income reported from 2008 to 2012. During the investigation, the SEC sought extensive information from GCC, including "[a]n oral recitation of what each (relevant) witness stated during interviews." In 2013, Morgan Lewis met with SEC staff and discussed the firm's interviews of twelve GCC employees as part of the review.

On December 29, 2016, the SEC issued a settled cease-and-desist order against GCC, which did not admit or deny the facts against it, and among other things, ordered GCC to pay a $6.5 million civil monetary penalty. In resolving the matter, the SEC gave GCC credit for self-reporting, cooperating, and remediating the alleged violations, noting, *inter alia*, that GCC had provided "detailed presentations on the key findings of the investigation" and had promptly produced "all relevant documents and information (including thousands of documents translated into English), chronologies, key document binders, interview downloads, and forensic accounting analyses."

Although the SEC settled the matter with GCC, the SEC separately filed a civil complaint against Mathias Sandoval Herrera and Maria Cidre, two GCC executives allegedly involved in the fraud. During discovery, Herrera and Cidre sought interview notes and memoranda that Morgan Lewis summarized for the SEC. In seeking discovery, Herrera and Cidre acknowledged that the interview materials were subject to attorney work-product protection, but they asserted that Morgan Lewis and GCC had waived the protection by giving the "interview downloads" to a potential adversary, the SEC.

Morgan Lewis argued against waiver, asserting that it did not waive work-product protection because (1) the firm never disclosed the actual interview notes or memoranda to the SEC, and (2) "the oral conveyance of information derived from interviews does not waive work-product protection as to the underlying attorney notes and memoranda." Morgan Lewis also argued that disclosure of work product only waives the protection as to "the actual materials disclosed, not other materials."

The court agreed with Herrera and Cidre. "Very few decisions are consequence-free events," Magistrate Judge Jonathan Goodman stated in his opinion. "The discovery dispute at issue here is no exception to this practical truism."

Although GCC cooperated with the SEC's investigation, the court found that the "SEC was the adversary"—which, according to the court, resulted in a waiver of attorney work-product protection. The court based its conclusion on the fact that the SEC was "investigating GCC" and that the SEC "eventually imposed a $6.5 million civil penalty against it." The court concluded that the waiver extended to the actual interview notes and memoranda because the "oral downloads" were the "functional equivalent" of the notes and memoranda:

> Because there is little or no substantive distinction for waiver purposes between the actual physical delivery of the work product notes and memoranda and reading or orally summarizing the same written material's

> meaningful substance to one's legal adversary, the Undersigned concludes that [Morgan Lewis] waived work product protection and must provide to Defendants the interview notes and memoranda that were orally downloaded.

Notably, the court limited its order only to "the witnesses whose interview notes and memoranda were orally provided," a group that was "far less than all the witnesses." Consequently, only the interviews "that were oral downloaded" were discoverable.

The opinion remains subject to appeal to the District Court. The court's opinion, however, highlights the growing risks of waiver for companies that cooperate with government investigations. Indeed, other cases have required disclosure of work product disclosed in government investigations,[2] and courts have generally refused to grant special treatment to government disclosures in assessing waiver.[3] This can be particularly problematic when, as here, the Department of Justice was also conducting an investigation (which resulted in a non-prosecution agreement with GCC) or a settlement of a government enforcement investigation results in follow-on class action litigation.

Navigating disclosures can raise significant challenges in a government investigation. On the one hand, the government has emphasized the importance of disclosing "all relevant facts about . . . individuals involved in corporate misconduct" for a company to receive credit for cooperation.[4] While GCC's FCPA conduct was not at issue before the court in *Herrera*, the decision highlights the risk of trying to satisfy the requirements of DOJ's FCPA pilot program.[5] On the other hand, failing to exercise proper care in making a disclosure can result in work-product waiver.

Companies should be aware that providing a full "oral download" of an interview in a government investigation could raise a significant risk of waiver; in contrast, providing only investigative facts should lower the risk of waiver. Work product traditionally has been recognized as consisting of two categories: (1) fact work product, i.e., the factual narrative developed during the investigation; and (2) opinion work product, reflecting legal findings and attorney impressions.[6] In *Herrera*, however, the court found that the robust oral download to the government constituted waiver over work product that was disclosed. One potential prophylactic measure therefore would be to limit government-facing downloads solely

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2 *See, e.g.*, *Gruss v. Zwirn*, No. 09-CIV-6441, 2013 WL 3481350 (S.D.N.Y. July 10, 2013).

3 *See, e.g.*, *In re Pacific Pictures Corporation*, 679 F.3d 1121 (9th Cir. 2012). Note that a statutory exception exists for any information provided to the CFPB, Federal Reserve, or any other banking supervisor, agency, or authority. 5 U.S.C. § 1828(x).

4 *See* Yates Memorandum at 3 (Sep. 9, 2015); *accord* FCPA Corporate Enforcement Policy, U.S. Attorneys' Manual 9-47.120 (2017).

5 The pilot program was recently made permanent and incorporating into the U.S. Attorneys' Manual. FCPA Corporate Enforcement Policy, U.S. Attorneys' Manual 9-47.120 (2017).

6 *See, e.g.*, *In re Cendant Corp. Sec. Litig.*,, 343 F.3d 658, 663 (3d Cir. 2003).

to facts uncovered during interviews, and to avoid revealing counsel's mental impressions, findings, or strategy.[7] In sum, *Herrera* provides a stark reminder concerning the risks in making oral presentations to the government and the need for careful evaluation to protect the privilege.

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[7] In the FCPA context, DOJ's recently released Corporate Enforcement Policy mitigates these risks to a limited extent by clarifying that cooperation credit does not require the waiver of privileged material. However, the policy does not explicitly extend that recognition to attorney work product. FCPA Corporate Enforcement Policy, U.S. Attorneys' Manual 9-47.120 (2017) ("attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of the facts").