February 14, 2018

Recent Decision Finds Waiver Based on "Oral Downloads" to the SEC

A federal magistrate judge in the Southern District of Florida recently ruled that a law firm had waived work product protection over notes and memoranda of witness interviews when it provided "oral downloads" of those interviews to the Securities and Exchange Commission ("SEC").

In a December 5, 2017 opinion, *SEC* v. *Herrera*, No. 17-cv-20301 (S.D. Fla. Dec. 5, 2017), Magistrate Judge Jonathan Goodman indicated that he was "not convinced" that "there is a meaningful distinction between the actual production of a witness interview note or memo and providing the same or similar information *orally*."[1]

The opinion serves as an important reminder of the risks of waiver—and the need to take steps to minimize those risks—when disclosing information to a government agency.

Background

In 2012, the wire and cable manufacturer General Cable Corporation ("GCC") retained a law firm (the "Firm") to provide it with legal advice concerning accounting errors at GCC's Brazilian subsidiary. The Firm conducted an extensive investigation, during which it interviewed a number of GCC executives and employees. The Firm disclosed the existence of the investigation to the SEC in November 2012, and the SEC requested, among other things, that the Firm share its investigative findings. In April 2013, the Firm provided the SEC with a PowerPoint presentation containing an event timeline, witness names, a breakdown of the significant transactions, and the results of the investigation. At another meeting in October 2013, the Firm provided the SEC with "oral downloads" of 12 witness interviews. During the course of the investigation, the Firm also read notes and memoranda aloud to the accounting firm Deloitte, which had been retained by GCC, and provided Deloitte with access to certain interview notes. GCC reached a settlement with the SEC in December 2016 in which it agreed to the entry of a Cease and Desist Order and a civil monetary penalty of $6.5 million.

[1] *SEC* v. *Herrera*, No. 17-cv-20301, 2017 WL 6041750 at *5 (S.D. Fla. Dec. 5, 2017).

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The SEC subsequently brought a civil enforcement action, *Herrera*, against former executives of GCC's Latin American operation for allegedly concealing the accounting errors at the Brazilian subsidiary.[2]

In October 2017, the *Herrera* defendants filed a motion to compel the Firm to produce any notes and memoranda from the 12 interviews it described orally to the SEC, and requested an *in camera* review of the Firm's notes from the October 2013 meeting at which it provided the downloads. The *Herrera* defendants also requested all of the materials the Firm read to or shared with Deloitte. The Firm opposed the motion, arguing that these materials were protected attorney work product.

On December 5, 2017, Magistrate Judge Jonathan Goodman granted the motion in part, ordering the Firm to produce notes and memoranda from the 12 interviews that were the subject of the "oral downloads" to the SEC, and to submit *in camera* any notes "discussing or reflecting what information was disclosed" in *all* meetings the Firm had with either the SEC or the Department of Justice ("DOJ"), which had been conducting a parallel investigation of GCC into potential violations of the Foreign Corrupt Practices Act ("FCPA").[3] Magistrate Judge Goodman denied the request to compel production of the materials disclosed to Deloitte.

In his opinion, Magistrate Judge Goodman determined that waiver of the attorney work product privilege turned on whether the information was disclosed to an adverse party. There was no dispute that the SEC and GCC were adversaries and shared no common interest. The Firm argued, however, that the oral communications did not constitute disclosure of the work product and were not the equivalent of sharing actual documents. Magistrate Judge Goodman rejected this argument, writing that he was "not convinced" that "there is a meaningful distinction between the actual production of a witness interview note or memo and providing the same or similar information *orally*."[4]

The order cited a number of cases in which work product privilege for investigation material was found to have been waived through oral descriptions of their contents. In *SEC* v. *Vitesse Semiconductor Corp.*, for example, Judge Jed Rakoff of the Southern District of New York compelled the production of contemporaneous interview notes (which were never reduced to formal memoranda) because the SEC was given oral summaries of those interviews that contained "very detailed, witness-specific" information. No. 10-cv-9239, 2017 WL 2899082 at *3 (S.D.N.Y. July 14, 2011). Judge Rakoff wrote that waiver "would probably not apply" if oral summaries "merely provided general impressions without organizing the

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2 SEC, Press Release, "SEC Charges Former Executives of Wire and Cable Company with Financial Fraud" (Jan. 25, 2017) available here.

3 *Herrera*, 2017 WL 6041750 at *6.

4 *Id.* at *5.

presentations 'in a witness-specific fashion,' but might very well apply if [a party] 'orally relayed in substantial part' the contents of witness interviews to the SEC." *Id.* (quoting *United States* v. *Treacy*, 2009 WL 812033, at *2 (S.D.N.Y. March 24, 2009)).

Similarly, in *SEC* v. *Berry*, the court held that oral descriptions of interviews resulted in a privilege waiver for interview memoranda. No. 07-cv-04431, 2011 WL 825742 (N.D. Cal. Mar. 7, 2011). Importantly, in *Berry*, the court noted that work product protection was only waived for the final interview memoranda and not for any draft memoranda or contemporaneous interview notes, because the oral summaries appeared to have relied exclusively on the final drafts. *Id.* at *6.

Magistrate Judge Goodman observed that the Firm had not claimed that the oral downloads were substantively different from the interview notes and memoranda, or that they were limited to "detail-free conclusions or general impressions."[5] Rather, he noted, the Firm had in fact conceded that the oral downloads contained the "substance of the 12 witness interview notes."[6]

As for the materials shared with Deloitte, Magistrate Judge Goodman relied on the generally accepted principle that, for purposes of waiver, outside auditors share a common interest with their clients. He rejected the defendants' arguments that, since Deloitte itself had entered into a tolling agreement with the SEC, it rendered them a potential adversary of GCC. Magistrate Judge Goodman pointed out that the SEC had not in fact brought an action against Deloitte, and that the tolling agreement was entered ten months after the disclosures of the interview memoranda, with no indication that the Firm was aware of the SEC's interest in obtaining a tolling agreement from Deloitte. He also reasoned that, even if Deloitte had been a potential adversary on one issue, "it still had a common interest for other purposes."[7]

December 19, 2017 Ruling in *Herrera*

The Firm did not produce most of the materials called for in Magistrate Judge Goodman's order. Rather, it submitted *in camera* a single attorney's notes from the October 2013 meeting with the SEC, and then filed its own motion for clarification of the ruling. In a December 19, 2017 opinion, Magistrate Judge Goodman chastised the Firm for failing to comply with his initial order and restated and expanded his rulings.[8]

Magistrate Judge Goodman wrote that he needed "to obtain significantly more facts in order to rule" on the clarification motion. He ordered the Firm to file a notice identifying all of the Firm's attorneys who

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5 *Id.*

6 *Id.*

7 *Id.* at *7.

8 *SEC* v. *Herrera*, No. 17-cv-20301 at *6 (S.D. Fla. Dec. 19, 2017).

participated in meetings with the SEC or DOJ at which summaries or downloads of witness interviews were provided, and to file under seal "notes and memoranda concerning any summary, download, or excerpt of witness interviews provided to the SEC or the DOJ, regardless of [when they were provided], regardless of whether they were provided in person, over the telephone, by email, by text message, or any other form of social media; and regardless of whether they concern the FCPA" and scheduled an evidentiary hearing at which the attorneys identified in the notice would be expected to testify and to respond to questioning by defense counsel.[9]

On January 3, 2018, the *Herrera* defendants and the Firm filed a notice of resolution of the discovery dispute and defendants withdrew their motion to compel. The court issued an order vacating its two rulings and canceling the evidentiary hearing.

Key Takeaways from *Herrera* Ruling

Oral Presentations Are Not a Waiver Exception. *Herrera* serves as a reminder that disclosing information orally does not necessarily eliminate the risk of waiver. There is no clear line establishing when a general summary becomes sufficiently detailed to effect a waiver over investigative material. Providing the government with a more extensive reading of excerpts from documents protected by the work product doctrine will increase the risk of waiver, at least as to those particular documents. A safer course is not to read from such documents.

In fact, because some courts have limited any waiver to documents actually relied upon during meetings with the government, it may be good practice in some circumstances for counsel to create separate, more narrowly tailored talking points to support oral presentations. This approach could help limit any potential waiver to the facts disclosed, and protect attorney thoughts and impressions in interview memoranda and notes. Counsel also should consider keeping detailed records of government meetings and phone calls that clearly indicate what information was disclosed.

Balancing Risk of Waiver against the Benefits of Cooperation. Companies can secure significant benefits from cooperating with the government, but investigative agencies like the SEC and Department of Justice generally expect the disclosure of relevant facts in order to earn credit for cooperation. There is an inherent tension in these agencies' policies that require full disclosure of facts learned in the investigation, but expressly do not condition cooperation credit on the waiver of privilege or work product and generally do not permit requests to waive privilege in the ordinary course.

It is useful to keep in mind the guidance published by each of the DOJ and the SEC with respect to the requirements for cooperation and the preservation of attorney-client privilege and work product protection.

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9 *Id.* at *7.

- Under the U.S. Attorneys' Manual ("USAM"), in order for cooperation to be considered as a mitigating factor, a company "must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct."[10] The USAM acknowledges that the development of information by counsel involves "a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected."[11] The USAM makes clear that "[e]ligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection" and only upon the disclosure of relevant facts.[12]

- The SEC's Enforcement Manual takes a similar approach. It states, "Voluntary disclosure of information need not include a waiver of privilege to be an effective form of cooperation and a party's decision to assert a legitimate claim of privilege will not negatively affect their claim to credit for cooperation. However . . . if a party seeks cooperation credit for timely disclosure of relevant facts, the party must disclose all such facts within the party's knowledge."[13]

  The Enforcement Manual also specifically addresses internal investigation documents. It explains that a "corporation need not necessarily produce, and the staff may not request without approval, protected notes or memoranda generated by the attorneys' interviews," but states that to earn credit "the corporation must produce, and the staff always may request, relevant factual information—including relevant factual information acquired through those interviews."[14]

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10 USAM § 9-28-700.

11 *Id.*

12 USAM § 9-28-720.

13 SEM § 4.3.

14 *Id.*

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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