ALERT MEMORANDUM

"Oral Downloads" of Counsel Interviews Waived Attorney Work Product Protection from Disclosure

December 22, 2017

On December 5, 2017, Magistrate Judge Jonathan Goodman in the United States District Court for the Southern District of Florida held in *SEC v. Herrera* that the "oral download" of external counsel's interview notes to the Securities and Exchange Commission ("SEC") waived protection from disclosure under the attorney work product doctrine. In the same order, Magistrate Judge Goodman held that providing similar access to the client's auditor did not result in a waiver. As a result of the decision, issued in an SEC enforcement action, Morgan Lewis & Bockius LLP was ordered to disclose to certain former employees of its client General Cable Corporation ("GCC") those interview notes that were orally downloaded to the SEC. Morgan Lewis subsequently moved for clarification or reconsideration of the order, and an evidentiary hearing is scheduled for January 10, 2018.

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Background

In some respects, this case underscores one of the core challenges facing companies that are seeking to cooperate with government investigations. Although the official policy of many U.S. government agencies preclude them from conditioning cooperation credit on a waiver of privilege, it is very common for government lawyers to request access to information obtained through companies' internal investigations, including in particular facts learned through interviews of corporate employees by external counsel. Recognizing the risk that such disclosure could result in privilege waivers in subsequent civil litigation, one of the risk-management techniques that has developed among the white collar defense bar is to provide "oral downloads" to government attorneys. While it is generally recognized that a presentation made to the government is unlikely to be privileged, this approach relies on an interpretation of the work product doctrine that would insulate the attorney's notes used as the basis for that download from disclosure (just as, for example, an attorney's notes would typically be protected by the work product doctrine even if used as the basis for a presentation in open court).

The outcome in *Herrera*, however, should also be understood in the context of the unique facts of the case, which importantly did not involve a request for disclosure of investigation materials from a defendant in follow-on civil litigation. Rather, this case involved a request made by defendants in an SEC enforcement action to material that was provided to the SEC itself, and therefore may reflect an attempt to avoid the inequity that might have otherwise resulted from asymmetric access to the information disclosed by GCC. Asymmetric access is a long-standing principle cited by courts and the government in denying attorney client privilege and work product protection.[1]

In late 2012, GCC hired Morgan Lewis to conduct an internal investigation relating to accounting errors at GCC's Brazilian subsidiary. As part of the investigation, Morgan Lewis conducted interviews with numerous GCC personnel. The SEC subsequently began investigating GCC as well, and asked for the findings of Morgan Lewis's investigation. In response, at a meeting with the SEC Staff in October 2013, Morgan Lewis provided, among other things, "oral downloads" of twelve witness interviews to the SEC staff. The SEC later initiated *Herrera* against certain former employees of GCC.

Magistrate Judge Goodman's Order

The subject of Magistrate Judge Goodman's order was defendants' motion to compel Morgan Lewis to produce interview notes and memoranda related to the firm's interviews of GCC personnel. Morgan Lewis argued that it did not waive work-product protection, contending that its oral delivery of information to the SEC was meaningfully distinct from providing the SEC with the notes and memoranda of the witness interviews. Magistrate Judge Goodman rejected this distinction, writing that "it is true that the SEC does not have the *actual* witness notes and memoranda – but it has the functional equivalent of them by receiving the oral summaries of the interview materials."[2]

Magistrate Judge Goodman concluded, however, that the waiver of work-product protection applied only to the witness interview notes and memoranda that were the subject of the "oral downloads" to the SEC, and rejected defendants' argument that Morgan Lewis be ordered to produce notes and memoranda from all witness interviews it had conducted with GCC personnel on the ground that they had been shared with GCC's auditor, Deloitte. Magistrate Judge Goodman was persuaded by caselaw holding that "an outside auditor has a common interest with the corporation for work-product waiver issues."[3] In that regard, the decision follows a series of similar orders finding that disclosure of *work product* material

[1] *See, e.g., SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 310, 313-14 (S.D.N.Y. 2011); *Xerox Corp. v. Int'l Bus. Machs. Corp.*, 64 F.R.D. 367, 381-82 (S.D.N.Y. 1974).

[2] Order on Defendants' Motion to Compel Production from Non-Party Law Firm at 13, *SEC v. Herrera*, No. 17-cv-20301 (S.D. Fla. Dec. 5, 2017).

[3] *Id.* at 17.

to external auditors does not result in waiver of the protection because an auditor is not an adversary of its client. (Importantly, courts have not reached the same conclusion with respect to disclosures of material subject to the attorney client privilege, which some courts have found is waived by disclosure to *any* third party).

Magistrate Judge Goodman's order also required Morgan Lewis to submit for *in camera* review copies of notes and memoranda reflecting other work-product material that had been provided to the SEC and the Department of Justice regarding the employee interviews, including attorney notes from the October 2013 meeting with the SEC. On December 12, 2017, Morgan Lewis filed a motion asking the Court to limit the order so that Morgan Lewis would only be required to produce the attorney notes from the October 2013 meeting and the portion of an interview memorandum that was read to the SEC during the meeting. Morgan Lewis argued that the more limited disclosure "would be consistent . . . with the principle that disclosure of work product-protected materials waives the privilege only as to the actual material disclosed, and not other materials."[4] Magistrate Judge Goodman issued an order on December 19, 2017, stating that more facts are required before he can rule on Morgan Lewis's motion, and setting a schedule for Morgan Lewis to provide relevant information, with a hearing to be held on January 10, 2018.[5]

Takeaways

While *Herrera* does not resolve what is a potentially contentious area of privilege law, it does highlight issues that internal and external lawyers should carefully consider when conducting internal investigations and particularly when providing downloads to the government of material that may be privileged or subject to work product protection. In particular:

- When a decision is made to disclose potentially privileged material to the government, lawyers and their clients should recognize that doing so increases the risk of a privilege waiver.

- Where possible, it is advisable to obtain an agreement with the government that information disclosed will be kept confidential. While not necessarily conclusive on the question of privilege waiver, doing so may help manage the risk that another party would have a basis to argue that a waiver has occurred.

- Clear records should be kept of what information is disclosed to the government. To the extent that portions of interview notes or memoranda are not downloaded, this should be documented.

- In cases where waiver of privilege or work product protection would be prejudicial, consideration should be given to providing a less verbatim presentation (preferably orally) to the government on the facts discovered in the interview, rather than a verbatim download of interview notes themselves. While such a presentation may not itself attract privilege, this approach may reduce the risk that a court would find that protection has been waived with respect to the underlying notes or memoranda.

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[4] Morgan Lewis' Motion for Clarification or Reconsideration of the Order on Defendants' Motion to Compel Production at 3, *SEC v. Herrera*, No. 17-cv-20301 (S.D. Fla. Dec. 12, 2017).

[5] Order Concerning Non-Party Law Firm's Motion for "Clarification" of Order Compelling Production, *SEC v. Herrera*, No. 17-cv-20301 (S.D. Fla. Dec. 19, 2017).