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Preserving Privilege in Government Investigations in Light of 'SEC v. Herrera'

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Corporations under investigation frequently decide to share information derived from privileged investigative materials—in particular, interview memoranda—as part of cooperation efforts with the government. But a recent case from the Southern District of Florida makes clear that counsel must tread carefully when assessing whether and how to share that information, as doing so may risk waiving the work product privilege over the underlying materials and potentially their entire subject matter. In a recent order issued in *SEC v. Herrera*, 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), a federal magistrate judge concluded that a law firm waived privilege over its interview memoranda and interview notes by providing the SEC with "oral downloads" of the interviews, which the court concluded were the "functional equivalent" of disclosing the memoranda and notes.

In terms of practical impact, the decision appears to expand the scope of materials that may be obtained as a result of actual waiver through disclosure, and further blurs the line between subject matter waiver and actual waiver. Both results unfortunately provide potent new tools for litigants seeking to obtain materials previously considered privileged.

Case Overview

In late 2012, Kentucky-based General Cable Corporation (GCC) identified accounting errors at its Brazilian subsidiary and engaged the law firm of Morgan Lewis & Bockius to conduct an internal investigation. GCC self-disclosed the accounting issues to the SEC, which subsequently launched its own investigation and ultimately entered a Cease and Desist order against GCC in December 2016.

Throughout the course of the investigation, the company cooperated, including by providing oral summaries, or "downloads," of witness interviews to the SEC.

The SEC later brought a civil action against three former GCC employees for their roles in concealing the accounting issues. To "level the playing field," the former employees issued a Rule 45 subpoena to Morgan Lewis seeking production of various materials from the investigation, including interview memoranda. The employees later filed a motion to compel production of the memoranda, arguing that Morgan Lewis waived privilege by providing oral summaries to the SEC. Morgan Lewis argued in response that verbally conveying information from witness interviews to the SEC did not waive work product protection for the underlying memoranda.

The magistrate judge ruled for the employees, concluding that there was "little or no substantive

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distinction for waiver purposes" between providing the memoranda and orally summarizing the substance of the memoranda. The court observed that waiver issues require an evaluation of the circumstances surrounding the disclosure, and noted that Morgan Lewis went beyond providing "vague references" or "detail-free conclusions or general impressions," and instead provided downloads of the substance of the interviews. Concluding that Morgan Lewis waived work product protection by providing oral downloads of the memoranda to the SEC, the court ordered the firm to disclose not only the memoranda associated with the interviews but also the underlying attorney notes upon which the memoranda were based.

The court rejected the other arguments raised by the former employees. Specifically, the court concluded that neither a PowerPoint presentation made to the SEC nor disclosure of interview memoranda to GCC's auditors resulted in a work product waiver. Notably, no waiver was found with respect to the PowerPoint presentation based on the court's finding that the presentation contained only facts, including the names of the interviewees, and not attorney mental processes.

Implications and Takeaways

The *Herrera* decision is the latest in a line of cases where courts have held that the verbal disclosure of the substance of interview memoranda waives work product protection for the memoranda themselves. For counsel conducting internal investigations, this finding further complicates efforts to cooperate with government inquiries while simultaneously preserving a critical privilege.

Perhaps more importantly, the decision appears to break new ground by concluding that merely providing a summary of the content of interview memoranda resulted in work product waiver of not just the memoranda, but also the underlying attorney notes. Because subject matter waiver is generally disfavored, litigants and government agencies increasingly have been attempting to expand the scope of materials that can be obtained as a result of actual waiver (i.e., waiver through physical disclosure or the oral equivalent). A litigant who can establish actual waiver will almost always be entitled to obtain the materials, so the recent push towards a broad interpretation of actual waiver is a troubling development for counsel seeking to protect attorney work product materials in internal investigations. By adopting an expansive view of actual waiver, the *Herrera* court provides litigants and government agencies with a new and potentially powerful strategy for seeking broad discovery of work product materials.

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The result could be a Hobson's choice for a company that seeks to cooperate with a government inquiry: cooperate fully with the government and risk a finding of work product waiver in related litigation or protect your work product privilege and risk the government concluding that your cooperation is insufficient. Moreover, Deputy Attorney General Rod Rosenstein stated in a recent speech that, in the FCPA context, there is now a presumption of a DOJ declination in cases where, among other things, the company voluntarily self-discloses and fully cooperates. To the extent this new policy creates an additional incentive for companies to disclose privileged materials to obtain cooperation credit, *Herrera* makes clear that taking that step may have serious consequences for related litigation.

Recommendations

Given the panoply of risks facing companies cooperating with government inquiries, counsel would be wise to consider proactive measures to preserve work product privilege and maximize protection of sensitive investigative memoranda and

materials. The *Herrera* order (and cited cases) suggest that there may be ways to successfully navigate these challenging circumstances.

First, the *Herrera* court suggested that merely providing the government with oral high-level conclusions or impressions from the interviews would not result in work product waiver. Similarly, an unpublished S.D.N.Y. decision cited in the order noted that providing general impressions of interviews without organizing them into witness-specific presentations likely would not result in waiver. *SEC v. Vitesse*, 2011 WL 2899082 at *3 (S.D.N.Y. July 14, 2011). Thus, while neither decision established the level of specificity required to trigger a waiver finding, it appears that counsel could preserve privilege by providing high-level conclusions based on the interviews rather than detailed summaries of individual interviews.

Second, it is important to keep in mind that the historic facts at issue in the investigation are not privileged. As a result, presentations to the government that focus on those facts, rather than the substance of witness interviews, should not result in a waiver. The *Herrera* court recognized this, concluding that the PowerPoint presentation for the SEC did not contain the substance of any witness statements and therefore did not implicate the work product privilege.

Of course, government agencies historically have taken a mixed view of whether mere factual presentations represent sufficient cooperation, especially under the previously-issued Yates Memo. But there is a strong argument that providing relevant facts through presentations—without resorting to providing information that may result in work product waiver—accords with DOJ and SEC guidance and should be considered full cooperation. The U.S. Attorney's Manual (USAM) addresses this point, noting that while cooperation credit requires "timely disclos[ure] [of] the relevant facts about the putative misconduct," it does not require disclosure of privileged materials. USAM 9-28.720. Indeed, the USAM specifically states that to receive cooperation credit "the corporation need not produce, and prosecutors may not request, protected notes or memoranda." USAM 9-28.720 (FN 2). This demonstrates that cooperation through sharing facts—rather than interview summaries—should be more than sufficient for DOJ's purposes.

Finally, counsel should attempt to reach an agreement with the government prior to disclosing information from privileged materials. Confidentiality agreements will not necessarily be sufficient to protect work product materials that are turned over to the government, particularly where the government agency has the ability to disclose the materials to others. But counsel may be able to obtain greater protection for oral presentations by reaching an agreement in advance with the government that the proffer of information will not result in a waiver of underlying work product materials. The ultimate impact of such an agreement in persuading a judge presiding over parallel civil litigation of course cannot be guaranteed.

Conclusion

Moving forward, companies and their counsel will need to closely monitor the emerging trend towards a broad interpretation of actual waiver in this area, and be alert to any situations in which sharing information with the government may give rise to a claim of waiver. While not a panacea, carefully tailored factual presentations and explicit confidentiality agreements may enable counsel to maximize protection for work product materials. Companies facing government scrutiny ultimately may decide that the potential benefits of disclosure outweigh the risks, but counsel should carefully consider all proactive measures before taking that step.