Investigations, Compliance and Defense

Judge Orders Disclosure of Interview Memoranda Following "Oral Downloads" of Facts to the SEC, Highlighting the Importance of Safeguarding Privilege when Cooperating with the Government

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On December 5, 2017, a Florida federal magistrate judge concluded in *S.E.C. v. Herrera* that attorney "oral downloads" of interview notes and memoranda to the US Securities and Exchange Commission (SEC) waived work product protection over these materials as to third-party litigants. The case highlights the risks entailed in communicating with government investigators about the results of an internal investigation and that attorneys must take care to mitigate those risks. It is important to note that the court addressed only the work product protection and did not address the attorney-client privilege.

The holding came in the course of a discovery dispute following a third-party subpoena issued to Morgan Lewis & Bockius LLP (Morgan Lewis), the law firm that conducted the interviews and provided the oral downloads to the SEC. The subpoena was issued by two former executives of the firm's client, General Cable Corp., whom the SEC charged in connection with the conduct that was the subject of the internal investigation.

The executives sought production of interview memoranda and notes that were orally disclosed to the SEC and Morgan Lewis objected, claiming work product protection. According to the court, the oral downloads, which Morgan Lewis attorneys made at the SEC's request during its own investigation, waived work product protection because they were a voluntary disclosure of otherwise privileged information to an adversary. In so holding, the court explained that the detailed oral summaries of witness interviews were the "functional equivalent" of the underlying notes and memoranda.

The result reached in *Herrera* is generally consistent with other courts' conclusions that substantive disclosures to a government agency, even if solely oral, can waive otherwise applicable privileges. The court, however, failed to address whether the waiver applied to opinion work product or resulted in broader subject-matter waiver (that is, waiver of privileged information that was not disclosed to the government).

These questions can be critical to assessing the scope of work product that could be vulnerable to disclosure. First, interview notes and related summary memoranda typically reflect opinion work product—the mental impressions, conclusions, opinions or theories of counsel. Even where a court orders production of otherwise protected work product, opinion work product typically remains protected absent a finding that the opinion work product itself has been put at issue in a proceeding. Some jurisdictions provide absolute protection for opinion work product. Even in those jurisdictions where opinion work product is not absolutely protected, discovery will be allowed, if at all, only upon a showing of extraordinary need, a standard rarely reached in practice. Federal Rule of Civil Procedure 26(b)(3)(B) specifically provides that, even where a court allows discovery of work product, it "must protect against disclosure" of opinion work product. Second, where a party makes a disclosure of privileged information to a federal office or agency, Federal Rule of Evidence 502(a) limits the scope of waiver only to the privileged information actually disclosed and does not expand waiver to undisclosed privileged information except under the very limited circumstances in which "fairness" requires disclosure of additional privileged information on the same subject matter. Thus, identifying the specific information that was disclosed to a federal agency is important in order to distinguish between information as to which privilege has been waived, and undisclosed information as to which privilege will be deemed

waived only after a showing of extraordinary circumstances that would justify some additional subject-matter waiver.

Nonetheless, the disclosure of work product ordered in this case highlights three key considerations for protecting the work product generated during an internal investigation in the context of communications with the government.

First, disclosures of facts learned during an internal investigation, especially through privileged interviews, are fraught with the risk of waiver of attorney-client privilege and work product protections. Government agencies, including the Department of Justice (DOJ) and the SEC, expect companies under investigation to provide the facts learned by a company during the course of an investigation, through oral presentation or written submission. As the decision in *Herrera* demonstrates, it may be difficult to provide factual information without revealing the substance of individual witness interviews or the contents of pre-existing work product.

Second, the risk of waiver may be exacerbated by the government's insistence on specificity and detail when discussing investigative findings. As reflected in the recent Foreign Corrupt Practices Act enforcement policy DOJ announced last month, DOJ and the SEC have frequently insisted that full cooperation requires efforts to attribute facts to specific sources rather than providing a general recitation of those facts. Although government agencies on the receiving end of disclosures insist that they are not seeking a waiver of applicable privilege protections, it is the courts—not the government agency—that will decide any waiver question. The emphasis on specificity puts pressure on a company to make comprehensive disclosures of all pertinent facts learned about specific individuals—through witness interviews and review of related documents—while protecting privilege by not disclosing the substance of any specific witness interviews.

Third, counsel should take care to protect privilege over material generated during the course of an internal investigation. To mitigate the risk of potential waiver, counsel may consider:

- executing a confidentiality or non-waiver agreement with the government agency that expressly covers the disclosed material;
- expressly stating that the company intends to disclose facts and does not intend to disclose the substance of any individual privileged communications;
- providing a list of witnesses interviewed and documents reviewed rather than attributing statements to any individual witness;
- framing communications with the government relating to specific individuals as hypothetical attorney proffers rather than as disclosures of statements made in specific interviews; or
- drafting documents separate from interview notes or memoranda for the express purpose of discussions with the government, which could protect the source materials from disclosure.

In assessing the nature and degree of communication with the government regarding the findings of an internal investigation, counsel should focus both on the risk of waiver and on concrete steps it can take to mitigate the scope of any waiver.

The case is *S.E.C. v. Herrera*, No. 1:17-cv-20301-JAL, 2017 WL 6041750 (S.D. Fla. Dec. 5, 2017). For more information about the implications of the decision or protecting the confidentiality of internal investigations, please contact any of the attorneys listed below or in our Investigations, Compliance and Defense or Securities Litigation and Enforcement practices.

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