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NEWSLETTER

# Federal Court Orders Production of Internal Investigation Memoranda to Third Parties Following Oral Disclosure to Government

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*Government Contracts Issue Update*

A federal magistrate judge in Florida recently ordered that witness interview memoranda from an internal investigation be produced to third parties in related civil litigation, finding that attorneys had waived attorney work product protection when they disclosed the contents of the memoranda to the Government. While this was a single magistrate judge's opinion, it has the potential to impact standard practices for witness interviews and cooperation in government investigations in the event other courts reach similar conclusions. Regardless of its wider adoption, this opinion should remind companies and their counsel of the care needed when conducting internal investigations, memorializing interviews, and making oral or written disclosures to the Government.

The case at issue, *SEC v. Herrera*, Case No. 17-CV-20301 (S.D. Fl. Dec. 5, 2017), involved allegations that employees of General Cable Corporation (GCC) concealed the manipulation of accounting systems at the Brazilian operations of GCC. The company hired Morgan Lewis & Bockius LLP (Morgan Lewis) to provide advice regarding these irregularities, and Morgan Lewis subsequently commenced an internal investigation and informed the U.S. Securities and Exchange Commission (SEC) of the investigation. As is standard practice in white-collar investigations, Morgan Lewis attorneys then conducted interviews of relevant witnesses and memorialized the substance of these interviews in memoranda. Following these interviews, undoubtedly as part of an effort to demonstrate cooperation with the SEC's investigation, attorneys for Morgan Lewis orally shared the

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content of some of the interview memoranda with the government lawyers. Subsequently, GCC settled with the SEC, and the SEC initiated a civil enforcement action against individual GCC employees in federal court in Florida. The individual defendants subpoenaed Morgan Lewis, seeking the production of all the interview memoranda related to the internal investigation. When the law firm refused, the defendants brought a motion to compel their production.

Magistrate Judge Jonathan Goodman partially granted the defendants' request, ordering the production of the interview memoranda that had been summarized for the SEC. The court found that the information sharing conducted by Morgan Lewis constituted a waiver of work product protection over the interview memoranda. The court noted that the work product doctrine is primarily about protecting materials from adversaries, and in this context the SEC—like any government enforcement agency—was an adversary. In the court's view, Morgan Lewis had "disclosed [the interview memoranda] in a manner which is either inconsistent with maintaining secrecy against opponents or substantially increases the opportunity for a potential adversary to obtain the protected information." The court found that an "oral download" of the content of the interview memoranda to an adversary was the functional equivalent of disclosing the documents themselves, as Morgan Lewis went beyond providing "only detail-free conclusions or general impressions" in the oral conversations. The court rejected the argument that an oral description was distinct from disclosing the document itself and found that Morgan Lewis had waived work product protection. On that basis, the court ordered that the interview memoranda discussed with the SEC be produced to the defendants in the SEC civil enforcement action.

Magistrate Judge Goodman's opinion requiring production of the interview memoranda is a startling—if not ultimately surprising—decision, as it implicates a common practice of sharing information with the Government following an internal investigation. Indeed, it seems to put corporations in a nearly impossible position when trying to both cooperate with the Government and maintain all legal protections over internal investigation materials. For example, in November 2017 (just days before this opinion), DOJ released its Corporate Enforcement Policy related to the Foreign Corrupt Practices Act (FCPA). The chief aim of that policy is to incentivize companies to cooperate with DOJ, including conditionally offering presumptions of declination for voluntary self-disclosures of FCPA violations. But to receive any credit under the new guidelines, companies must give "full cooperation" to DOJ, including proactive disclosure of "all relevant facts gathered during the company's independent investigation" and "attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of facts."

In addition, DOJ policy as laid out in the "Yates Memo" (formally titled Individual Accountability for Corporate Wrongdoing and currently under review by DOJ) requires that organizations provide DOJ with "all relevant facts relating to the individuals responsible for the misconduct" in order to receive any cooperation credit in either civil or criminal matters. Because witness interviews are a primary way that a corporation or its outside counsel conducts internal investigations and learns information about misconduct, DOJ guidance virtually requires a disclosure of the substance of individual witness interviews in order to gain cooperation credit. Despite these expectations, the court in *Herrera* found such behavior forfeited legal protections over interview memoranda. *Herrara* thus sets up an inherent conflict between maintaining work product protection over witness interviews and cooperation of the type expected by DOJ.

This conflict is heightened in the government contracts context, where mandatory disclosure obligations require the disclosure of credible evidence of violations of certain laws, including the civil False Claims Act. *See* FAR 52.203-13(b). Because extensive information sharing as a part of a mandatory disclosure could constitute a waiver of protection over interview memoranda if *Herrara's* logic is adopted elsewhere, companies now more than ever need to consider how the manner in which those disclosures are made has the potential to impact later civil discovery involving the company.

As it stands, Magistrate Judge Goodman's opinion was initially appealed, but that matter has settled, leaving his opinion in place. Given the risk that this approach may be adopted by other courts, it is advisable to consider adapting internal investigation best practices to minimize the risk of potential production of interview memoranda. Government contractors, which often find themselves answering any number of governmental investigative inquiries—be it from DOJ, SEC, various IGs, or Congress—are subject to rigorous government oversight and as a result should have robust internal investigation functions. They and their counsel should now be even more sensitive to the format and content of interview memoranda. Consideration should be given to restricting editorializing or commentary in interview memoranda, omitting statements made by counsel and focusing on the statements made by the witness. That way, if a disclosure made to the Government is later deemed to be a "waiver," the production of the underlying interview memorandum itself will not reveal the mental impressions of counsel on the factual or legal issues involved in the investigation. Additionally, when making a disclosure to the Government, detailed records of exactly what is disclosed should be maintained, to combat any overbroad waiver arguments.

Finally, contractors need to be mindful about the level of detail they are providing to the Government and at what stage of resolving an issue. In an ideal world a contractor would avoid altogether the kind of detailed disclosure that could even arguably result in a waiver of work product, neutralizing the *Herrera* issue, but this may not be possible when satisfying the mandatory disclosure rules and dealing with suspension and debarment officials. In the voluntary cooperation paradigm, however, contractors should attempt to gain whatever cooperation credit is available while seeking to avoid an "oral download" that could potentially result in a waiver. When given more flexibility, contractors should avoid a read-out of specific statements made by individuals, instead trying to summarize the overall factual conclusions from an investigation. That balancing act will be challenging, and companies subject to investigations, as well as their counsel, will need to be intentional about their approach. As Magistrate Judge Goodman noted in the opening line of the opinion, "[v]ery few decisions are consequence-free events." Government contractors would be wise to be mindful of the consequences of these decisions.