Is Cooperation with the Government a "Consequence-Free Event" or a Waiver?

Alan D. Strasser – May 22, 2018

The decision in *Securities & Exchange Commission v. Sandoval Herrera*, No. 17-20301-CIV, 2017 WL 6041750 (S.D. Fla. Dec. 5, 2017), illustrates a dilemma familiar to lawyers who defend companies against Department of Justice or Securities and Exchange Commission (SEC) investigations: A third party argues that the lawyers' submissions waive the work-product protection for those submissions and related materials in later litigation. The lawyers' effort to defend a company from a governmental adversary invites another adversary to exploit those efforts in different litigation. *Sandoval Herrera* shows, as the court observed, that "[v]ery few decisions are consequence-free events."

Magistrate Judge Goodman's opinion in *Sandoval Herrera* explains that General Cable Corp. (GCC), a publicly traded company, retained Morgan Lewis & Bockius (ML) to advise it on the legal significance of accounting errors at a Brazilian subsidiary. ML conducted an internal investigation, interviewing at least three dozen witnesses and preparing notes and memoranda about the interviews. The company reported to the SEC that it was investigating accounting errors. The SEC opened its own investigation and asked the company to provide its investigative findings. ML offered a PowerPoint presentation with a factual overview of the investigation and, what is more important for our purposes, provided what the opinion called "oral downloads" of a dozen witness interviews. GCC ultimately settled with the SEC.

The SEC brought an enforcement action against three officers of the Brazilian subsidiary, who then subpoenaed ML for the underlying notes and memoranda of all the witness interviews,

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contending that the disclosures to the SEC waived any work-product protection for those documents. ML disclosed the PowerPoint but contended that its disclosures to the SEC did not waive work-product protection because it had only summarized the memoranda and had held back the actual documents from the SEC.

The court's ruling, which has attracted considerable attention, held that the oral discussion of the content of witness interviews with the SEC waived work-product protection for the memoranda for those witnesses whose testimony was actually described to the SEC, even without disclosure of the actual memoranda themselves. The court observed that ML had not provided only "vague references" to witness notes or "detail-free conclusions or general impressions." Instead, the court said, ML acknowledged that it provided to the SEC "oral downloads of the substance of the 12 interview notes and memos." The court found that was sufficiently similar to disclosing the documents that ML had waived work-product privilege.

The critical issue was the level of detail that ML disclosed to the SEC. ML argued that the officers should not get the underlying witness interview memoranda when the SEC did not have them. The court disagreed, observing that the SEC already had the "functional equivalent" of the documents because it had received the oral downloads. Here the court followed decisions like *SEC v. Vitesse Semiconductor Corp.*, No. 10 Civ. 9239, 2011 WL 2899082, at *3 (S.D.N.Y. July 14, 2011) (disclosure to SEC of nearly verbatim summaries required disclosure to third party), and *SEC v. Berry*, No. C07-4431, 2011 WL 825742 (N.D. Cal. Mar. 7, 2011) (disclosure of substance of five witness interviews to SEC required disclosure of those interview memos to third party).

Can one limit this ruling to the kinds of cases in which the recipient of the summaries from counsel is the litigation adversary of the party seeking the documents—such as here, where the SEC was both the recipient of the description of the interviews and the adversary of the Brazilian executives? The court could have been troubled by the potential disparity in access to information between the SEC and the executives of the Brazilian subsidiary. Although GCC produced hundreds of thousands of pages in discovery to the executives, the Brazilian executives had neither the benefit of the interview summaries nor access to any account of the meeting. Other cases, such as *Berry* and *United States v. Reyes*, 239 F.R.D. 591 (N.D. Cal. 2006), require disclosure to third parties in analogous circumstances.

However attractive this focus on disparity in access between the SEC and other adversaries might be, other courts do not seem to have adopted it. For example, in *Gruss v. Zwirn*, No. 09 Civ. 6441,

2013 WL 3481350, at *4, *13 (S.D.N.Y. July 10, 2013), the court ordered disclosure to a defamation plaintiff of the materials the defendant provided to the SEC, even though the SEC was not a party to the litigation. That court ruled that "voluntary disclosure of work product to an adversary waives the privilege as to other parties." *Id.* at *6 (emphasis omitted) (quoting *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993)). While a few courts have held that selective disclosure to an adversary does not waive work-product protection, most have not.

Can the lawyers create a written record of precisely what was disclosed to the SEC so that it can produce a document to a third party without revealing the underlying memoranda? Perhaps this was ML's strategy in preparing the PowerPoint presentation that did not refer to or incorporate explicitly any interviews; the court held that the disclosure of the PowerPoint did not waive work-product protection. ML thus avoided the traps posed by cases like *In re Weatherford International Securities Litigation*, No. 11 Civ. 1646, 2013 WL 6628964 (S.D.N.Y. Dec. 16, 2013), and *Gruss*, in which the court required disclosure of interview memos quoted in PowerPoint presentations. Nevertheless, the use of the PowerPoint in *Sandoval Herrera* did not prevent a disclosure of the interview memoranda and did not even shield ML's notes of the SEC meeting from in camera review so that the court could determine whether ML had discussed the substance of *other* interviews.

So what else could ML have done to avoid this problem? It is facile to suggest that ML might have provided less detailed summaries ("vague generalities," as the court put it) to the SEC, because that risked depriving GCC of the benefit of cooperation with the SEC. The ultimate goal of the disclosures is to achieve a favorable resolution for the company, not to avoid disclosure of witness memos. Nor will it help to characterize the discussions with the SEC as settlement discussions, because Federal Rule of Evidence 408 won't shield information from disclosure to third parties. Nondisclosure agreements with the enforcement agencies have not prevented rulings that the disclosure worked a waiver (a topic for a separate article). In short, there is no ready-made solution to the problem of disclosing enough to be persuasive to the government while withholding enough to keep the material secret from third parties.

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