Mom (as Always) Was Right: Don't Talk to Strangers

By C. Evan Stewart

For most Rick Springfield aficionados, his best song is undoubtedly "Jessie's Girl"—after all, it is/was his only number one hit.[1] Always the contrarian, I guess, I much prefer his "Don't Talk to Strangers" —which is/was not too shabby, reaching and staying at No. 2 on the U.S. Billboard Hot 100 chart for four weeks.[2] And Rick's advice has turned out to be pretty good,[3] especially when it comes to understanding the attorney work product doctrine.

General Cable Corporation

In January of 2012, two senior executives of a Brazilian subsidiary of General Cable Corporation (GCC) allegedly became aware of material problems with the subsidiary's inventory, as well as an inventory theft scheme by several employees.[4] Nonetheless, neither informed GCC's executive management of these serious matters; as a result, the financial reports issued by GCC were materially in error and a restatement of the company's financial disclosure documents had to be issued. Ultimately, on December 29, 2016, GCC agreed to pay the SEC $6.5 million to resolve the accounting-related violations that resulted from the problems at its Brazilian subsidiary.[5]

In the latter half of 2012, GCC had retained Morgan Lewis & Bockius to investigate what was going on at its Brazilian subsidiary. Morgan Lewis, while interviewing company employees, also informed the SEC of its investigation. The SEC then commenced its own investigation and requested the fruits of Morgan Lewis's labors. In October of 2013, Morgan Lewis lawyers met with SEC staff and presented, among other things, "oral downloads" of 12 witness interviews. These cooperative efforts by GCC and its counsel were cited by the SEC in its December 29, 2016 order, in which the $6.5 million penalty was publicly disclosed.[6] And these cooperative efforts also played a key role in the SEC bringing securities fraud charges against the two subsidiary executives on January 25, 2017 in Miami federal court.[7]

Miami Vice

Defense counsel in the Miami litigation served Morgan Lewis with a Rule 45 subpoena, seeking, *inter alia*, the law firm's witness interview notes and memos which were used in the "oral downloads" on the 12 individuals. Morgan Lewis resisted on work product grounds, and motion practice led to a December 5, 2017 ruling by Magistrate Judge Jonathan Goodman.[8]

The judge initially (and correctly) noted that disclosure of attorney work product to an adversarial government agency like the SEC waives work product protection.[9] Of course, that did not and could not resolve the issue because Rule 26(b)(3) of the Federal Rules of Civil Procedure—the basis for the work product doctrine—only deals with "documents and tangible things that are prepared in anticipation of litigation or for trial," and the interview notes and memos were never given to the SEC. Morgan Lewis thus argued that those *written* materials were not waived because all they did was read from them to the SEC staff. Defendants' position was that they needed those written materials to "level the playing field" — i.e., they had no ability to interview or depose any of the 12 non-citizen interviewees, and the information they provided the SEC (via Morgan Lewis) obviously served as the basis for the SEC's fraud case against the two defendants. Magistrate Judge Goodman sided with defendants on that point, finding that the verbatim-like "oral downloads" were the "functional equivalent" of the Morgan Lewis interview notes and memos. In support of that ruling, the Magistrate Judge cited three district court decisions in which oral presentations of work product to government agencies were so detailed that they "matched [the lawyer's] notes almost verbatim."[10]

Defense counsel did not stop there—they also wanted *all* the work product that Morgan Lewis had shared with GCC's outside auditor, Deloitte; those materials covered, among other things, interviews with 38 witnesses. Magistrate Judge Goodman, however, rejected compelling that disclosure, citing a plethora of decisions which hold that auditors are not in an adversarial relationship with the companies they audit—indeed, they share a "common interest" with their client.[11] Defense counsel tried to argue their way around such unhelpful precedent by arguing that Deloitte did not share a common interest with GCC because Deloitte also might have faced an SEC enforcement action due to its auditing work. The judge did not buy that creative argument on numerous grounds, the most important being that the SEC never in fact brought such a case.

Defense counsel pressed even further, arguing that they were entitled to *all* of Morgan Lewis's work product on the ground that defendants had demonstrated a "substantial need" for it (*see* Fed. R. Civ. P. 26(b)(3)(A)(ii)). The principal basis for this position appears to have been that the key witnesses were in Brazil and could only be questioned (prior to trial) via letters rogatory. Magistrate Judge Goodman was unpersuaded by this, finding that—beyond

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the materials he was compelling production of (which clearly did provide detailed, material information on the 12 key witnesses)—other internal Morgan Lewis materials (not shared in any form with the SEC) should be considered "classic attorney work product" —i.e., opinion work product—and would not be discoverable under a "substantial need" standard.[12]

Flurry from the Peanut Gallery

Magistrate Judge Goodman's decision caused a predictable outcry from the chattering class about "break[ing] new ground," a "troubling trend," and predictions of the "end" of attorney work product, etc.[13] But what is the real scoop?

Starting in reverse order, the judge's ruling with respect to opinion work product was clearly correct. While ends-oriented courts have sometimes invented ways to get around the basic protections of the attorney work product doctrine,[14] it is nonetheless well-settled law that "opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances."[15] Clearly, such circumstances were not present in *Herrara*; as the Supreme Court has made clear, the "need" exists only in the following situation:

> Where relevant and *non-privileged facts* remain hidden in an attorney's file and where production of those *facts* is *essential* to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in *evidence* or give clues as to the existence or location of relevant *facts*.[16]

Next up, what was new or troubling about the judge's ruling vis-à-vis disclosure of work product to Deloitte? In a word, nothing. Although defense counsel in *Herrara* argued that there is a "split" in authority—with only a "majority" of cases "hold[ing] that auditing and accounting firms typically do share a common interest," in point of fact that is really not so. And the judge correctly pushed back on that assertion, not only citing leading authority to the contrary,[17] but also noting that "Defendants have not cited *any* legal authority, binding or *otherwise*, to support the notion that a common interest disappears under factually analogous scenarios."[18]

As the D.C. Circuit opined in *United States v. Deloitte LLP*,[19] to reach a different result would not only be contrary to the whole purpose of the work product doctrine (to prevent a litigant from gaining an advantage "on wits borrowed from the adversary"), it would be bad public policy as well: "discourag[ing] companies from seeking legal advice and candidly disclosing that information to independent auditors."[20]

Last up is the judge's ruling on the "oral downloads." Morgan Lewis obviously thought it was on safe ground because of the explicit language of Rule 26(b)(3).[21] But given that it was disclosing this information to a governmental agency that was indisputably adverse to its client,[22] the firm should have done a bit of legal research before sending lawyers down to the SEC, where they robotically read to the SEC staff from interview memos—such research would have revealed that that practice was *already* quite dangerous.[23]

Going forward, the judge's decision already points to one way to avoid this problem from recurring. Indeed, Magistrate Judge Goodman suggested that making "vague references" to attorney-generated documents, or providing "detail-free conclusions or general impressions" from the same would have led to a different outcome.[24]

Of course, such "vague references," etc. may not satisfy the SEC in its quest for knowledge (and its desire to have others do the heavy lifting for the Commission's staff). That leaves corporate counsel with a choice, if they want to be deemed "cooperative" by the government. Either they can take their chances with Magistrate Judge Goodman's "vague references" approach, or they can go the full monty route and "download" their work product (and expect disclosure in civil litigation thereafter). If the latter route is chosen, it is clearly preferable to ensure that such work product is in the nature of transcript-like documents, with no trace of attorney opinion work product. That way, whatever is subject to disclosure is merely the functional equivalent of what the opposing side in civil litigation would get in a deposition at some later point; in other words, you might have made life a little easier for your opposite number(s), but at least you have not unnecessarily sacrificed any strategic or tactical advantage(s) to them.

That being said, perhaps the SEC (and other governmental agencies) might want to re-think embracing the "downloads" approach. In *Herrara*, the SEC undoubtedly loved thinking they were having their cake (getting straight "downloads" from Morgan Lewis on 12 key offshore witnesses) and eating it too (using those "downloads" to force a settlement against GCC and then filing a civil fraud case against the two executives, with the expectation that those defendants would not have access to the same information prior to trial and thus would not be in a position to mount a strong defense). It is this same "heads I win, tails you lose" approach that motivated the SEC's consistent—but unsuccessful—advocacy of selective waiver throughout the federal circuit courts.[25]

But now that there is a body of well-reasoned case law rejecting a one-way discovery street in civil litigation that follows an investigation, the SEC will be forced—in cases it brings—onto a level playing field, where the fight will be fair. And if history is any guide, the Commission may find

that the 800-pound gorilla could well have its bananas taken away on a regular basis.[26]

Conclusion

Notwithstanding all the hub-bub, the *Herrara* decision by Magistrate Judge Goodman actually plows no new legal ground and its components are consistent with well-established precedent. As set forth above, the real impact of this decision may be that it alters how eager the SEC (and other government agencies) are to be recipients of wholesale dumps of attorney fact work product. But we shall see.

Endnotes

1 Released February 1981 (RCA) (written by Springfield) (two weeks at No. 1 on the U.S. Billboard Hot 100 chart) (appeared on the album "Working Class Dog").

2 Released March 1982 (RCA) (written by Springfield) (appeared on the album "Success Hasn't Spoiled Me Yet"). In 1983, Springfield was nominated for Best Male Pop Vocal Performance for this song. Other songs by this same title have been performed by The Beau Brummels (Autumn Records 1965; No. 52 on the Billboard Hot 100 chart) and Don Hedley (Universal Music 2009; No. 11 on the Canadian Hot 100 chart).

3 Given the title of this article, it is proper and appropriate to review at least some of the songs that pay tribute to Mom (and her advice). So let me highlight just three. First is the Beatle's "Your Mother Should Know" (Lennon and McCartney, but really written by McCartney) (on the "Magical Mystery Tour" album (Parlophone, Capital, EMI 1967)); this song contributed to the widely spread story "Paul is dead"). Next is "Mama Told Me Not to Come" (Randy Newman 1967); this song was originally written for the first solo album of Eric Burdon (most famous for fronting The Animals). Newman covered the song himself on his 1970 album "12 Songs" (Reprise). Also in 1970, Three Dog Night covered the song ("Mama Told Me (Not to Come)") (Downhill); in July 1970, it became (for two weeks) the number one single on the Billboard Hot 100 (and was certified gold that same month). Last but not least is the 1925 Ivor Novello classic "And Her Mother Came Too." Covered innumerable times over the years, the best version (in my view) was performed by Bobby Short ("Mabel Mercer/Bobby Short/Live at Town Hall") (Atlantic 1969). In Robert Altman's last film "Gosford Park" (Entertainment Film Distributors 2001), Jeremy Northam (portraying Ivor Novello) treats his fellow weekend guests to a rendition of this song.

4 *See* SEC Litigation Release No. 23726 (January 25, 2017). On this same day, the SEC filed fraud and other charges in Miami federal court against the two executives. A third executive simultaneously consented to the entry of a final judgement.

5 SEC Release No. 79702 (December 29, 2016). At the same time, GCC also agreed to pay the federal government more than $75 million to resolve parallel SEC and DOJ investigations into Foreign Corrupt Practices Act violations throughout the world (e.g., Angola, Bangladesh, China, Egypt, Indonesia, and Thailand). In addition, GCC's former CEO and CFO returned millions of dollars of compensation they had received during the relevant period of GCC's legal difficulties.

6 How much this "cooperation" did to mitigate the penalty paid by GCC is, of course, unknowable.

7 *See supra* note 4.

8 *SEC v. Herrara*, 2017 WL 60417 (S.D. Fla. Dec. 5, 2017).

9 *See In re Initial Public Offering Sec. Litig.*, 249 F.R.D. 457, 465-67 (S.D.N.Y. 2008). As observed by the author of this decision (Judge Scheindlin), *every* circuit court that has looked at this issue has so ruled—even the 8th Circuit, which anomalously once ruled that there could be selective waiver of attorney-client privileged materials to the government. *See Diversified Industries v. Meredith*, 572 F.2d 596 (8th Cir. 1977). This 1977 decision is an outlier among *all* other circuits. *See* C.E. Stewart, *The False Promise of "Reform,"* New York Law Journal (Feb. 21, 2008); C.E. Stewart, *Can the U.S. Capital Markets Be Saved By Tinkering with the Legal Profession?* The Metropolitan Corporate Counsel (June 2007); C. E. Stewart, *Corporate Investigations: The Good, The Bad, and The Ugly,* New York Law Journal (March 27, 2006); C.E. Stewart, *Attorney-Client Privilege: Killing Limited Waiver,* New York Law Journal (Dec. 17, 1992). All that being said, there are always judicial outliers that can be found. *See, e.g.*, *In re Symbol Techs, Inc. Sec. Litig.*, 2016 BL 334855 (E.D.N.Y. September 30, 2016) (disclosing investigation documents to the SEC did not waive work product protection).

10 *See SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 3d. 310 (S.D.N.Y. 2011); *SEC v. Berry*, 2011 WL 825742, at *5 (N.D. Cal. March 7, 2011); *SEC v. Roberts*, 254 F.R.D. 371, 377 (N.D. Cal. 2008). Defense counsel also contended that Morgan Lewis made other oral disclosures of work product at meeting(s) with the SEC staff; to test that claim the judge ordered the law firm to produce *in camera* attorney notes of the meeting(s). And to the extent Morgan Lewis actually supplied the SEC with written work product, the judge ordered that it also be submitted for an *in camera* review.

11 *See*, *e.g.*, *United States v. Deloitte LLP*, 610 F.3d 129, 142 (D.C. Cir. 2010); *In re Weatherford Int'l Sec. Litig.*, 2013 WL 12185082, at *5 (S.D.N.Y. Nov. 19, 2013); *Gutter v. E.I. Dupont de Nemours & Co.*, 1998 WL 2017926, at *5 (S.D. Fla. May 18, 1998).

12 *See Hickman v. Taylor*, 329 U.S. 495 (1947); *In re Murphy*. 560 F.2d 326 (8th Cir. 1977); *Beaubrun v. GEICO Gen. Ins. Co.*, 2017 WL 1738117, at *5 (S.D. Fla. May 4, 2017).

13 *See*, *e.g.*, B. Johnson, B. McGuire, A. DaCunha, *Preserving Privilege in Government Investigations in Light of "SEC v. Herrera,"* New York Law Journal (Jan. 28, 2018).

14 *See* C.E. Stewart, *Caveat Corporate Litigator: The First Circuit Sets Back the Attorney Work Product Doctrine*, NY Business Law Journal (Summer 2010) (discussing *U.S. Textron*, 577 F.3d 21 (1st Cir. 2009) (*en banc*)); C.E. Stewart, *Policing the Corporate Beat: "One Small Step for Man….,"* New York Law Journal (May 7, 1998). *See also FTC v. Boehringer Ingelheim Pharm. Inc.*, 2015 BL 4384 (D.C. Cir. February 20, 2015) (D.C. Circuit rejects "smoking gun" standard in discovery dispute over fact work product).

15 *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977). For a full explication of this seminal decision, see C.E. Stewart, *Jumping on a Hand Grenade for a Client*, Federal Bar Council Quarterly (November 2009). *See also United States v. Deloitte LLP*, 610 F.3d 129, 135 (D.C. Cir. 2010) ("virtually undiscoverable"). Of course, if an attorney puts her opinion work product directly at issue in litigation, then all bets are off. *See* C.E. Stewart, *"Positively 4th Street": Lawyers and the "Scripting" of Witnesses,* NY Business Law Journal (Summer 2014); C.E. Stewart, *Corporate Counsel & Privileges: Going, Going…*, New York Law Journal (July 11, 1996); C.E. Stewart, *Corporate Counsel and Attorney Work Product*, New York Law Journal (Nov. 8, 1993).

16 *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (emphasis added). To review some lower court decisions where the "substantial need" threshold was not attained or exceeded, *see, e.g., Delco Wire & Cable, Inc. v. Weinberger*, 109 F.R.D. 680, 689-90 (E.D. Pa. 1986); *In re Grand Jury Investigation (Sun Co.)*, 599 F.2d 1224 (3d Cir. 1979).

17 *See supra* note 10. A lot of the cannon fodder against this well-settled law comes from a misuse (well-meaning or not) of *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), in which the Court declined to recognize an accountant work product privilege.

18 *See supra* note 8 (emphasis added). For more context on how the privilege of "common interest" works (and does not work), see C.E. Stewart, *The New York Court of Appeals Takes the Wrong Fork in the Road on the Common Interest Privilege,* NY Business Law Journal (Winter 2016).

19 *See supra* note 11.

20 *Id.*

21 And Morgan Lewis's California lawyers may have weighed in on California's idiosyncratic view of attorney work product. *See Fireman's Fund Ins. Co. v. Superior Ct.*, 196 Cal. App. 4th 1263 (Ct. Appls. 2nd Dept. 2011) (*unwritten* work product is entitled to absolute protection). *See also Coito v. Superior Court*, 54 Cal. 4th 480 (2012).

22 Notwithstanding the Second Circuit's hard to understand decision in *United States v. Stein*, 541 F. 3d 130 (2d Cir. 2008) (state action found because KPMG—under threat of criminal prosecution—was ruled to be a "willing participant in joint activity" with the government) [*see* C.E. Stewart, *A Tale of Two Judges*, NY Business Law Journal (Summer 2012)], the case law on the work product doctrine is clear that disclosure of work product to an agency like the SEC is a waiver. *See supra* note 9.

23 *See supra* note 10. That the 12 key witnesses were offshore and not subject to normal discovery made this asymmetric discovery to the government even more problematic. *See SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 310, 313-14 (S.D.N.Y. 2011); *Xerox Corp. v. Int'l R Mach. Corp.*, 64 F.R.D. 367, 381-82 (S.D.N.Y. 2974). This asymmetric discovery directly led to the SEC's civil fraud litigation and that undoubtedly factored into the judge's decision to order disclosure of the written work product relating to the 12 witnesses.

24 *See SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 310 (S.D.N.Y. 2011); *United States v. Treacy*, 2009 WL 812033 (S.D.N.Y. March 24, 2009). This type of approach has been used by imaginative counsel before. *See*, *e.g.*, *In re Willkie Farr & Gallagher*, 1997 WL 118369 (S.D.N.Y. March 14, 1977) (counsel gave hypothetical results of its internal investigation to outside auditors). Unfortunately, the court ruled that the information was not work product because the investigation was not done "primarily" with litigation in mind—this decision was rendered pre-*United States v. Adlman*, 134 F.2d 1194 (2d Cir. 1998). *See* C.E. Stewart, *Policing the Corporate Beat: "One Great Step for Man…*," New York Law Journal (May 7, 1998).

25 *See supra* note 9. *See also* C.E. Stewart, *The Wrong Track to Reforming Corporate Governance*, New York Law Journal (October 10, 2006).

26 *See e.g.*, *SEC v. Prince*, 942 F. Supp. 2d 108 (D.D.C. 2013); *SEC Loses Civil Case Against Securities Felon*, The Blog of Legal Times (May 9, 2013). *See also* C.E. Stewart, *The SEC's Setbacks in Litigation*, New York Law Journal (May 17, 2007); C.E. Stewart, *Courts Undercut SEC's Litigation Advantage*, New York Law Journal (October 8, 1998).

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