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Court Holds Oral Downloads of Witness Interviews Waive Corporate Privilege



In a criminal case against two former officers of Cognizant Technology Solutions Corp.

(Cognizant), a New Jersey federal district court recently ordered Cognizant to produce unredacted internal interview memorandums and notes prepared by its outside counsel. The court found that the company had waived attorney-client privilege and work-product protection over those documents by disclosing the information contained in them to the U.S. Department of Justice (DOJ). The decision is a cautionary reminder to companies of the risk of waiving privilege when cooperating with the government.

Privilege Waiver and Corporate Cooperation

It is well-settled that a company waives its attorney-client privilege and work product protection when it purposefully discloses privileged material to a third party. In the context of disclosures made to a federal agency, and pursuant to Federal Rule of Evidence 502(a), the waiver may extend to an undisclosed communication or information if (1) the waiver is intentional, (2) the disclosed and undisclosed communications or information concern the same subject matter, and (3) the disclosed and undisclosed communications ought in fairness to be considered together.

Companies often disclose information in response to government investigations to earn cooperation credit, but they are not required to disclose privileged information. The [DOJ Justice Manual](#) states that "a company is not required to waive its attorney-client privilege or attorney work product protection to be eligible to receive cooperation credit." Instead, cooperation credit is extended to a company "regardless of whether it chooses to waive privilege or work product protection in the process, if it provides all *relevant facts* about the individuals who were involved in the misconduct."

Cognizant's Disclosures

The DOJ's investigation arose from allegations that Cognizant, through certain employees, had paid bribes to government officials in India to obtain permits for company projects, in violation of the Foreign Corrupt Practices Act (FCPA). Cognizant voluntarily self-disclosed the alleged criminal conduct to the DOJ within two weeks after its board learned of the conduct. The company cooperated extensively during the DOJ's investigation by, among other things, providing "all known relevant facts about the misconduct," and it agreed to cooperate with any future prosecutions resulting from the DOJ's investigation. Cognizant also hired outside counsel to conduct an internal investigation and make presentations to the DOJ containing detailed summaries of its findings. The presentations included nearly real-time progress reports of Cognizant's internal investigation and oral downloads of 42 witness interviews of 19 different employees conducted by Cognizant's outside counsel.

The DOJ ultimately [declined to prosecute](#) Cognizant based on its extensive cooperation. But the DOJ pursued criminal charges in New Jersey district court against two former Cognizant officers who had allegedly authorized the bribes. In that criminal action, the former officers subpoenaed Cognizant—a third party—for records of its internal investigation, including witness interview memorandums and attorney notes, arguing that the company had waived the attorney-client privilege and work-product protection by providing them to the DOJ.

The Cognizant Orders

On February 1, 2022, the court ordered Cognizant to produce purportedly privileged interview summaries that were conveyed to the DOJ during the oral downloads of outside counsel's witness interviews. The court held that by disclosing the summary information to the DOJ "while under threat of prosecution, Cognizant handed [the] materials to a potential adversary and destroyed any confidentiality they may have had, undermining the purpose of the attorney-client and work-product privileges." The court further ordered Cognizant to produce all "memoranda, notes, summaries, or other records of [witness] interviews" concerning the same subject matter or that formed any part of Cognizant's presentations to the DOJ. Cognizant produced witness interview memorandums that redacted information it claimed was not conveyed to the DOJ and moved for reconsideration.

In a clarifying order unsealed on May 4, 2022, the court further held that Cognizant must produce the documents in their full, unredacted form because the company had waived any privilege or protection once it disclosed the information contained in those documents to the DOJ. In other words, the court's decision was "not that such items could not have been privileged as an original matter, but rather that the disclosure to the government waived any privilege as to any documents actually disclosed and certain related documents pertaining to the same subject matter." Applying the criteria set forth in Federal Rule of Evidence (Rule) 502(a), the court found that the corporation's waiver was intentional because Cognizant "full[y] and proactive[ly] cooperat[ed] with the government" to avoid liability; that the memorandums and notes pertained to the same subject matter as the detailed summaries disclosed in the presentations to the DOJ; and that the documents were "so related to the [disclosed] information that they 'ought in fairness be considered together.'"

Key Takeaways

The Cognizant orders are consistent with [other recent orders](#) finding a waiver where a company conveys otherwise privileged communications or protected information to the government. But the Cognizant court goes further by finding a broad subject matter waiver that requires production of *all* undisclosed documents pertaining to the same subject matter. The orders therefore serve as an important reminder that companies seeking cooperation credit from the DOJ should vigilantly avoid waving the privilege and work product protection. To mitigate the risk of waiver, companies should take steps to disclose only the relevant facts to government investigators. In particular, companies should do the following:

- Timely disclose relevant facts to the government about the alleged misconduct, such as how and when the alleged misconduct occurred, who promoted or approved it, or who was responsible for committing it.
- Disclose relevant facts acquired through your internal investigation unless identical factual information has already been provided. Any written or oral presentations to the government should relay only the facts and rely on underlying documentary evidence.
- Do not disclose (in writing or orally) the substance or content of memorandums or notes prepared by counsel, including statements made by witnesses in counsel-conducted interviews or counsel's mental impressions or opinions. If the DOJ asks for attorney-client privileged or work-product protected information, note that such requests are prohibited by DOJ policy.

Authors

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