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PRIVILEGE

Maintaining Work Product Protection During Investigations After the Herrera Decision

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It should come as no surprise that the government continues to promote the potential incentives available to companies that voluntarily self-disclose misconduct in a timely manner and fully cooperate with law enforcement and regulators. In a recent speech, Deputy Attorney General Rod Rosenstein, for example, announced enhancements to the DOJ's FCPA Corporate Enforcement Policy, stating that "when a company satisfies the standards of voluntary self-disclosure, full cooperation, and timely and appropriate remediation, there will be a presumption that the Department will resolve the company's case through a declination." The enhanced DOJ policy, memorialized in the United States Attorneys' Manual, characterizes full cooperation in FCPA matters as the timely disclosure of "all relevant facts gathered during a company's independent investigation" and the "attribution of facts to specific sources when such attribution does not violate the attorney-client privilege." Similarly, the Division of Enforcement for the SEC places an emphasis on both a company's timely self-reporting of misconduct and the thoroughness with which it reports "all information relevant" to possible violations of the federal securities laws.

It should also come as no surprise, however, that the timely disclosure of facts developed by either in-house or outside counsel during the course of a company's internal investigation, though critical in achieving full cooperation credit from a regulator, poses certain risks that counsel must consider before making such disclosure. Highlighting the potential pitfalls that can arise when a company seeks to fully cooperate with a regulator, a Florida federal magistrate judge in December 2017 ordered a company's law firm to turn over attorney notes and memoranda of witness interviews created during the course of an internal investigation. The order was based on the finding that the law firm waived the work product protection for these materials when it provided the SEC with oral summaries of the contents of those materials. This article analyzes the Court's decision and discusses strategies counsel can employ to avoid waiving the attorney work product protection.

See The Anti-Corruption Report's three-part series on protecting attorney-client privilege and work product while cooperating with the government: "Establishing Privilege and Work Product in an Investigation" (Feb. 1, 2017); "Cooperation Benefits and Risks" (Feb. 15, 2017); and "Implications for Collateral Litigation" (Mar. 1, 2017).

Demand for Documents in General Cable Case

In SEC v. Herrera, a magistrate judge in the United States District Court for the Southern District of Florida issued a December 5, 2017, decision ordering a non-party law firm (the Firm) to disclose to defendants case notes and memoranda that it generated during an internal investigation it performed for client General Cable Corp. (GCC).[1]

See "General Cable Pays $75 Million to Settle Wide-Ranging Bribery Scheme Based on Agents and Distributors" (Jan. 18, 2017).

Waiver If No Physical Copies Provided?

The Firm's 2012 investigation into accounting errors at GCC's Brazilian subsidiary entailed interviews with relevant company personnel and witnesses. Attorneys reduced the content of those interviews to notes and memoranda. During a later SEC inquiry into GCC, the Firm relayed the substance of its investigation findings in a meeting with SEC officials, including what parties describe as an "oral download" of the notes and memoranda from witness interviews. When the SEC later brought suit against certain GCC employees, those individuals (here, "defendants") asked the court to order the Firm to produce the notes and memoranda. The judge granted the request, finding that the Firm had waived the work product protection when it orally disclosed the contents of the documents to the SEC. The ruling turned on the court's conclusion that the Firm's decision to provide "oral downloads" to the SEC was not fundamentally different from turning over the documents themselves.[2]

Work product protection is waived when disclosure is made to an adverse party "in a manner which is either inconsistent with maintaining secrecy against opponents or substantially increases the opportunity for a potential adversary to obtain

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the protected information."[3] But the Firm did not contend that the SEC was not its client's adversary. Indeed, as the Court pointed out, the SEC ultimately imposed a $6.5 million civil penalty following an inquiry into GCC misstatements. Instead, the Firm argued that it had not waived privilege because it had not produced physical copies of the notes and memoranda from witness interviews – only oral summaries.

Finding the balance of case law in favor of the defendants, the Court ruled that oral summaries such as those given by the Firm's attorneys to the SEC are akin to physical production of documents and serve equally to waive privilege. The judge distinguished a case where "detail-free conclusions or general impressions" would likely not waive the privilege, but did not elaborate on precisely how detailed an oral summary might need to be before tipping the scales to constitute disclosure of the documents involved.[4] What is clear, however, is that the highly detailed "downloads" at issue here, per the Court, operate as surely as physical production to waive attorney work product protection.

See "How Compliance Officers Handle Privilege" (Nov. 29, 2017).

Auditors and Common Interest

In the same order, the Court ruled that the Firm did not waive applicable privilege as to documents and materials it shared with its client's auditor, Deloitte & Touche (Deloitte).[5] Although most courts have recognized auditors as sharing a "common interest" with their clients, the defendants here urged the Court to deem Deloitte a "potential" GCC adversary. According to the defendants, the SEC investigation could easily have targeted Deloitte, which may have been motivated to claim it was misled by GCC personnel, rather than admit its own fault. The Court rejected that argument on several grounds, most notably finding that "even if Deloitte was a potential adversary on that issue, it still had a common interest for other purposes."[6] The Herrera order has signaled that even faced with a compelling and novel theory suggesting adversarial interest, the "common interest" between auditors and their clients will not be undone and work product protection – properly invoked by attorneys serving a mutual client – will equally withstand.

See our two-part series on attorney-client privilege: "Key Considerations for Using the Kovel Doctrine" (Dec. 21, 2016) and "Structuring and Implementing the Kovel Arrangement" (Jan. 18, 2017).

Maintaining Work Product Protection in the Wake of Herrera

The Herrera decision, while leaving intact a company's disclosures to its auditors, breathes fresh air into the challenges that companies and their in-house and outside counsel face when voluntarily cooperating and making disclosures to regulators. But a company's decision to cooperate with a regulator does not – and should not – lead to an applicable privilege waiver. Indeed, both the stated policies of the DOJ and the SEC make clear that, for a company to receive full cooperation credit, a privilege waiver is not ordinarily required.

Setting forth parameters that will safeguard the attorney work product protection at the outset of an internal investigation is the lesson that companies and counsel should draw from Herrera.

The following three strategies constitute some of the steps counsel can take to maintain the attorney work product protection:

1) Keep Facts Separate From "Mental Impressions"

Internal investigations, in the normal course, not only involve a complete gathering of the pertinent facts, but also a legal assessment of what those facts mean. Although facts by themselves generally do not implicate privilege issues, an attorney's legal assessment, or "mental impressions" of those facts, reduced to writing, are quintessentially shielded from disclosure under the attorney work product doctrine. Memorializing objective facts learned during an internal investigation in separate documents from any "mental impressions" arising from those facts may allow later disclosure to a regulator of only those objective facts, helping to avoid waiver of the work product protection as to documents containing mental impressions.

2) Secure Agreement With the Regulator in Advance Regarding Work Product Concerns

In our experience, regulators are sensitive to counsel's concerns for privilege. Whether in-house or outside counsel are producing company documents or preparing company employees for testimony, regulators are receptive to counsel's reasonable assertions of privilege. Regulators, in the wake of Herrera, will no doubt be willing to engage with counsel and discuss privilege concerns, particularly in the context of a company's decision to self-report misconduct. Securing an agreement with a regulator from the beginning that full cooperation will be limited to high-level discussions of

the facts coupled with "detail-free conclusions or general impressions" will help counsel withstand future arguments that disclosures to the regulator were so comprehensive that they waived the work product protection.

3) Stick to the Agreement and Only Provide High-Level Factual Summaries and Conclusions

Having secured an agreement designed to maintain the attorney work product protection with the regulator, counsel should proceed with care to adhere to the agreement's bargained-for terms. It is not difficult to imagine, in zealously seeking to obtain full cooperation credit for a company, counsel stepping beyond the threshold of "high-level" facts and "general" conclusions and providing detailed recitations of facts and findings to regulators akin to what is contained in their attorney notes and memoranda. Outlining remarks and preparing for meetings with regulators in advance, cognizant of the attorney work product doctrine, can help avoid this pitfall.

See "Dispelling Myths About When Attorney-Client Privilege Applies to Communications With In-House Counsel" (Sep. 20, 2017).

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[1] SEC v. Herrera, No. 17-20301-CIV, 2017 WL 6041750, at *8 (S.D. Fla. Dec. 5, 2017).

[2] Id. at *5.

[3] Id. at *4 (quoting Niagara Mohawk Power Corp. v. Stone & Webster Eng. Corp., 125 F.R.D. 578, 590 (N.D.N.Y. 1989)).

[4] Id. at *5.

[5] Id.

[6] Id. at *6.