

Protecting the Privilege in Internal Investigations

Privilege & Investigations

- Be thoughtful about privilege and work product
- Consider privilege and involve counsel in decision making and scoping of potential investigation
- Consider privilege in light of potential outcomes and audiences
 - Likely to lead to government involvement?
 - Likely to lead to litigation?
 - Likely to affect financial statement audit?

Case Law: Work Product Waiver

- *SEC v. Herrera, et al.*, 2017 WL 6041750 (S.D. Fla. Dec. 5, 2017)
 - Detailed description of substance of interview memoranda waived work product protection for the memoranda themselves
- *SEC v. Berry*, 2011 WL 825742 (N.D. Cal. Mar. 7, 2011)
 - Detailed description of interviews waived work production protection for memoranda, but did not waive protection over draft memoranda or interview notes
- *SEC v. Vitesse Semiconductor Corp.*, 2017 WL 2899082 (S.D.N.Y. July 14, 2011)
 - Detailed summaries presented to SEC waived work product over contemporaneous interview notes; court stated there “probably” would have been no waiver if law firm presented only “general impressions” as opposed to witness-by-witness accounts

Reports to Government

- Threshold question: whether to report investigation findings to the government
 - Government agencies may offer cooperation credit for self-reporting
 - While cooperation credit does not require waiving privilege – can create Catch-22, as credit can depend on extent of information reported
- Waiver is not always clear-cut, but there are guard rails to keep in mind
 - Reporting “play by play” of witness interviews increases the risk of waiver over notes and memos of the interviews
 - Reporting high-level takeaways of an investigation presents a lower risk of waiver

Focus on Employee Agreements

- Confidentiality agreements used during internal investigations
- Provisions that prohibit employees from reporting concerns to the government
- Provisions that require prior authorization by the company before reporting to the government
- Limitations on employees' right to recovery under the SEC whistleblower program
- Non-disparagement provisions that extend to reports to the government