Protecting Environmental Documents and Information: Ethical and Practical Challenges

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1. INTRODUCTION

A client may need assistance in performing due diligence associated with a business transaction, in defending a regulatory enforcement action or a litigation cost-recovery action, and in evaluating the clients' ongoing, day-to-day compliance with environmental laws and regulations. In any and all of these events, the client expectations will often include protecting the work of the environmental consultants and attorneys from the client's opponent. Protecting the work of the client's consultant by merely having the attorney hire the consultant is just a beginning (though perceived "on the street" as the means to protect consultant's work from unwanted disclosure) and by itself is insufficient. Effective use of the attorney "fact" work product privilege and the attorney-client privilege is necessary to build the legal arguments to actually offer possible protection from disclosure of consultant's work.

A Florida attorney gives a solemn oath to "maintain the confidence and preserve inviolate the secrets of [her] clients…." The purpose behind the absolute confidence placed in the attorney is so the client will communicate "fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." Comment to Rule 4-1.6, The Rules Regulating the Florida Bar ("Florida Bar Rules"). Maintaining and preserving client confidences is an obligation that "lies at the very foundation of the attorney client relationship." *Ford v. Piper*, 436 So.2d 305, 307 (Fla. 5th DCA 1983). Both the (1) attorney-client privilege and the companion, but different, attorney "fact" work product privilege found in the law of evidence and the (2) attorney's duty of confidentiality embodied in legal ethics give effect to an attorneys' obligation to protect sensitive client information, such as is contained in reports and documents prepared by an environmental consultant on behalf of a client. See *State v. Hamilton,* 448 So. 2d 1007 (Fla. 1984) (a third person assisting in the legal representation of the client also enjoys the privilege.); *UpJohn v. United States,* 449 U.S. 383 (1981). The attorney-client privilege and the attorney work product privilege are exclusionary rules of evidence law. These privileges protect against disclosure of certain documents and information: the attorney-client privilege protecting confidential communications between attorney and client and the work product privilege protecting documents prepared in anticipation of adversarial proceedings. The lawyers' ethical duty of confidentiality, however, applies beyond the circumstances where

evidence is sought. The duty of confidentiality not only applies to all client confidences communicated to the attorney but also to all information from all sources relating to the representation. See Model Rules of Prof'l Conduct R. 1.6 cmt. 3.

A. "Fact" Work Product Privilege

Although the attorney-client privilege is often referenced as the means for protecting "sensitive" client information, the "fact" work product privilege is of more practical use when a client believes an enforcement action or civil litigation may result. See, *Southern Bell Tel. & Tel. Co. v. Deason,* 632 So.2d 1377, 1384 (Fla. 1994)

"Fact" work product protects information relating to he case which is gathered in anticipation of itigation.). Documents or information gathered *in anticipation of an adversarial proceeding*, which neans a reasonable belief that litigation, administrative proceedings, or regulatory enforcement activities may occur, may be protected f appropriately handled. This protection applies regardless of whether the contents of the written material pertain to client confidences; thus, the protection is larger than the attorney-client privilege. Significantly, and unlike the attorney-client privilege, disclosure of "fact" work product to a third party does not result in a loss of the protection. See *United States v. American Tel. & Tel. Co.,* 642 F.2d 1285, 1299 (D.C. Cir. 1980)("…the work product privilege does not exist to protect a confidential relationship, but rather to promote the adversarial system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent.")

In *Prudential Insurance Co. of America v. Fla. Dept. of Insurance and Gary Ricketts,* 694 So.2d 772 *(Fla. 2d DCA 1997),* the appellate court quashed an administrative order compelling production because Prudential demonstrated that documents generated by Prudential employees and representatives at the direction of Prudential's legal staff were protected work product prepared in response to accusations in extensive news reports, policyholder complaints, and lawsuits. "Even preliminary investigative materials are privileged if compiled in response to some event which foreseeably could be made the basis of a claim." *Prudential,* 694

So.2d @773, quoting *Anchor Nat'l Fin. Servs., v. Smeltz, 546 So.2d 760,761 (Fla 2dDCA 1990).*[1]

In addition to written materials, oral statements from interviews of witnesses by an attorney are also non-discoverable work product. See, *Horning-Keating v. Florida,* 777 So.2d 438 (Fla. 5th DCA 2001).

1. Pointers

"safeguarding the fruits of an attorney's trial preparations"

a. An investigation should not commence with conducted under the supervision of an attorney.

Investigating an environmental incident or event that may lead to an adversarial proceeding before consulting and involving an attorney may result in materials generated as part of the "investigation" being discoverable. Simply having an "investigator", such as the environmental consultant, provide the results to the attorney after its being conducted does not render the investigation protected by the work product privilege because the privilege applies only to what the lawyer, including those assisting the lawyer, did and learned in her role as an attorney in anticipation of adversarial proceedings. In order to enjoy this protection, the attorney must be able to make a reasonably good argument that the primary purpose of the investigation was to assist in defending possible adverse actions.

b. The investigation should be "upon advice of legal counsel."

The client should send a memo indicating a concern that the environmental event may result in litigation, and request the attorney perform an investigation. In practice, the key factor is to show the documents or other materials were prepared *in anticipation of litigation*. Information assembled in the ordinary course of business will <u>not</u> be protected. To protect environmental reports, documents, analyses prepared by or for a client, any activity should be initiated by a written letter from legal counsel advising the client on a particular course of action that will generate the materials needing

[1] Fact work product may be discoverable but the burden is on the opposing party to establish (1) a need for the information to prepare for an adversarial proceeding and (2) the information is not available from other sources without undue hardship. E.g., *Prudential,* 694 So.2d @ 774; Rule 1.280 (b)(3), Fla. R. Civ. P.

protection and expressly stating the activity is *upon advice of counsel* and such letter should be delivered as soon as a situation is known.

c. What to include in the investigative materials?

In the event of a release or environmental matter that may lead to adversarial proceedings, consult with legal counsel *prior* to preparing notes, reports, or summaries. Prepare such documentation related to the matter so that it will be treated as privileged as discussed above, and when preparing such documentation, certain information will be helpful to an attorney in defending against an adverse claim, including (1) mitigating the steps taken to reduce damage or injury; (2) identity of potential witnesses; and (3) outside causes that contributed to event.

d. The materials from the investigation should be delivered to the attorney.

The attorney should send a memo to the party conducting the investigation outlining the matter to be investigated and indicating the proper handling of the results, including the fact that all reports should be sent to the attorney, that all documents generated should be labeled as subject to the attorney work-product privilege, and that none of the materials or information generated should be divulged to anyone, including other members of the client without a need to know.

e. Protect from disclosure first and decide what to disclose later.

The investigation may disclose information that would be useful in preventing future accidents, and company's management and its lawyers may determine that the information should be released, but the purpose for obtaining the protection of the work product doctrine is to enable the company and lawyers to control the information. The option of disclosing is always available, but once the information has lost the protection of the work product doctrine, it is impossible for the protection to be regained.

B. Attorney-Client Privilege

This privilege may be helpful in protecting due diligence activities and routine matters under federal or state environmental laws that are NOT in anticipation of litigation. This privilege enables the client

to protect the substance of communications that relate to the subject matter for which legal advice is sought and made in confidence with attorneys and environmental consultants assisting in the legal representation. The attorney-client privilege only protects confidential communications. A client communication is confidential if it not intended for disclosure to third persons other than (1) those, like environmental consultants, whose work is necessary for the lawyer to achieve a legal objective, for example, obtaining a permit or evaluating the scope of representations and warranties in a contract, and (2) only those persons necessary are party to the communication. Section 90.502, *Florida Statutes;* see also *MLC Auto., LLC v. Town of S. Pines,* 532 F.3d 269 (4th Cir. 2008) (environmental consultant's information assisting the attorney in obtaining permits was privileged.); but see *Sanders v. State,* 707 So.2d 664 (Fla. 1998) (while a consultant communicating confidential information to assist the lawyer is generally a privileged communication, if the consultant becomes a testifying expert witness in an adversarial proceeding the privilege is relinquished.).

Concerning the corporation as client, the Florida Supreme Court recognized a corporation can only act through its agents and employees and it also relies significantly on its attorneys for legal advice, but the Court also expressed worry that corporate attorneys would use the attorney-client privilege to become "shields to thwart discovery." *Southern Bell Tel.,* 632 So.2d @ 1383. As a result, claims of privilege receive a "heightened level of scrutiny" by Florida courts, and the Supreme Court provided the following criteria to judge whether a corporation's communications are protected by the attorney-client privilege:

(1) the communication would not have been made but for the contemplation of legal services;

(2) the employee making the communication did so at the direction of his or her corporate superior;

"statements or documents must *directly involve* the attorney"

(3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;

(4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties;

(5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Id. @ 1383. Also, while the communication between the attorney and the client is privileged, the underlying facts, such as groundwater sample results, are not privileged and can be discovered. *Id* @ 1387.

1. Pointers

a. Only statements or documents to the attorney in order to provide legal advice to the client are protected.

A statement made by a business owner or employee to others in the business or to a consultant are not privileged; thus, statements or documents must *directly involve* the attorney in the providing of legal analysis or advice.

b. Third-party attendees may result in waiver of attorney-client privilege.

Ensure that notes of meetings when third parties attend reflect the departure of these third-parties from the meeting to reduce risk that attorney-client privilege will be deemed waived by the presence of these same third-parties.

c. Label communications as "CLIENT CONFIDENCE."

Always begin correspondence with the "client confidence" as the impetus for the communication because if no confidences are revealed, there may not be a protection.

d. "CC" the attorney on everything.

Always "cc" the attorney on emails and correspondence to at least give the appearance and possibility to argue the communication is protected attorney-client confidence. Conversely, for environmental reports that are in final form for submittal to the regulatory

authorities, just “bcc” the attorney to avoid the wrong appearance of privilege.

C. Self-Audit Privilege

Self-audits of a client’s ongoing, day-to-day compliance with environmental laws and regulations is not protected by a Florida privilege statute; indeed, little protection exists in the law for a client’s voluntary self-audit. A federal district court in Florida in

udicial self-audit privilege in the context of environmental audits and the EPA has an audit policy titled “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations.” *Reichhold Chemicals, Inc. v. Textron, Inc.,* 157 F.R.D. 522 (N.D.Fla.1994) has some limited usefulness to a client in the litigation context where the self-audit privilege could be asserted to protect information from an adversary seeking to establish the client’s liability; however, courts have been consistent in rejecting the use of the self-audit privilege where documents are sought by regulatory agencies because to attach such privilege would impede the regulator’s ability to enforce environmental laws. *Reichhold* recognized and applied a self-audit privilege for retrospective self-assessment of compliance with environmental regulations. The common law privilege was recognized in *Reichhold* pursuant to a federal rule of evidence. The privilege will apply if:

(1) the information comes from a critical self-analysis;

(2) the public interest in preserving the free flow of this type information must be served;

(3) the information is of the type whose flow would be curtailed if discovery were allowed; and

(4) the information was prepared with an expectation of confidentiality and kept confidential.

Id @ 525.

The court observed:

> The privilege protects an organization or individual from the Hobson's choice of aggressively investigating accidents or possible regulatory violations, ascertaining the causes and

> results, and correcting any violations or dangerous conditions, but thereby creating a self-incriminating record that may be evidence of liability, or deliberately avoiding making a record on the subject (and possibly leaving the public exposed to danger) in order to lessen the risk of civil liability.

Id. @ 524. The court further reasoned:

> The fact that an actor had actual prior knowledge of the harm that would or could result from a course of action, and, nevertheless, deliberately chose to act is highly relevant in a negligence action and should ordinarily be discoverable. However, retrospective analysis is generally not relevant.

Id. @ 527. Understand the this privilege is highly fact-specific and will not often apply.

The EPA's Audit Policy seeks to provide incentives, principally by way of penalty reductions, for the client to voluntarily come into compliance with federal environmental laws and regulations. Among other incentives, the EPA agrees to

> …refrain from routine requests for audit reports….[H]owever, if the Agency has independent evidence of a violation, it may seek the information it needs to establish the extent and nature of the violation and the degree of culpability.

Final Policy Statement on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" 65 Fed. Reg. 19618, 19620 (April 11, 2000). In short, to possibly protect a self-audit, the self-audit must be to obtain legal advice concerning the compliance status of the facility as opposed to technical environmental advice.

1. Pointers

a. Remember the overriding public interest in confidentiality.

A client's internal audit policy and the actual self-audit documents must emphasize its confidentiality. The stated objectives should include compliance, improved efficiency, reduced pollution, and, generally speaking, the client's overall self-improvement.

b. The self-audit should include legal analysis and opinions.

D. Attorney's Ethical Duty Of Confidentiality

Though at times incorrectly viewed as synonymous with the attorney-client evidentiary privilege, a lawyer's obligation to maintain and protect client confidences is much broader than the scope of the attorney-client and work product privileges; indeed, the duty of confidentiality to a client also includes information obtained relating to the client's representation from others, such as the confidences and information of a client's environmental consultant. See *Buntrock v. Buntrock*, 419 So. 2d 402, 403 (Fla. 4th DCA 1982) (noting that protecting client confidences are broader than attorney client evidentiary privilege); *Kenn Air Corp. v. Gainesville – Alachua Co. Regional Airport Authority*, 593 So. 2d 1219 (1st DCA 1992). Rule 4-1.6, Florida Bar Rules, states: "a lawyer shall not reveal information relating to the representation of a client . . . unless the client gives informed consent," but there are exceptions. Despite the duty of confidentiality, there are exceptions when the lawyer must reveal information regardless of client's consent. Rule 4-1.6, Florida Bar Rules, contain two exceptions where an attorney must reveal information:

A lawyer *shall* reveal such information to the extent a lawyer reasonably believes necessary: (1) to prevent a client from committing a crime; or (2) to prevent a death or substantial bodily harm to another. (emphasis added)

Concerning Rule 4-1.6(b)(1), Florida Bar Rules, which is an exception that relates to "prospective" client contact relating to the commission of a crime, a lawyer must reveal information to the extent the lawyer "reasonably believes necessary" to prevent a client from committing a crime. In an environmental context, it is a third degree felony, punishable by a fine not to exceed $50,000 or 5 years imprisonment, or both, to willfully "cause pollution, . . . so as to harm or injure human health or welfare, animal, plant, or aquatic life or property." Section 403.161(1)(a) & (3), *Florida Statutes*. Further, the person who acts with reckless indifference or gross careless disregard is guilty of a second degree misdemeanor punishable by a fine not to exceed $5,000 and 60 days in jail, or both. Section 403.161(1)(a)& (4), *Florida Statutes*. If a person fails to obtain a

permit required by law, or violates or fails to comply with a permit (or rule, regulation or order), he may be guilty of a first degree misdemeanor punishable by a fine not greater than $10,000 or 6 months in jail, or both. Section 403.161(1)(b) & (5), *Florida Statutes*.

CERCLA, RCRA, the Clean Water Act, the Toxic Substances Control Act, the Emergency Planning and Community Right to Know Act, and comparable Florida law all have reporting requirements. Failure to report the release of contaminants to regulators may result in civil and criminal penalties. Under Rule 4-1.6(b)(2), Florida Bar Rules, if the attorney believes it is reasonably necessary "to prevent a death or substantial bodily harm to another," the attorney is ethically bound to report such past acts to the proper authorities. The American Bar Association's Model Rules of Professional Conduct illustrate this reporting obligation as follows:

> Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply *may*[2] reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure was necessary to eliminate the threat or reduce the number of victims. (emphasis added)

If an attorney's effort to persuade the client to take appropriate action fails, under Federal and Florida law a lawyer who then fails to report such information as required under Rule 4-1.6(b), Florida Bar Rules, could possibly become liable as the principal violator.[3] I am not aware of any source where a lawyer was found liable under the environmental statute merely arising out of a laywer's failure to disclose a "clients'" failure to report. However, Rule 4-1.6(b), Florida

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[2] The ABA's Model Rules of Professional Conduct were adopted in 1983. The Florida Bar Rules generally track the ABA Model Rules, but a significant difference is the ABA Model Rules state the lawyer may reveal information to prevent the commission of a crime or the death or substantial bodily harm where the Florida Bar Rules command that the lawyer "shall" reveal such information.

[3] Kerns, "The Liability of Attorneys for Environmental Exposures," papers submitted in connection with the ABA's National Conference on Professional Responsibility, May 27, 1994 (federal laws with reporting obligations that are not complied with "may subject attorneys to liability for failing to disclose information to federal regulators when they learn it from their clients.")

Bar Rules, makes it imperative for the lawyer to reveal information concerning the commission of a crime or to prevent a death or substantial bodily harm to another; thus, instead of an ethics rule that merely forbids the disclosure of a client confidence, the Florida Bar Rules make the disclosure imperative. Further, a lawyer is an officer of the court and part of our system of justice "charged with upholding the law." Rule 4-1.6, Florida Bar Rules comment and preamble to the Rules of Professional Conduct, Florida Bar Rules.

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