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KBR And Maintaining Privilege Throughout Investigations

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Last month, for the second time, the D.C. Circuit in In re Kellogg Brown & Root Inc., No. 14-5319, slip op. (D.C. Cir. Aug. 11, 2015), granted a writ of mandamus sought by KBR and vacated a series of district court orders that would have compelled KBR to turn over key documents from an internal investigation to a plaintiff who filed a whistleblower complaint pursuant to the qui tam provisions of the False Claims Act. While the principles of attorney-client privilege set forth by the U.S. Supreme Court in its seminal decision in Upjohn Company v. United States, 449 U.S. 383 (1981), were ultimately upheld by the D.C. Circuit, the KBR saga serves as a stark reminder that documents from internal investigations may ultimately end up subject to production in litigation because a court finds either that the privilege has been waived, or that the privilege did not apply in the first place.

Ultimately, a company should take appropriate steps to protect the privilege not only at the outset of an investigation, but also at each subsequent inflection point, in order to best position the company to establish that the investigation is entitled to privilege protection.

Attorney-Client Privilege and Work Product Protection — The Basics

The purpose of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[1] The privilege applies to communications between attorney and client if such communication was intended to be and was in fact kept confidential, and was made for the purpose of obtaining or providing legal advice to the client.

The work product doctrine, which was first recognized by the United States Supreme Court in Hickman v. Taylor, 329 U.S. 495, 510-11 (1947), provides that materials prepared by counsel, or at counsel's

direction, in preparation for trial or in anticipation of litigation are not discoverable absent a showing of substantial need, undue hardship, or inability to obtain their substantial equivalent by other means. Counsel's mental impressions and litigation strategy, in contrast, enjoy nearly absolute protection.[2]

An Issue Arises: Structuring the Investigation to Maximize Privilege Protection

When an issue first arises, decisions are often made quickly. Companies quickly consider issues such as whether an investigation is warranted, who will handle the investigation, the scope of the investigation, whether a government disclosure is necessary, and if so, when. In some instances, investigations are launched by internal audit departments or other groups of nonattorneys before in-house counsel even has an opportunity to ask these fundamental questions. The Barko/KBR litigation presents a cautionary tale, and a reminder of the benefits of thinking carefully before launching an investigation to ensure that appropriate steps are taken to ensure privilege protection.

In 2005, Harry Barko, who worked for defense contractor KBR, filed a whistleblower complaint under seal, alleging that KBR defrauded the federal government by inflating costs and accepting kickbacks while performing reconstruction contracts in Iraq. In the meantime, KBR received a tip from an employee regarding alleged violations of the company's Code of Business Conduct arising from the company's wartime government contracts, including the contract at issue in Barko's qui tam complaint.

Several simultaneous internal investigations were initiated and conducted at the direction of KBR's legal department and pursuant to the company's code of business conduct ("COBC"). During discovery, Barko sought documents related to those internal investigations, which KBR claimed were subject to the attorney-client and work product privileges.

Barko moved to compel production of the documents and the district court granted his motion, concluding that the privilege did not apply in the first place to the documents at issue, because KBR's internal investigation was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice."[3] The district court explained that KBR's COBC merely implemented U.S. Department of Defense regulations that require all of its government contractors to investigate certain "improper conduct." As a consequence, the district court concluded that KBR had not shown that "the communication would not have been made 'but for' the fact that legal advice was sought," and would have been made even if legal advice had not been sought.[4]

In so holding, the district court distinguished KBR's investigation from the privileged investigation at issue in the Supreme Court's decision in Upjohn. There, the Supreme Court held that the attorney-client privilege applied to documents created during a corporate internal investigation, where the investigation was conducted by the company's general counsel after conferring with outside counsel, and the witness interviews were conducted by attorneys. The KBR court noted that in contrast, outside counsel played no role whatsoever in KBR's investigation, many of the interviews were conducted by nonattorneys, and the interviewees were never informed that a purpose of the interviews was to assist KBR in obtaining legal advice.

On appeal of the privilege decision, the D.C. Circuit held that KBR's assertion of the privilege was "materially indistinguishable" from the assertion of privilege upheld in Upjohn.[5] The D.C. Circuit vacated the district court's discovery order, finding that, as in Upjohn, KBR initiated the internal investigation to gather facts and ensure compliance with the law after being informed of alleged misconduct. In addition, the D.C. Circuit noted that KBR's investigation was conducted under the auspices of KBR's in-house legal department acting in its legal capacity. These facts alone, from the D.C.

Circuit's perspective, brought KBR's investigation within the ambit of Upjohn.

When the D.C. Circuit granted KBR's petition, in-house counsel and outside counsel alike breathed a collective sigh of relief. The case, however, is a reminder of the need to approach internal investigations cautiously and in a manner to maximize privilege protection.

Companies should structure investigations in a way to make clear that they are being "conducted by counsel" for the purpose of "obtaining legal advice." This does not mean that only attorneys can participate in an investigation, or that outside counsel must be engaged for every investigation. But it does mean that steps should be taken to make clear that the investigation is being conducted by (or at least at the direction of) attorneys for the purpose of providing legal advice to the company. Engaging outside counsel to conduct the investigation or at a minimum to provide strategic guidance can help shore up claims that an investigation is being conducted for the purpose of providing legal (and not business) advice. Because of the hybrid functions of in-house counsel — serving as both attorneys and corporate officers — engaging outside counsel may better position a company to claim privilege as it helps establish that a significant purpose of the investigation was to obtain legal advice.

But even where the investigation is conducted solely by use of internal resources, it should be clear that the investigation is being conducted by counsel. Attorneys should direct the overall investigation including its scope, the documents to be reviewed, the witnesses to be interviewed, and the specific issues to be decided. Where nonattorneys conduct interviews in an investigation, it is advisable to document and convey to interviewees that the interviews are being conducted at the express direction of legal counsel — whether internal or external.

Any third parties or consultants hired to assist with the investigation should be engaged by counsel, and the engagement letter should make clear that they are being engaged to assist with providing legal advice. Moreover, nonattorney investigators should affix a privilege legend to documents related to the investigation. Communications and work product should appropriately be labeled as attorney-client privileged and/or work product. And any written record of the investigation should leave no doubt that a purpose of the investigation was to obtain legal advice.

The Government Disclosure Dilemma: Balancing the Desire to Maximize Cooperation While Protecting the Privilege

In situations where a company decides to (or is required to) disclose the issue under investigation to governmental authorities, much care should be taken to balance the desire to cooperate and provide full disclosure, with the desire not to waive the attorney-client privilege. This is frequently an issue for government contractors in False Claims Act-related investigations because of the "mandatory disclosure rule," which provides that contractors must "timely disclose" whenever the contractor has "credible evidence" of certain criminal law violations or violations of the civil False Claims Act.[6] The failure to disclose can result in suspension or debarment.

Self-disclosure does not, however, mean that a company must necessarily waive the privilege in order to cooperate with the government. Indeed, current U.S. Department of Justice guidelines prohibit prosecutors from requesting privilege waivers except where the company asserts an advice-of-counsel defense or the communications were made in furtherance of a crime or fraud. Rather, in assessing cooperation, prosecutors must focus on the disclosure of nonprivileged "relevant facts."[7] In accordance with this guidance, although they are unlikely to request a privilege waiver, government investigators will generally expect disclosure of relevant underlying facts contained within privileged

materials.

Voluntary production of privileged documents to government investigators in connection with a disclosure could create a significant risk of privilege waiver. The attorney-client privilege ordinarily is waived by disclosure of privileged information to a third party. When disclosure is made to the government, the majority of courts take the position that there is a complete waiver and that the privilege is destroyed (and not that there is a selective waiver only with respect to the government).[8] This means that such privileged documents would be subject to disclosure to other parties, for example, in subsequent litigation.[9]

Defending the Privilege in Subsequent Litigation: Whether or Not to Place the Investigation "At Issue"

Although the D.C. Circuit granted the first writ requested by KBR, it expressly allowed that the district court might consider arguments for why the privilege should not attach to the documents (i.e., other than that they were not prepared primarily for the purposes of seeking legal advice). The district court accepted the D.C. Circuit's invitation, and in a subsequent series of orders, held that the attorney-client privilege and work product protection were impliedly waived for certain investigation-related documents. KBR filed another petition for a writ of mandamus seeking review of the orders.

One of the grounds on which the district court based its privilege waiver determination was that KBR had put the privileged documents "at issue" in the litigation.[10] Specifically, the district court concluded that KBR had waived the privilege by seeking a positive inference in its favor that its internal investigation found no wrongdoing. KBR allegedly did this by soliciting deposition testimony about the investigation, attaching deposition excerpts to its summary judgment motion and referencing deposition language in its statement of undisputed material facts regarding the COBC investigations and KBR's contractual reporting duties, and discussing the COBC investigative mechanism in a footnote in its summary judgment brief in a way that implied that the internal investigation concluded that no wrongdoing had occurred.

On appeal, the D.C. Circuit again rejected the district court's holding, finding that deposition excerpts and statements of undisputed materials facts "cannot themselves give rise to inferences that place privileged materials 'at issue,'" as the deposition transcript is simply a record of what was said (not itself an argument) and there are no inferences to be made in a statement of undisputed materials facts.[11] Moreover, the discussion of the COBC investigative mechanism in KBR's summary judgment brief constituted a recitation of facts that appeared only in the motion's introduction (not in an argument), and all inferences should have been drawn against KBR as the movant for summary judgment. The D.C. Circuit thus disagreed that KBR had asked the court to draw an "unavoidable" inference that the investigation found no wrongdoing, and rejected the district court's finding of an "at issue" waiver.

Once again, while the privileged nature of KBR's internal investigation was ultimately upheld, this second round of litigation in the Barko/KBR matter underscores that care must be taken not to inadvertently waive the privilege over an internal investigation during subsequent litigation. While KBR's references to its investigation in this instance were not held to have put the investigation "at issue," the D.C. Circuit's ruling implies that had KBR referenced the investigation in argument or asked the court to infer from the fact that KBR had not made a disclosure that the investigation had uncovered no wrongdoing, the outcome could very well have been different. Careful thought should be given as to whether or not to raise the issue of an internal investigation, and in what context, in subsequent litigation so as to avoid a waiver.

Conclusion

In sum, while it is critical to make strategic and thoughtful decisions about the structure of an investigation in order to maximize privilege protection, the privilege considerations do not end there. Steps should be taken to protect the privilege at all points in the investigation. Any mandatory or voluntary disclosure and other communications with government agencies must be carefully managed to protect the privilege where appropriate. And finally, any decision to waive privilege in litigation should be deliberate, and not inadvertent.

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[1] Upjohn, 449 U.S. at 389.

[2] State law on the protection of attorney work product can vary considerably from federal law.

[3] United States ex rel. Barko v. Halliburton Co., 37 F. Supp. 3d 1, 5 (D.D.C. 2014).

[4] Id. (quoting United States v. ISS Marine Services, Inc., 905 F. Supp. 2d 121, 128 (D.D.C. 2012)).

[5] In re Kellog, Brown & Root, Inc., 756 F.3d 754, 757 (D.C. Cir. 2014).

[6] 48 C.F.R. § 52.203-13.

[7] See Memorandum from Mark Filip, Deputy Att'y Gen., to Heads of Dep't Components and U.S. Att'ys on Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008); cf. Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., to All Component Heads and U.S. Att'ys on Bringing Criminal Charges Against Corporations (June 16, 1999); Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Heads of Dep't Components and U.S. Att'ys on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003); Memorandum from Paul J. McNulty, Deputy Att'y Gen., to Heads of Dep't Components and U.S. Att'ys on Principles of Federal Prosecution of Business Organizations.

[8] See, e.g., Westinghouse Elec. Corp. v. Republic of Phil., 951 F.2d 1414, 1425 (3d Cir. 1991); Permian Corp. v. United States, 665 F.2d 1214, 1220-21 (D.C. Cir. 1981).

[9] Unlike the attorney-client privilege, work product protection is not automatically waived through disclosure to a third party. See, e.g., In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982). However, disclosing work product to an adversary may waive the protection. See, e.g. Carter v. Gibbs, 909 F.2d 1450, 1451 (Fed. Cir. 1990); United States ex rel. Garbe v. Kmart Corp., No. 12-cv-00881, 2014 U.S. Dist.

LEXIS 73261, at *13-15 (N.D. Ill. May 29, 2014) (holding that in creating and producing sub-set of transactional data to U.S. Department of Health and Human Services in connection with ongoing investigation, work product protection had been waived).

[10] United States ex rel. Barko v. Halliburton Co., No. 1:05-CV-1276, 2014 U.S. Dist. LEXIS 181353 (D.D.C. Nov. 20, 2014). The District Court also held that the investigation documents had to be produced under Federal Rule of Evidence 612 under the theory that Christopher Heinrich, KBR Vice President (Legal), reviewed the disputed documents in preparing for his deposition pursuant to Federal Rule of Civil Procedure 30(b)(6). The D.C. Circuit rejected this conclusion as well.

[11] In re Kellogg Brown & Root, Inc., No. 14-5319, slip op. at 15.
