

ALERT

D.C. Circuit Reaffirms Privilege for Internal Investigations...Again

August 12, 2015

For the second time in just over a year, the U.S. Court of Appeals for the D.C. Circuit rejected a district court opinion that had required a government contractor to produce confidential internal investigation reports and materials. The D.C. Circuit's decision would appear to put an end to a long-running dispute regarding the privileged nature of certain internal investigation materials. The D.C. Circuit's second mandamus decision in the *Kellogg Brown & Root* saga reaffirms the broad application of the attorney-client privilege to materials associated with internal investigations.

The original controversy arose when a *qui tam* plaintiff moved to compel the production of internal investigation materials from the defendant, Kellogg Brown & Root (KBR). These internal investigation materials purportedly related to the fraud alleged in the plaintiff's complaint. The district court initially concluded that these materials were ordinary business records rather than privileged documents and communications and ordered the production of these materials. Of particular relevance to the district court was that KBR had a regulatory obligation to conduct the investigation and that the investigation had been conducted by non-attorneys. In June 2014, the D.C. Circuit vacated the district court's ruling and held that the attorney-client privilege applies to internal investigations by in-house attorneys, and covers communications between company employees and company attorneys.

After reviewing the issue in light of the D.C. Circuit's first ruling, the district court once again ordered the production of the internal investigation materials. This time, the district held that KBR had waived the attorney-client privilege and cited two instances of waiver. First, the privilege was waived when KBR's representative reviewed

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the disputed documents in preparation for his Rule 30(b)(6) deposition. According to the district court, under Federal Rule of Evidence 612, KBR waived any privilege when its representative reviewed the internal investigation materials to “refresh” his recollection. Second, the privilege was impliedly waived when KBR made “affirmative” arguments involving the internal investigation materials in a footnote in KBR’s summary judgment brief. Specifically, the district court held that KBR had waived the privilege when KBR stated it had conducted investigations and that, afterward, it did not report any wrongdoing to the U.S. Department of Defense (which would have been required under KBR’s regulatory obligations), which one could infer meant that the investigation did not find any wrongdoing.

The D.C. Circuit determined that the district court’s ruling was clearly erroneous. In reaching its decision, the D.C. Circuit cited to United States Supreme Court precedent in *Upjohn Co. v. United States*, 449 U.S. 383 (1981) and its own June 2014 ruling and noted that the district court’s ruling “would erode the confidentiality of an internal investigation.” The D.C. Circuit tackled both of the district court’s reasons for finding waiver of the attorney client privilege. Regarding waiver in relation to KBR’s deposition, the D.C. Circuit noted that the plaintiff had specifically designated the internal investigation as a subject of the deposition and thus KBR’s representative had an obligation to review the materials. The circuit court held that allowing the attorney-client privilege to be so easily defeated for internal investigations would “defy reason and experience...and potentially upend certain settled understandings and practices about the protections for such investigations.” Regarding the implied waiver, the D.C. Circuit looked at the context of the whole passage and held that KBR was merely reciting facts rather than making an argument.

The D.C. Circuit went on to clarify that communications from an investigator (acting at the direction of in-house counsel) to in-house counsel are not attorney-client communications. The court found that in such circumstances, the “investigator effectively steps into the shoes of the attorney.” Thus, such communications do not constitute attorney-client communications but instead would constitute attorney work product.

This decision reaffirms the long-standing principle that internal investigation materials are protected by the attorney-client privilege and/or the attorney work product doctrine. Indeed, these protections are strong enough to survive tenuous claims of waiver brought during litigation. Nonetheless, to minimize the risk of disclosure and avoid potentially unnecessary and costly litigation, it is prudent to ensure that internal investigations retain clear indicia of privilege and confidentiality. For additional information regarding past decisions in this case and privilege considerations, please refer to our previous articles [here](#) and [here](#).