

Client Alert

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DC Circuit Further Clarifies Scope of Privilege in Internal Investigations in Latest KBR Ruling

The Court of Appeals for the District of Columbia Circuit again issued an opinion refining the scope of the attorney-client privilege in the context of internal investigations in the latest opinion issued in *In re Kellogg Brown & Root, Inc., et al.* The court vacated several rulings by the district court that required Kellogg Brown & Root, Inc. (KBR) to produce documents from an internal investigation.

In a series of rulings in late 2014, the district court had concluded that KBR implicitly waived privilege by allowing its in-house counsel to review documents from the investigation in preparation for a deposition, and by referring to that deposition testimony in a footnote in its motion for summary judgment. The district court also ordered KBR to produce substantial portions of the contents of its internal investigation on the grounds that neither the attorney-client privilege nor work product protections shielded from discovery summary reports of employee interviews prepared by nonattorney investigators.

In granting KBR's second petition for a writ of mandamus, the DC Circuit articulated an important holding regarding the application of the attorney-client privilege to materials and information generated during internal investigations. This ruling provides important guidance to companies and outside counsel engaged in internal investigations going forward, as the court of appeals addressed the circumstances that will trigger protection of materials generated in such investigations.

The court specifically held that investigative reports summarizing statements made by KBR employees to nonattorney KBR investigators acting under the direction of its legal department were covered by the attorney-client privilege. The court explained that where an investigator is acting at the direction of in-house counsel, "the investigator effectively steps into the shoes of the attorney." Thus, to the extent that the investigators' reports summarized statements made by KBR employees, they are within the scope of the attorney-client privilege.

In contrast, the court noted that the portions of the investigative reports containing the investigators' mental impressions or communications from an investigator to an in-house attorney are shielded from disclosure not by the attorney-client privilege but by the work product protection. The DC Circuit cautioned against conflating the two, stating that "[t]he attorney-client privilege and opinion work product protection separately operate as barriers to compelled disclosure, and there is nothing to be gained by sloppily insisting on both or by failing to distinguish between them."

In addition to the above rulings applying privilege protection to materials generated by nonattorney investigators, the court also addressed the procedural attacks on privilege in the context of civil litigation. First, the court held that an in-house attorney designated under Rule 30(b)(6) to testify in response to a deposition notice about an internal investigation does not waive privilege by simply reviewing investigative documents in advance of the deposition and testifying to their privileged nature. To hold otherwise, the court explained, "would allow the attorney-client privilege and work product protection covering internal investigations to be defeated routinely by a counter-party noticing a deposition on the topic of the privileged nature of the internal investigation."

Second, the DC Circuit held that KBR did not place the privileged investigative materials at issue in the litigation by simply referencing the investigation in its memorandum in support of summary judgment. The court noted that KBR did not directly state the results of its internal investigation in the footnote, nor seek any specific relief based on those results.

In a prior ruling in the same KBR matter, the DC Circuit had clarified that the attorney-client privilege applies to internal investigations “[s]o long as obtaining or providing legal advice was one of the significant purposes of the internal investigation.” *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014). This latest opinion makes clear, however, that there is no blanket privilege for internal investigations. In-house counsel should consider the following guidelines in conducting internal investigations and utilizing outside consultants and investigators in the process:

- A “significant purpose” of an internal investigation must be to obtain or provide legal advice if the product of such investigation is to receive attorney-client privilege protection.
- Summary reports created by nonattorney investigators will receive privilege protection if the reports contain client communications, the investigator is acting at the direction of counsel and the nature of the underlying investigation is clearly privileged.
- Nonattorney investigators’ mental impressions and communications with in-house counsel may receive protection as work product so long as they are prepared in anticipation of litigation, even if they are not covered by the attorney-client privilege.
- Privilege protections are strengthened when a distinction is drawn between materials that are attorney-client communications versus work product, as opposed to blanket assertions conflating the two.

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