Clients&FriendsMemo

D.C. Circuit Upholds Attorney-Client Privilege Again in *In re Kellogg Brown & Root, Inc.*

August 17, 2015

On August 11, 2015, the U.S. Court of Appeals for the D.C. Circuit granted a petition by Kellogg Brown & Root, Inc. ("KBR") for a writ of mandamus in order to protect KBR's assertion of attorney-client privilege over its prior internal investigation of alleged violations of the False Claims Act. *In re Kellogg Brown & Root, Inc.*, No. 14-5319, slip op. (D.C. Cir. Aug. 11, 2015) [hereinafter *KBR II*]. The opinion was actually the second writ of mandamus granted in this closely watched case over the course of only 14 months. Whereas the earlier opinion in the case broadly addressed the scope of attorney-client privilege in internal investigations, this week's decision greatly reduces the potential for opposing parties to argue that any mention of an internal investigation in litigation will result in waiver.

KBR I

The D.C. Circuit issued its first writ of mandamus in the KBR litigation on June 27, 2014. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) [hereinafter *KBR I*]. As the court explained, the case involves alleged violations of the False Claims Act in connection with government contracts. The complaint was filed by a former employee, Harry Barko, who alleges that KBR inflated costs and received kickbacks in connection with defense contracts in Iraq. The principal dispute in *KBR I* was over the scope of attorney-client privilege in connection with the internal investigation performed by KBR into the allegations listed in Barko's complaint. Although Barko sought access to the substance of that investigation, KBR maintained that the material was protected by attorney-client privilege.

The district court held in Barko's favor. It had proposed a stringent test for privilege, protecting only attorney-client communications that "would not have been made 'but for' the fact that legal advice was sought." *United States ex rel. Barko v. Halliburton Co.*, 37 F. Supp. 3d 1, 5 (D.D.C. 2014). The district court held that KBR's investigation failed this test, because it was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." *Id.*

The D.C. Circuit rejected the district court's conclusions on both the law and the facts. According to the D.C. Circuit, an attorney-client communication receives the protection of privilege as long as

"obtaining or providing legal advice was one of the significant purposes" of the communication. *KBR I* at 760. Moreover, because KBR had conducted its investigation *both* to comply with regulatory requirements and corporate policy *and* to obtain legal advice, attorney-client privilege applied in this case. *Id.*

KBR II

Although *KBR I* firmly established that KBR's internal investigation was protected by attorney-client privilege, Barko's attempts to obtain copies of the privileged materials continued after the case returned to district court. Specifically, Barko argued, and the district court agreed, that KBR had impliedly waived its attorney-client privilege on two separate occasions: first, in the deposition of KBR's Vice President (Legal), and second, in arguments put forth by KBR in a motion for summary judgment.

Barko's first argument was that KBR had waived privilege in its deposition of Christopher Heinrich, KBR's Vice President (Legal). KBR designated Heinrich to testify on its behalf on selected topics—including the internal investigation—in accordance with Federal Rule of Civil Procedure 30(b)(6). As the D.C. Circuit emphasized, the deposition was noticed and the topics selected by Barko himself. To prepare for the deposition, Heinrich reviewed the privileged material sought by Barko. Although counsel for KBR stated at the beginning of the deposition that Heinrich was giving his testimony subject to privilege and work product protection, Barko requested the materials reviewed by Heinrich under Federal Rule of Evidence 612, which allows adverse parties to obtain a writing used by a witness to refresh his or her memory.

The district court applied a balancing test with mixed results, but ultimately concluded that "fairness considerations" weighed in favor of disclosure to Barko. However, the D.C. Circuit disagreed with the district court's decision to apply that test, which is generally used for "a witness who consults a writing *while testifying*." *KBR II* at 10. More broadly, the D.C. Circuit reasoned, "It cannot be the case that just stating the documents were privileged constitutes a testimonial reliance on their contents." *Id.* Otherwise, the "mere invocation" of attorney-client privilege and work product protection would entitle the opposing party to any protected materials. *Id.*

The panel also concluded that the district court's conclusions were precluded by *Upjohn*, since the lower court's application of the balancing test "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." *Id.* at 10-11.[1] As the circuit court explained later in its opinion, the decision to issue a writ of mandamus in this case was motived by this important concern:

[1] The panel also rejected as "absurd" Barko's argument that KBR should have provided Heinrich with a summary of the privileged documents, rather than allowing Heinrich to review them himself. As the panel explained, such a rule would create

> If allowed to stand, the District Court's rulings would ring alarm bells in corporate general counsel offices throughout the country. . . . These alarm bells would be well founded. If all it took to defeat the privilege and protection attaching to an internal investigation was to notice a deposition regarding the investigations (and the privilege and protection attaching them), we would expect to see such attempts to end-run these barriers to discover in every lawsuit in which a prior internal investigation was conducted relating to the claims.

Id. at 24.

Barko's second argument stemmed from a footnote in a motion for summary judgment submitted by KBR shortly after Heinrich's deposition. This footnote stated, in significant part:

> KBR has an internal code of business conduct ("COBC") investigative mechanism that provides a means of identifying any potentially illegal activities within the company. When a COBC investigation reveals reasonable grounds to believe that a violation . . . may have occurred requiring disclosure to the government . . . KBR makes such disclosures. . . . KBR intends for these investigations to be protected by the attorney client privilege and attorney work product privilege . . . . [W]ith respect to the allegations raised by Mr. Barko, KBR represents that KBR did perform COBC investigations related to [the KBR subcontractor and employee at the center of the fraud alleged by Barko], and made no reports to the Government following those investigations.

In re KBR II at 6 (quoting KBR Defendants' Motion for Summary Judgment).

The district court held that by including this footnote in its motion, KBR had placed the privileged materials "at issue" and therefore waived privilege. In particular, the district court felt that KBR was putting the privileged content at issue in its statement that "when [KBR] discovers wrongdoing during investigations, 'KBR makes such disclosures.'" *Id.* at 17-18. The district court claimed that KBR was seeking an "unavoidable" inference from the district court that no wrongdoing was found during the internal investigation. *Id.* at 15.

The D.C. Circuit disagreed with the district court's holding for multiple reasons. First, the panel disagreed that the inference described by the district court was "unavoidable," noting that "an alternative inference—presumably, the one that Barko would ask a fact-finder to draw—is that the investigation showed wrongdoing but KBR nonetheless showed no report to the government." *Id.* at 15. The D.C. Circuit acknowledged that the "highest hurdle" to its holding was the statement cited by the district court that "when [KBR] discovers wrongdoing during investigations, 'KBR

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unhelpful incentives for entities to designate "less knowledgeable" representatives for depositions, leading to poorer factual discovery.

makes such disclosures.'" *Id.* at 17-18. Nonetheless, the court maintained that KBR's statement had to be read in context—it appeared only in the factual section (not the argument section) of KBR's motion, and only in a footnote. More importantly, the panel explained that KBR had not actually argued that the district court should find no wrongdoing because KBR's investigation had found none. The D.C. Circuit stated that the district court committed error when it inferred this argument from KBR's footnote; since KBR was the summary judgment movant, the district court was required to draw inferences in Barko's favor, not in KBR's. As a result, the D.C. Circuit concluded that attorney-client privilege had not been waived.[2]

Conclusions

The D.C. Circuit's opinion in *KBR II* contains both notes of encouragement and points of caution for company counsel seeking to maintain attorney-client privilege following an internal investigation. The panel's reversal of the district court in *KBR II* suggests that the court is committing fully to the protection of attorney-client privilege set forth in *KBR I*, and will not easily allow opposing parties to create end-runs around that protection. However, *KBR II* also suggests that counsel should be wary of making arguments based on the contents of privileged documents—especially the conclusions of an internal investigation—as such arguments may lead to a finding of waiver.[3]

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[2] The D.C. Circuit also addressed the issue of whether communications between KBR's in-house counsel and an investigator acting at the direction of counsel were covered by attorney-client privilege. The panel agreed with the district court that communications between counsel and the investigator were protected as work product, rather than under attorney-client privilege. However, the D.C. Circuit found error in the district court's order compelling disclosure of the report summarizing statements of KBR employees to the investigator, because (1) those statements were subject to attorney-client privilege, and (2) they included mental impressions constituting opinion work product. *KBR II* at 19-22.

[3] *Cf. In re General Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 (JMF), slip op. at 6-7 (S.D.N.Y. Aug. 11, 2015) (holding that outside counsel would not be required to testify regarding privileged information from an internal investigation of GM, due in part to GM's prior commitment not to use the investigative report as evidence in the instant litigation).