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FEATURE COMMENT: 'Read My Lips ... No More Uncertainty!': The D.C. Circuit Closes The Book On Qui Tam Relator Barko's Attempts To Pierce KBR Legal Protections

Introduction and the Bottom Line—In a long-simmering dispute in a 10-year-old litigation still in the discovery phase, the U.S. Court of Appeals for the D.C. Circuit appears to have put the final nails in the coffin of a qui tam relator's attempts to obtain materials for which defendant Kellogg Brown and Root asserted attorney-client privilege and work product protection.

Disputes about the relator's right to view the documents in question have run up and down the Washington, D.C. federal judiciary like an excited teenager running the aisles at a Taylor Swift concert, from the district court's March 2014 decision, to the Circuit Court's June 2014 reversal and remand back to the district court, which produced a set of decisions issued in November and December 2014, ruling again that the qui tam relator was entitled to view the company's internal investigation documents, and ending most recently (and according to the Circuit Court, definitively), with the Court's August 11 decision once again reversing the district court. See *In re Kellogg Brown & Root*, No. 14-5319, 2015 WL 4727411 (D.C. Cir. Aug. 11, 2015).

The materials at issue include primarily an internal investigation report prepared by KBR compliance personnel under the auspices of the legal department pursuant to regulations and contractual provisions that required KBR to investigate and disclose to the Government instances of

kickbacks occurring in connection with the performance of Government contracts. In its latest decision, the Circuit Court reversed the district court and granted KBR's writ of mandamus, finding that the internal investigation materials are subject to attorney-client privilege and work product protection, and that KBR did not waive its right to claim protection merely because it mentioned the report in a deposition and footnote to a brief supporting its motion for summary judgment in the qui tam suit. *The decision represents a resounding and, according to the Circuit Court, final (for the KBR litigation), affirmation of the U.S. Supreme Court's decision in Upjohn and its applicability to Government contractor internal compliance investigations.* However, practitioners need to beware: Some jurisdictions diverge on these issues. For now, the issue is settled in the D.C. Circuit.

I don't remember much about my first-year law school classes; it seems that nervousness rendered me temporarily deaf and unable to follow legal reasoning. I remember from those days only a few curious and interesting snippets that professors offered. One came from the first days of my Contracts 101 class. The professor said, "In matters of law, companies/contractors are most interested in knowing *where* the line is drawn, not exactly *how* the line gets drawn. They want certainty more than anything else: 'Tell me where the line is, and I can live with that; but don't tell me the line is moving all the time.' " This did not make sense to me at the time; after more than 30 years in law, it does. And this is the visceral message that the Circuit Court delivered in its August 11 decision regarding *l'affaire de privilège juridique KBR*.

In a startlingly direct and powerfully written opinion, the Court banged away at two fundamental points in telling the qui tam relator and district court "¡No más!": (1) the Supreme Court's decision in *Upjohn v. U.S.*, 449 U.S. 383 (1981), is fundamental, and it continues to apply to contractor internal investigations conducted for the purpose of complying with Government compliance programs; and

(2) there *must* be *certainty* for contractors regarding the applicability of the attorney-client privilege and work product protection to compliance investigations that contractors perform at the Government’s behest or direction. The Court invoked *Upjohn* and certainty principles over and over in its decision:

In a prior petition for writ of mandamus on this case, we noted that “[m]ore than three decades ago, the Supreme Court held that the attorney-client privilege protects confidential employee communications made *during a business’s internal investigation led by company lawyers.*”

In re KBR, 2015 WL 4727411, at *1 (emphasis added);

We agree that these challenged [district court] decisions suffer from *the same fundamental flaw*: They run contrary to precedent by *injecting uncertainty* into application of attorney-client privilege and work product protection to internal investigations. See *Swidler & Berlin v. United States*, 524 U.S. 399, 409 (1998); *Upjohn*, 449 U.S. at 393; *In re KBR*, 756 F.3d at 763.

id. (emphasis added);

Upjohn teaches that “[a]n uncertain privilege, or one which purports to be certain but results in widely varying application by the courts, is little better than no privilege at all.” 449 U.S. at 393. The District Court’s ruling, therefore, runs counter to *Upjohn*.

id. at *5 (emphasis added);

Further, even if the balancing test had been appropriate, *the District Court’s conclusions were precluded* by *Upjohn*.

id. (emphasis added);

The error here was “clear and indisputable” because the outcomes arrived at by the District Court would erode the confidentiality of an internal investigation in a manner squarely contrary to the Supreme Court’s guidance in Upjohn and our own recent prior decision in this case. See *Upjohn*, 449 U.S. at 393; *In re KBR*, 756 F.3d at 763. The Supreme Court has “rejected use of a balancing test in defining the contours of [attorney-client] privilege” because it would defeat the purpose of the privilege to promote candid communications with counsel in the first instance.

id. at *12 (emphasis added);

Just as in the first petition, the District Court’s November 20 and December 17 orders would generate “substantial uncertainty about the scope of the attorney-client privilege in the

business setting.” *In re KBR*, 756 F.3d at 756. *If allowed to stand, the District Court’s rulings would ring alarm bells in corporate general counsel offices throughout the country about what kinds of descriptions of investigatory and disclosure practices could be used by an adversary to defeat all claims of privilege and protection of an internal investigation.* See *id.* at 762–63 (“[P]rudent counsel monitor court decisions closely and adapt their practices in response.”).

id. (emphasis added). And, in concluding, the Circuit Court said, “¡No más!”:

Because this remains true—and because we trust that this opinion will *conclusively resolve the issue on which this case has seemed stuck as with a scratch on a broken record*—we deny KBR’s request for reassignment.

Id. at *13 (emphasis added).

The principles articulated by the Court in these passages are very clear, and fundamental. Unfortunately, the theories and practical application of the fundamental principles are substantially more nuanced than they might appear on the surface. For those who practice in this area of the law, it is worth understanding the nuances, reasoning and pitfalls, which we describe below, followed by some practice guidelines.

Background and Prior Rulings—Relator Harry Barko first filed this suit in 2005, accusing KBR of making false claims while serving as a contractor in Iraq under the U.S.’ Logistics and Civil Augmentation Program (LOGCAP) III contract. Barko claimed that KBR presented inflated and fraudulent bills to the U.S. for work done by subcontractors who received preferential treatment from KBR. Barko moved to compel the production of materials prepared during an internal investigation undertaken by KBR pursuant to its code of business conduct (COBC), collectively called the “COBC documents.” The ongoing discovery disputes in this case relate to Barko’s repeated attempts to obtain—and KBR’s vigorous efforts to protect—these COBC documents.

In March 2014, Judge Gwin for the U.S. District Court for the District of Columbia (a federal judge in Cleveland designated to oversee the KBR litigation in 2011) rejected KBR’s claims of attorney-client privilege and attorney work product, and ordered production of all 89 COBC documents. See *U.S. ex rel. Barko v. Halliburton Co.*, 37 F.Supp. 3d 1 (D.D.C. 2014). Judge Gwin concluded that, because

the documents were created to comply with mandatory anti-kickback requirements under 48 CFR § 52.203-7(c), they were not created for the “primary purpose” of obtaining legal advice. *Id.* at 5.

In June 2014, Government contractors breathed a collective sigh of relief when the Circuit Court rejected the district court’s “primary purpose” test and vacated the order compelling production of the COBC documents. See *In re Kellogg Brown & Root*, 756 F.3d 754 (D.C. Cir. 2014); 56 GC ¶ 224. The Circuit Court found the district court’s privilege ruling “materially indistinguishable” from the Supreme Court’s contrary ruling in *Upjohn*. *Id.* at 757. The Court held that “[i]n the context of an organization’s internal investigation, if *one of* the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply.” *Id.* (emphasis added).

While rejecting the district court’s “primary purpose” analysis, the Circuit Court expressly allowed that the district court might consider *other* arguments as to why the privilege should not attach. The Circuit Court’s caveat opened the door for renewed attempts by relator Barko to obtain the COBC documents. This time he argued (a) implied waiver and (b) substantial need for attorney work product materials.

Once again, the district court ordered production of the documents. In two separate rulings in November and December 2014, the district court held: (1) KBR impliedly waived the privilege by affirmatively using the contents of the COBC documents; and (2) the reports drafted by KBR investigators were more properly characterized as attorney work product (specifically “fact product”) rather than attorney-client privileged documents, and Barko’s “substantial need” and “undue hardship” necessitated disclosure of the reports. (As a side note, the district court rejected Barko’s additional arguments that the COBC documents should be produced under the crime-fraud exception to attorney-client privilege, and further that KBR waived privilege when it failed to produce a privilege log in response to an investigative subpoena.)

On Dec. 19, 2014, KBR again filed a writ of mandamus with the Circuit Court. As discussed below, the Circuit Court rejected both holdings by the district court and vacated the orders to compel production.

Implied Waiver—The district court’s Nov. 20, 2014 ruling held that KBR impliedly waived any attorney-client privilege that applied to the COBC documents. Relator argued that KBR put the contents

of the COBC files at issue in a Fed. R. Civ. P. 30(b)(6) deposition noticed and taken by Barko. The deposition notice required Barko to designate a representative to testify regarding specific KBR contracts in Iraq, as well as about KBR’s dealings with subcontractors. See *U.S. ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276 (D.D.C. Nov. 20, 2014).

In response, KBR produced Christopher Heinrich, in-house counsel for federal Government contracting activities. Heinrich acknowledged that prior to the deposition, he had reviewed the COBC documents at issue. *Id.* at *11. Throughout the examination, KBR’s attorney invoked the attorney-client privilege when Barko questioned Heinrich about the contents of the internal investigation in question. On cross-examination, KBR’s attorney had Heinrich confirm the following facts:

- Federal Acquisition Regulation 52.203-7, the Anti-Kickback clause, was incorporated into the subject contract.
- FAR 52.203-7 requires a contractor to report a possible violation if the contractor has reasonable grounds to believe a violation has occurred.
- KBR adheres to the anti-kickback procedures, and in other instances has made disclosures pursuant to this clause.
- COBC investigation reports typically include findings of investigations of such violations, including whether or not an allegation was substantiated, which KBR would use to conclude whether it should make a disclosure pursuant to FAR 52.203-7.

Id. at *11–14. Five days after Heinrich’s deposition, KBR moved for summary judgment in the district court proceedings. In a footnote in the introductory statement of its brief, KBR noted that, although it asserted privilege over the contents of the investigation, it did not assert privilege over *the fact* that the investigation occurred, and it *did not* make a disclosure to the Government based on the investigation. KBR Defendants’ Motion for Summary Judgment at 4 n.5, *U.S. ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276 (D.D.C. Feb. 10, 2014), ECF No. 136. I.e., KBR used the facts noted above in the bullets as evidence to support its motion for summary judgment. Barko then moved to compel production of the COBC documents on the basis that KBR had waived the privilege.

The Doctrine of Implied Waiver: The D.C. Circuit has stated that under the doctrine of implied waiver,

“the attorney-client privilege is waived when the client places otherwise privileged matters in controversy.” *Ideal Elec. Sec. Co. v. Int’l Fid. Ins. Co.*, 129 F.3d 143, 151 (D.C. Cir. 1997). As noted by both the district court and the Circuit Court in this case, “[t]he doctrine of implied, or at issue waiver, is an extension of the axiom that privilege cannot be used both as a sword and a shield.” *Barko*, No. 05-cv-1276 at *8 (D.D.C. Nov. 20, 2014). In other words, “litigants cannot hide behind the privilege if they are relying upon privileged communications to make their case.” *Id.* at *8–9 (quoting *In re Lott*, 424 F. 3d 446, 454 (6th Cir. 2005)).

The district court held that KBR impliedly waived the privilege under two separate theories. First, the court held that under Fed. R. Evid. 612, KBR waived the privilege when Heinrich reviewed the documents prior to his deposition. Second, the court held that KBR waived the privilege by putting the contents of the COBC documents at issue in its motion for summary judgment. Using the “clear error” legal standard of review, the Circuit Court found the district court’s rulings to be incorrect on both theories.

Rule 612 Waiver: Fed. R. Evid. 612 allows an opposing party to inspect writings that a witness uses to refresh his memory. If the witness examines a writing prior to testifying, the opposing party may examine the writing “if the court decides that justice requires.” See Fed. R. Evid. 612(a)(2). Additionally, “an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness’s testimony.” Fed. R. Evid. 612(b).

The district court here engaged in a balancing test to determine whether disclosure was appropriate. In describing its analysis, the district court explained, “At its essence, this analysis requires a context-specific determination about the fairness of the proceedings and whether withholding the documents is consistent with the purposes of attorney-client privilege and work-product protection ... as a result, this Court finds that similar fairness considerations support disclosure.” *Barko*, No. 05-cv-1276 at *25.

The Circuit Court found the district court’s holding to be incorrect both in its initial use of a balancing test, and also in how it applied the balancing test. At the outset, the Court held that use of the balancing test was inappropriate because Rule 612 applies only if a witness “uses a writing to refresh memory.” *In re*

KBR, 2015 WL 4727411, at *4. Citing *Weinstein’s Federal Evidence* and case law from the Third Circuit, the Court determined that consulting a document does not constitute use of a writing to refresh memory “unless the writing influenced the witness’s testimony.” *Id.* Applying that interpretation to the facts here, the Court stated that “it cannot be the case that just stating the documents were privileged constitutes a testimonial reliance on their contents.” *Id.*

The Circuit Court further noted that even if use of the balancing test had been appropriate, the district court’s analysis stood contrary to *Upjohn* by failing to give due weight to the privilege attached to the documents. The Circuit Court distinguished a deposition examining the *investigation itself* from a deposition examining the *contents* of the investigation. *Id.* Thus, the Court found, adverse parties cannot routinely defeat an otherwise applicable privilege simply by noticing a deposition concerning the privileged nature of the investigation, and then demanding to see the investigatory documents used to prepare the witness. *Id.* at *5.

Issue Waiver: The Circuit Court also rejected the district court’s holding that KBR placed the contents of the COBC documents at issue in its deposition cross-examination and motion for summary judgment. The Circuit Court agreed with the district court that “a party asserting attorney-client privilege cannot be allowed, after disclosing as much as he pleases, to withhold the remainder.” *Id.* at *6 (internal quotations omitted).

The Circuit Court disagreed, however, with the district court’s determination that Heinrich’s cross-examination put the contents of the COBC documents at issue. The district court determined that the line of questioning in the deposition gave rise to an inference that the COBC documents contained nothing that would warrant disclosure, and therefore their discussion in the deposition placed the documents at issue. Citing *U.S. v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989) (a case relied on heavily by KBR), the Court determined that a general assertion that an attorney has examined a matter is not sufficient to waive the attorney-client privilege. *Id.* at *6. Since KBR merely made this assertion, without partially disclosing any of the documents’ contents, the Court determined that the deposition failed to place the contents at issue. *Id.* at *7.

According to the Circuit Court, *Barko*’s argument that KBR’s motion for summary judgment

put the contents of the COBC documents at issue presented the most difficult issue. As noted in the district court's holding, the statements in KBR's brief that (a) the company has an investigative mechanism to identify potential illegal activities, (b) it discloses to the Government if an investigation reveals reasonable grounds to believe that a violation has occurred, (c) it conducted an investigation in this instance, and (d) it did not make a disclosure to the Government, all created an inference that the COBC documents did not support a reasonable belief that violations may have occurred (i.e., that KBR used the COBC documents as a sword, to argue innocence). See *Barko*, No. 05-cv-1276 at *17.

Although KBR did not directly state that the COBC investigation revealed no evidence of wrongdoing, by including in its argument that it makes such disclosures if it discovers wrongdoing, KBR came dangerously close to placing the contents of the COBC documents at issue and waiving its privilege. (On the other hand, the rule as the district court applies it would mean that any time (1) a company admits that an investigative report exists, and (2) the company did not make a disclosure based on the input, it could be waiving the privilege.)

The Circuit Court employed three arguments, the first two of which seem rather strained, to knock down the district court's holding regarding KBR's brief in support of its motion for summary judgment. First, the Court reasoned that because the argument appeared only in the motion's introduction and not in the discussion section of KBR's brief, it should be treated as a fact rather than as an argument. See *In re KBR*, 2015 WL 4727411, at *9. Second, the Court argued that because KBR made its argument in a footnote rather than in the main text, it should be accorded little weight. *Id.* It is unlikely that either of these arguments standing alone—or even together—would suffice to support a finding that the district court's ruling was clear error.

The Court's third argument, however, has more force. The Court points out that the crux of the potential waiver is the inference that the COBC documents contain no evidence of wrongdoing. As the Circuit Court notes, however, "KBR was the movant for summary judgment and it is beyond peradventure that all inferences were to be drawn against KBR at this stage of the litigation." *Id.* Given this rule, the Circuit Court concluded, the district court erred in making any inference in KBR's favor based on the contents of the COBC documents.

Although the Circuit Court, by its own admission, had to overcome "high hurdles" to protect KBR's privilege, its arguments circle back to the same principle it emphasized in its prior decision: the need to establish certainty regarding the protection of contractors' confidential internal investigations. Here the Circuit Court emphasized again, "[w]e agree that these challenged decisions suffer from the same fundamental flaw: They run contrary to precedent by injecting uncertainty into the application of attorney-client privilege and work product protection to internal investigations." *Id.* at *1.

Work Product Doctrine—In addition to addressing the district court's Nov. 20, 2014 ruling on implied waiver, the Circuit Court also vacated the district court's Dec. 17, 2014 ruling that the work product doctrine that attached to large portions of the COBC documents constituted attorney *fact* work product (rather than *opinion* work product) that could be overcome by Barko's showing of substantial need and undue hardship. In doing so, the Circuit Court provided a helpful analysis of the nuances between attorney-client privilege and attorney work product protection.

Attorney-Client Privilege and Attorney Work Product Protections: Attorney-client privilege and attorney work product, while often conflated, are separate doctrines afforded differing degrees of protection. It often goes unnoticed that there actually are three distinct concepts involved:

- attorney-client privilege,
- attorney opinion work product and
- attorney fact work product.

As discussed at length in the Circuit Court's June 2014 ruling, the attorney-client privilege protects confidential communications between clients and attorneys if one of the significant purposes of the communications is to allow company employees to receive legal advice. See *In re KBR*, 756 F.3d at 758. The privilege prevents disclosure of confidential communications between attorneys and clients, but it does not eclipse discovery of underlying factual information. *Id.*

Work product protection has a broader scope than attorney-client privilege, but the protection is less absolute. See *In re Sealed Case*, 676, F.2d 793, 808 (D.C. Cir. 1982). Fed. Rule Civ. P. 26(b)(3) defines attorney work product as "tangible things prepared in anticipation of litigation or for trial by or for another party or its representative." The

rule also distinguishes between “fact product” and “opinion product.” As the district court here noted, “Opinion work product, which reveals an attorney’s mental impression, opinions, legal theories or strategy, is virtually undiscoverable. But under certain circumstances purely factual material embedded in attorney notes may not deserve the super-protection afforded to a lawyer’s mental impressions.” *U.S. ex rel. Barko v. Halliburton Co.*, 75 F.Supp. 3d 532, 538 (D.D.C. Dec. 17, 2014).

The legal principles articulated above are well-settled. In this instance, the parties argued about the facts, and specifically how to define the materials encompassing the COBC documents. The district court determined that substantial portions of the documents contained attorney fact product (rather than opinion work product), and that Barko made an adequate showing to overcome traditional work product protections. *Id.* at 545. In doing so, the district court rejected KBR’s argument that the entire investigative report constituted an attorney-client communication between KBR’s internal investigator and KBR’s in-house counsel. As a result, the Circuit Court determined first that the investigative report itself was not attorney-client privileged before turning to the question of whether the report was fact work product or opinion work product. Thus, the Circuit Court agreed with the district court’s statement of the law, but not with the district court’s application of the law to the facts.

Communications between Internal Investigators and In-House Counsel: In an argument rejected by both the district court and the Circuit Court, KBR contended that the entire investigative report should be protected as work product communication between its internal investigator and its in-house counsel. A portion of the COBC documents reflected communications from an investigator, acting at the direction of in-house counsel, to an in-house attorney. *In re KBR*, 2015 WL 4727411, at *10.

In its prior motion seeking a writ of mandamus, KBR argued—and the Circuit Court agreed—that an investigator acting at the direction of in-house counsel “effectively steps into the shoes of the attorney.” See *In re KBR*, 756 F.3d at 758. Thus, KBR argued, the investigator’s work product warranted attorney work product protection, and the investigator’s communications with employees should receive attorney-client privilege protection. But this protection, as the Circuit Court noted, does not extend to communications

between an investigator and another attorney: “KBR seemingly would have it both ways and argue[d] that the investigator should also count as its employee for purposes of creating attorney-client privilege when the investigator communicates something to the lawyer.” *In re KBR*, 2015 WL 4727411, at *10.

The Circuit Court therefore refused to accept KBR’s interpretation that the entire investigative report constituted an attorney-client privileged communication between the investigator and in-house counsel. Instead, the Court determined that the report was attorney work product. The Court made a point of noting that “the attorney-client privilege and opinion work product protection operate separately as barriers to compelled disclosure, and there is nothing to be gained by sloppily insisting on both or by failing to distinguish between them.” *Id.* at *10.

Communications between Investigators and Employees: Although it defined the investigative report as attorney work product, the Circuit Court nevertheless noted that, to the extent that the report contained information obtained from the client, such materials still warranted attorney-client privilege protection, at least related to those client communications. The Circuit Court agreed with the district court that “materials produced by an attorney’s agent are attorney-client privileged only to the extent they contain information obtained from the client[,] including ‘where the purpose of the report was to put in usable form the information obtained from the client.’” *Id.* (quoting *FTC v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980)).

Investigator Notes: Opinion Product vs. Fact Product: While the district court and Circuit Court agreed on the statement of the law regarding work product, the Circuit Court found clear error in the district court’s application of the law to the facts, specifically with its designation of investigator notes as attorney fact product. Upon in camera review of the reports, the district court determined that “the reports scrupulously avoid stating conclusions about the allegations investigated,” and “give raw factual contract background material” for the legal department. See *Barko*, 75 F.Supp. 3d at 542.

The Circuit Court disagreed. Once again citing *Upjohn*, the Court held that to the extent that the notes of in-house counsel go beyond recording employee responses to questions, they reveal the attorneys’ mental processes in evaluating the communications and thereby constitute opinion work product. The

Circuit Court declined to engage in the district court's fact-specific analysis to distinguish between fact and opinion product, and instead implied a more general rule that an attorney's or investigator's work product constitutes opinion product to the extent that it is not a verbatim recording of employee responses. See *In re KBR*, 2015 WL 4727411, at *10.

In sum, despite correctly defining the parameters of the work product and privilege protections, the district court nevertheless ordered production of documents that were, according to the Circuit Court, clearly protected. The compelled disclosure included summaries of statements from KBR employees and numerous mental impressions of the investigators. See *id.* at *11. Because the Circuit Court found that the district court misapplied the definition of attorney fact product, it declined to address the district court's analysis of substantial need or undue hardship.

Takeaways and Practical Guidance—The major takeaway from the Circuit Court's ruling is virtually identical to that of its June 2014 decision. In both instances, the Circuit Court's decisions emphasize the Court's commitment to preventing uncertainty in the application of the attorney-client privilege and work product doctrines in the context of company internal investigations conducted under Government compliance programs. While KBR has continued to prevail in protecting its investigatory documents, the decisions nevertheless highlight several important lessons for contractors, among which are the following.

- U.S. companies are well-advised to provide documented and complete *Upjohn* instructions at the start of any employee interview dealing with a compliance matter, no matter who conducts the interview (though ideally, interviews would be conducted by outside counsel or by in-house counsel who perform truly legal rather than business functions).
- It is imperative that Government contractors draft and implement written mandatory disclosure rule protocols or procedures for initial intake and triage of any allegations of potential misconduct, assignment of allegations for review, assessment to determine whether disclosure is warranted, documentation of the entire process, and maintenance of documentation for an appropriate period.
- The protocol should require preparation of documentation at the outset of an investiga-

tion establishing that the investigation will be conducted at the express direction of and under the supervision of counsel for the purpose of securing legal advice and (when appropriate) in anticipation of litigation.

- The protocol should specify the type of documentation that will be maintained with respect to any intake matter or investigation, and how and where the documentation will be maintained.
- The protocol should state (as appropriate) that documentation generated in the course of an investigation has been created for the purpose of obtaining or providing legal advice, and/or in anticipation of litigation, and at the express direction of counsel, and is transmitted to counsel if created by non-lawyers.
- In many U.S. jurisdictions fact work product, unlike opinion work product, may be discoverable if the requesting party can demonstrate a substantial need for the materials to prepare its case, and cannot, without undue hardship, obtain their substantial equivalent by other means. Contractors conducting internal investigations should take appropriate steps to ensure that documents generated in the course of an internal investigation are properly structured to confer opinion work product protection on important documents prepared at the direction of attorneys.
- To prevent disclosure pursuant to Fed. R. Evid. 612, a corporate designee may review privileged documents in preparation for a deposition, but should not rely on their content during testimony in order to protect that content.
- Although the Circuit Court ultimately found that KBR did not waive its attorney-client privilege by referencing the COBC documents in its motion for summary judgment, to prevent issue waiver, parties should use caution when referring to privileged documents in the context of an argument or claim.
- Investigators and counsel should remember that communications between them may not be considered attorney-client privileged in the context of an internal investigation if an investigator "steps into the shoes" of an attorney (rather, such communications may be attorney-to-attorney communications subject to work product analysis).

- Investigators and counsel should resist the urge to conflate attorney-client privilege and attorney work product, as they are separate and distinct.
- The Circuit Court's August 11 decision includes a highly instructive discussion of the fundamental choice contractors must make when submitting disclosures to the Government. Either (1) they can elect to withhold privileged material in making a disclosure in order to preserve the privileges, as most contractors do, but risk a finding by the Government that the disclosure is not complete or adequate; or

(2) they can elect to include privileged material, understanding that waiver has occurred, but expecting Government leniency due to the contractors' significant cooperation.



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