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2 New Cautionary Tales About Protecting Privilege

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In twin rulings in May, district courts in Washington, D.C., and the Western District of Arkansas ordered the production of memoranda and reports created during corporate internal investigations over the investigating parties' privilege objections. Both courts determined that the parties failed to meet the burden of establishing that the attorney-client privilege or work-product immunity applied. These cases make clear that when it comes to privilege, facts matter. Developing an early record of the purpose of an investigation and the involvement of lawyers is crucial to establishing and maintaining privilege over the records eventually created.

On May 16, 2017, in a dispute between developer Banneker Ventures LLC and the Washington Metropolitan Area Transit Authority("WMATA") after WMATA backed out of the parties' agreement to develop a project, the D.C. district court held that WMATA must produce 51 witness interview memoranda created by WMATA's outside counsel as part of WMATA's internal investigation into how its board handled the project.[1] WMATA had moved for a protective order against production of the memoranda, arguing that the attorney-client and work-product privileges applied. Over two years after WMATA backed out of the agreement, it retained outside counsel to "provide investigative and legal services regarding the actions of WMATA's Board in connection with the ... project."[2] The investigation lasted five months and resulted in the creation of the fifty-one interview memoranda. The outside counsel drafted a report of its investigation that included references to and citations from the interview memoranda. At the end of the investigation, as recommended by WMATA's board, WMATA released the report to the public. The court held that the work-product immunity did not apply because the investigation was not conducted in anticipation of litigation and that WMATA had waived the attorney-client privilege over the memoranda to the extent they were cited in the publicly released report.

No Work-Product Protection Over Investigation to Evaluate Business Practices That Was Initiated More Than Two Years After Litigation Was Threatened

As the court noted, the work-product immunity only applies to documents created "in anticipation of litigation," a determination that features a temporal factor and an intent factor. The question was whether WMATA initiated its internal investigation because of the threat of litigation or for some other

reason. In support, WMATA pointed to a letter received from Bannekar that threatened a lawsuit if WMATA failed to move forward on Banneker's term sheet. WMATA's investigation, however, did not start until two years after Bannekar's letter, a fact the court found undermined WMATA's claim that the investigation was "in anticipation of litigation." So too did the stated purpose of the investigation: to evaluate WMATA's business practices and revise its standards of conduct for its board. Put another way, the court found that WMATA's investigation may have coincidentally gathered facts relevant to Banneker's eventual lawsuit, but WMATA did not initiate the investigation for that purpose.

Release of Privileged Report Resulted in a Subject Matter Waiver

The parties agreed that the communications between outside counsel and the current and former WMATA employees were privileged communications, but Bannekar argued that WMATA waived the privilege by making the report public. The court noted that to preserve the attorney-client privilege, the confidentiality of the communications must be "zealously protect[ed]," which WMATA failed to do. The court found that WMATA's public release of the report was an intentional waiver of privilege not only as to the communications described in the report, but also to other documents containing undisclosed communications concerning the same subject matter, including the interview memoranda. Noting that WMATA had used the report to its advantage in the litigation, the court added that fairness also dictated that the waiver should extend to the underlying memoranda.

Disclosure Ordered Over Privilege and Work Product Objections Where Party Failed to Establish Basis for Either

Banneker came on the heels of a decision by an Arkansas district court in the long-running shareholder litigation between City of Pontiac General Employees' Retirement System ("PGERS") and Wal-Mart Stores Inc., arising out of allegations that a Walmart subsidiary bribed Mexican officials.[3] Those allegations are also the subject of long-running U.S. Securities and Exchange Commission and U.S. Department of Justice investigations of Walmart for potential violations of the Foreign Corrupt Practices Act. In 2005 and 2006, Walmart had initiated an internal investigation that resulted in reports about the events in Mexico. PGERS moved to compel production of those reports, which Walmart withheld on attorney-client privilege and work product immunity grounds. Walmart also asserted both privileges during the deposition of its former (nonattorney) in-house investigator, who had conducted the company's investigation into the bribery allegations.

The district court found Walmart failed to establish that its in-house investigator's reports were attorney-client communications or were created in anticipation of litigation. Apparently, Walmart failed to submit any declarations from in-house or outside counsel describing their role in its investigation to support Walmart's privilege and work product claims. On the attorney-client privilege issue, the court noted that neither the in-house investigator, nor the person he reported to were attorneys, and there was no indication in the record that either of them had been directed by or ever communicated with attorneys. As to work product, the court found that Walmart had offered only arguments instead of evidence that its investigation was conducted in anticipation of litigation or a government investigation.

Unsurprisingly, Walmart has protested the order, moving for reconsideration and for a stay pending resolution of its motion for reconsideration and, if necessary, the filing of a writ of mandamus on the issue. On June 1, 2017, the court granted the motion to stay pending resolution of the motion for reconsideration.

Privilege Disputes Continue to Arise in Litigation

These cases bring to mind another district court's attempt to limit the application of the attorney-client privilege and work product immunity to internal investigation materials. In 2014, in In re Kellogg Brown & Root Inc., A writ of mandamus reversed a district court decision that ordered the production of documents created by KBR during an internal investigation into allegations that the company had defrauded the U.S. government.[4] There, the district court erroneously required KBR to meet a too-stringent standard by showing that the internal investigation would not have occurred "but for" the fact that legal advice was sought.[5] In its mandamus ruling, the D.C. Circuit held that the correct standard is whether obtaining legal advice was a primary purpose for the investigation, a standard cited by Walmart in its motion for reconsideration.

In another case, the London High Court recently agreed with the U.K.'s Serious Fraud Office that the attorney-client privilege and work-product immunities did not extend to outside counsel's notes of witness interviews, investigative reports, or forensic accounting reports created as part of an internal investigation.[6] Applying English law, the London High Court held that an internal investigation occurring before criminal proceedings were "reasonably contemplated" fell outside the scope of work-product immunity and that outside counsel's communications with individuals not designated by the company to obtain legal advice did not qualify for attorney-client privilege protection.

To be sure, unlike the D.C. Circuit and London High Court decisions, the WMATA and Walmart cases represent fairly straightforward applications of privilege law given the facts presented in those cases. But they do provide important reminders of the type of record companies must develop during their internal investigations and — if litigation ensues — before a court to ensure that the attorney-client privilege and work-product protections are established and preserved.

What This Means for You

These cases highlight two periods when developing a record is critical for preservation of the attorney-client and work-product privileges: (1) during the investigation itself and (2) when faced with a challenge in any subsequent litigation. These two periods are cumulative: As these cases show, where there is a failure to develop a record to establish privilege during the investigation, it is difficult to establish protection after the fact.

It is important for companies that undertake internal investigations to be mindful of certain risks and precautionary steps:

1. Establish and document the purposes of an internal investigation, including the need to obtain legal advice as a primary purpose and any concerns about potential litigation either at the start of or that arise at any point during the investigation;

2. Promptly initiate internal investigations if any concerns about potential litigation do exist and document reasons for any delays in initiating an investigation;

3. For any investigation conducted at the direction or supervision of counsel (whether in-house and/or outside counsel), ensure that there is documentation of counsels' (1) direction or supervision of the investigation and (2) involvement throughout the internal investigation in analyzing the facts discovered through the investigation and making conclusions and recommendations; and

4. Carefully consider potential waiver implications before making the results of an investigation public.

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DISCLOSURE: Vinson & Elkins represented KBR in the case discussed above.

[1] Banneker Ventures LLC v. Graham, et al, Case No. 1:13-cv-00391-RMC, Dkt. No. 108, at *1 (D.D.C. May 16, 2017).

[2] Id. at *2

[3] City of Pontiac Gen. Employees' Retirement Sys. v. Wal-Mart Stores, Inc., et al, Case No. 5:12-cv-05162-SOH, Dkt. 364 (W.D. Ark. May 5, 2017).

[4] 756 F.3d 754, 757 (D.C. Cir. 2014).

[5] Id.

[6] The director of the Serious Fraud Office v. Eurasian Natural Resources Corp. Ltd. [2017] EWHC 1017 (QB) 177-80.